PUBLIC RECORDS: REASONABLE ACCESS: PAROLE BOARD: DEPARTMENT OF CORRECTIONS: VISITOR'S APPLICATION. Iowa Code §§ 17A.2(7)(f), 28A.2(3), 28A.5, 28A.8(1), Ch. 68A, §§ 68A.3, 692.3; 291 I.A.C. 20.3(1)(f)(1-7), 291 I.A.C. § 20.13(2). The Department of Corrections has, by requiring a limited category of persons to submit to prior approval before attending Parole Board meetings, reasonably provided public access to on-site Parole Board meetings held in secure correctional institutions consistent with § 28A.5. Neither the appeal of the denial of entry into a correctional facility to visit an inmate or to attend a Parole Board meeting is a matter which must be decided by an agency after notice and an opportunity for evidentiary hearing. The only avenue for appeal of the refusal of the Department of Corrections to permit attendance at a Parole Board meeting is an original Ch. 28A action. That statute gives some latitude under the reasonable access language to governmental bodies in reasonably tailoring restrictions regarding attendance at meetings. (Morgan to Angrick, 1/25/85) #85-1-13(L)

January 25, 1985

Mr. William P. Angrick II
Citizens' Aide/Ombudsman
Citizens' Aide Office
Capitol Complex
L O C A L

Dear Mr. Angrick:

We are writing to respond to your request for an Attorney General's opinion, dated October 24, 1984, regarding the recently adopted Department of Corrections' administrative rules for attendance at Parole Board hearings held within State correctional facilities.

The Iowa Department of Corrections adopted administrative rules setting forth the criteria for attendance by the general public at Parole Board interviews because the Board of Parole only recently permitted the public to attend inmate interviews. For many years, the Board of Parole had interviewed inmates inside various correctional facilities without permitting the attendance of the public. We note by means of background information, that the standards enunciated in the rules regarding visits to the correctional institutions for the purpose of attending Parole Board hearings are not new.

Visitors to the institutions have been subjected to scrutiny when they enter the correctional institution for purposes of preserving the safety, security, and orderly operation of the institution.

For inmate visits, the Department has adopted rules providing for multiple screening mechanisms including criminal history, relationship to inmate, possession of contraband, use of illegal drugs or alcohol, or other activities or factors believed to be detrimental to the inmate or the institution. Visits may be modified or curtailed when one or more of the following conditions is met.

> a. The inmate or visitor engage in behavior that may in any way be disruptive to order and control of the institution.
>
> b. The visitor or inmate fails to follow the established rules and procedures of the institution.
>
> c. The visitor and inmate directly exchange any object or article. This does not apply to purchases from the canteen which are consumed during the visit.
>
> d. The effect of alcohol or narcotic drugs is detected before, during, or after the visit.
>
> e. The visit or continued visiting is detrimental to the health of the inmate or visitor.
>
> f. The visitor does not manage children to prevent them from interfering with or disrupting other visits.

291 I.A.C. § 20.3(5).

The general rules for visitors leave two primary areas of discretion of the warden. First, the warden may make exceptions to the rule generally excluding persons with a history of criminal activity from the institution. Persons with a criminal history or who are under indictment may visit with the warden's permission. 291 I.A.C. § 20.3(1)(f). The Department of

Corrections' rules for visiting inmates of penal institutions are grounded in the competing public policies of permitting access to maintain relationships with family and friends while preserving the safety, security and orderly administration of the institution.

> Inmates are encouraged to maintain and strengthen relationships with family members and friends. Though visits are encouraged as a means to accomplish this, the number and length of visits may be limited by the institution's schedule, space, personnel constraints, treatment considerations, or other substantial reasons relating to the safety and security of the institution and its operations.

291 I.A.C. § 20.3(218).

Second, the warden may modify the timing or length of visits to permit extended or off-schedule visits in the event of unique or exigent circumstances for the inmate or the visitor. The warden's decision here is final. 291 I.A.C. § 20.3(15). See 1983 Iowa Code § 246.46, as amended by H.F. 74, Acts of the 70th G.A., 1984 Session.

Courts have reviewed portions of the visitors' screening rules relating to strip search and have set out the public interests to be weighed by the facility in strip searching visitors. Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).

> The penal environment is fraught with serious security dangers. Incidents in which inmates have obtained drugs, weapons, and other contraband are well-documented in case law and regularly receive the attention of the news media. Within prison walls, a central objective of prison administrators is to safeguard institutional security. To effectuate this goal prison officials are charged with the duty to intercept and exclude by all reasonable means all contraband smuggled into the facility. Indeed, Iowa correctional officials recognize their duty to constrict the flow of contraband into the

> prison. They consider both clothed and unclothed body searches an effective means of controlling contraband and "a basic implement of the institutions['] overall security."
>
> Although the preservation of security and order within the prison is unquestionably a weighty state interest, prison officials are not unlimited in ferreting out contraband.

Hunter v. Auger, 672 F.2d at 674 (8th Cir. 1982).

Agency rules are presumed by courts to be reasonable, Davenport Community School District v. Iowa Civil Rights Comn, 277 N.W.2d 907, 909-910 (Iowa 1979), and the person challenging the rule bears the burden of proof of the unreasonableness of the rule. Schmidt v. IDSS, 263 N.W.2d 739, 749 (Iowa 1979).

The courts have routinely deferred to the expertise of the agency in knowing and managing its own business. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 312-313 (Iowa 1978). Deference to the agency expertise in prison management is particularly appropriate in light of the special problems associated in protecting the inmates and the public in secure penal facilities. Hunter v. Auger, 672 F.2d 668, 676 (8th Cir. 1982) (quoting Kelly v. Brewer, 525 F.2d at 399 [8th Cir. 1975], "it is not the function of the Federal courts to embroil themselves unduly in matters of prison administration ... or prison security.")

The Department of Corrections' rules for visiting inmates authorize screening of visitors for previous serious criminal history, recent serious or non-serious criminal conviction, recent incarceration, present indictment, and present participation in a community correction program. In addition, the rules permit the warden to screen for "behavior control problems" or behaviors "conterproductive to the rehabilitation of (an) inmate", such as "irresponsible ... use of a controlled substance" or "previous violation of institutional rules". These factors may or may not have culminated in arrest, indictment, or incarceration.

Persons screened out from entering the facility may request the warden to make an exception to permit them to visit the facility. A reasonable agency with expertise in confinement of prisoners could conclude that prior criminal record or disruptive

behaviors are inappropriate and detrimental to the maintenance of an orderly, secure, and safe facility.

The rules also provide for the denial of visits to persons who have intentionally falsified the visitor's application form. Obviously, the facility also has an interest in questioning the privilege of persons attempting to subvert the system for determining whether conduct is detrimental.

The rules are not an absolute exclusion of persons from the institution. If an overriding reason is given by the applicant, the warden may permit the visit to proceed. We are of the opinion that the Department of Corrections could reasonably conclude that its rules are reasonably related to the orderly and safe administration of the secure facilities.

We are advised by the agencies that the Iowa Board of Parole, a governmental body within the meaning of Ch. 28A, conducts its business in a variety of locations. The Board meets at its administrative offices at 10th and Grand in Des Moines, Iowa, at each of the correctional facilities operated by the Iowa Department of Corrections, and at other locations which may be convenient to members of the Board of Parole. Interviews of inmates have historically been conducted in the correctional facility housing the inmate as an accommodation to the prison authorities and to reduce the Parole Board expenses.

The location of the interviews inside the institution is very important to both the board and to the facility. If the board meets outside of the facility, the Department will be obligated to transport inmates to the location of the meetings. This transportation is logistically complicated and difficult for the D.O.C. and will result in a substantial expense for one agency or the other. Additionally, the Department could well conclude that transportation of inmates would raise risks of escape or injury to the public.

We now turn to the questions you ask in the context of the substantial amount of factual background information provided to us by the respective agencies.

1.

You first ask whether the Iowa Department of Corrections may apply restrictions for visitors to persons seeking to attend Parole Board meetings held at an institution.

Since the Parole Board determined that it would provide public access to meetings concerning the release of inmates, the Department has adopted rules applying the visitor's screening mechanisms to persons seeking to attend Parole Board meetings. 291 I.A.C. § 20.13. We are advised by the Department that the same criteria for screening former offenders and persons providing false information is used to screen Parole Board meeting attendees.

The standard to which governmental bodies are held under the Iowa open meetings law is found at § 28A.3 of the Code:

> Meetings of governmental bodies shall be preceded by public notice as provided in § 28A.4 and shall be held in open session unless closed sessions are expressly permitted by law.

1983 Iowa Code § 28A.3. An "open session" is defined as "a meeting to which all members of the public have access". § 28A.2(3).

The general rule is modified by another significant statement in the open meetings chapter. The governmental body is permitted to select reasonable times and places for scheduling and locating meetings:

> Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to handicapped or disabled individuals.

Section 28A.3(2).

The Board is required to meet in a place with reasonable access to the public or to demonstrate good cause if meeting at such a place is impossible or impractical. Except for former offenders or persons known to have falsified the application, anyone over the age of eighteen may attend Parole Board meetings on a space available basis. The warden's screening mechanism permits reasonable access to most of the population and to the press.

For the minority, those who the warden determines are a threat to the safety, security or orderly administration of the facility, we understand how the agency could conclude that it has good cause for denying access.

The competing public interests to be weighed may each be read in light of a standard of reasonableness. The rules constitute a compromise by the Department and the Board in accommodating the three interests which the agencies are balancing: the security interests of the facility, the cost of administration of a secure facility and the general public's right to observe the conduct of governmental meetings.

The stakes for the agencies are high. They are responsible for the retention and release of people viewed by many as dangerous. The care and public security they provide is expensive and complicated. They face civil and potential criminal penalties for deliberately denying access to people to Parole Board meetings.

Both the open meetings statute and the Department of Corrections' statute and regulations may be applied in light of the need of these agencies to reasonably provide for legitimate needs and purposes within a secure facility. A reasonable agency could conclude that the Department has, by requiring a limited category of persons to submit to prior approval before attending, reasonably provided public access to on-site Parole Board meetings consistent with § 28A.5.

In response to your first question, we conclude that the right of access of all members of the public to Parole Board interviews must be read in light of other parts of Chapter 28A which provide only reasonable access to meetings and which permit electronic meetings of governmental bodies. A reasonable agency could conclude that the fiscal and social costs of transporting inmates to a non-secure location constitutes good cause for limiting access to meetings to persons approved by the warden for attendance under the rules presently in place.

We know of no formal finding of good cause by the Board for meeting within the facility as controlled by the warden pursuant to rule. If they were asked to determine whether good cause exits, we can see how a reasonable Board could conclude that denying access to persons the warden determines to be dangerous within the meaning of the visitor's rules meets the legal standard for open sessions in the statute.

2.

You further inquire whether a precise statement or definition of what constitutes a "security consideration" is necessary. The agency has by administrative rule adopted a prior approval system for a limited category of persons who meet the definition of security risks set forth in 291 I.A.C. § 20.13(2). We know of no published criteria which the agency uses to approve or deny visits by persons who must seek prior approval before entering the facility. Nothing in the Iowa Administrative Procedure Act requires agencies to develop criteria for decision-making. Young Plumbing and Heating v. INRC, 276 N.W.2d 377 (Iowa 1979); Community Action Research Group v. ISCC, 275 N.W.2d 217 (Iowa 1979). In fact, when the publication of criteria would be premature, it is permissible under Young Plumbing for the agency to make a case-by-case determination of policy.

While we can see a benefit to the Department and to the public in defining some of the criteria used by the warden or superintendent in permitting or denying access to meetings for specific risky individuals, we recognize that the definition itself of what constitutes a security consideration may present a threat to institutional security. Undoubtedly, some of the criteria used by the warden or superintendent, if disclosed, would enable law violators to avoid detection or facilitate disregard of requirements imposed by law or would give a clearly improper advantage to persons who are in an adverse position to the state. Because these negative consequences would arise from the publication of criteria or a definition of "security considerations", we do not believe that the agency is under any obligation to define or disclose the nature of the criteria used. See § 17A.2(7)(f). The right to observe or attend public meetings is not unreasonably withheld by the Board and the Department by requiring individuals to submit to the warden's review prior to attending meetings of the Board.

3.

You also asked whether recourse for the denial of access to Board of Parole meetings is available and whether any appeal of an adverse decision would be a contested case pursuant to Ch. 17A of the Code. Neither the appeal of the denial of entry into a correctional facility to visit an inmate or to attend a Parole Board meeting is a matter which must be "determined by an agency after an opportunity for an evidentiary hearing." (Iowa Code § 17A.2(2).) We find no constitutional or statutory right to make such a visit outside of Chapter 28A of the Code. The remedy

of an aggrieved person under Chapter 28A is an original action pursuant to that chapter in the Iowa district court. An aggrieved person also has a § 17A.19 "other agency action" remedy. It is possible that in a particular circumstance, the director of the Department of Corrections may intercede informally with the warden to permit a particular person to attend Parole Board meetings. Such an informal procedure has not been reduced to writing by the agency, nor is it required by statute.

4.

You ask about the criteria for exclusion of certain persons from open sessions conducted by other governmental bodies. Of course, every governmental body may exclude persons if it is conducting a meeting for one of the purposes listed in the section justifying closed sessions. For example, the Council on Human Services could conduct a closed session and exclude persons from attendance when discussing pending litigation, or the Conservation Commission could exclude persons from attending meetings to review bids on potential real estate purchases. Certain persons could also be ejected from the meeting conducted in open session if they could not conform their conduct to the reasonable rules adopted by the body to assure an orderly and uninterrupted conduct of business. See § 28A.7.

Because it is difficult to generalize about the variety of situations which other governmental bodies may face in conducting business, we prefer not to speculate on the circumstances under which others may be excluded from meetings of governmental bodies. This opinion is directed at only meetings of the Parole Board conducted within secure institutions subject to Department of Corrections' visitors rules. We believe the statute gives some latitude under the "reasonable access" language to governmental bodies in reasonably tailoring restrictions regarding attendance at meetings. We do not view this practice as an exception to Chapter 28A, but in conformity therewith.

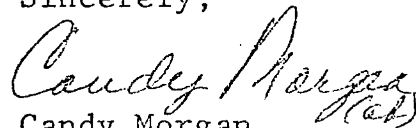
5.

You also ask whether the visitors' application forms or other documents used by the correctional institution to complete a background investigation of individuals desiring to attend Board of Parole interviews are public records within the meaning of Chapter 68A of the Code. The general rule in Iowa is that all records and documents of a state agency are public records which Iowa residents have the right to inspect. Section 68A.3. With respect to visitation records maintained on attendees at Parole

Board meetings, we find no statutory exception to that general rule which would cover the bulk of the information recorded and maintained by the correctional facility. There is a limited category of information, (criminal history data) protected by § 692.3, which may be maintained by the agency along with the visitation record, and if so, § 692.3 would control redissemination.

The application form for permission to visit the institution for the purpose of attending a Parole Board meeting is a public record regardless of where it is housed or stored by the agency. Only reports of otherwise protected information, (see Ch. 692 or Senate File 2082 of the Acts of the 70th General Assembly, 1984 Session, for further particulars) may be held confidential by the facility.

Sincerely,



Candy Morgan
Assistant Attorney General

CM/jaa

INVESTMENT OF PUBLIC FUNDS: Drainage District Obligations. Iowa Code Chs. 453 and 455 (1983); Iowa Code §§ 452.10, 453.9 and 455.77; 1984 Iowa Acts Ch. 1230, §§ 3 and 14. A county may not invest otherwise idle funds in drainage district warrants or improvement certificates. (Lyman to Thole, Osceola County Attorney, 1/25/85) #85-1-12(L)

January 25, 1985

Mr. Michael E. Thole
Osceola County Attorney
Sibley, Iowa 51249

Dear Mr. Thole:

This will acknowledge and reply to your letter of November 28, 1984, in which you requested the opinion of this office regarding the investment of excess county funds into drainage warrants or improvement certificates to finance the repairs or improvements needed by a drainage district.

Iowa Code § 452.10, as amended by 1984 Iowa Acts, Ch. 1230, § 4, requires that public funds not currently needed for operating expenses be invested in one or more of the following items:

> notes, <u>certificates</u>, bonds, prime eligible bankers acceptances, commercial paper . . . perfected repurchase agreements, or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies; or in time deposits in depositories . . . and receive time certificates of deposit therefor; or in savings accounts in depositories. (emphasis added).

Your inquiry recognizes that this section specifically authorizes investments in "certificates"; however, it is unclear if this term encompasses drainage district improvement certificates issued pursuant to Iowa Code § 455.77 (1983).

Words and phrases used in statutes must be construed to the context and the approved usage of the language, but technical words or phrases that have acquired an appropriate meaning in law must be construed accordingly. Farmers Drainage Dist. v. Monona-Harrison Drainage Dist., 246 Iowa 285, 67 N.W.2d 445 (1955). The word "certificate," standing alone, does not constitute a technical term of art, and consequently, its meaning must be derived from the context in which it appears in Iowa Code § 452.10. An initial review of this provision discloses a veritable investment "laundry list" of an extremely broad nature; upon further consideration, however, the question arises as to what investments are limited by the modifying clause "or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or one of its agencies." Prior to the passage of S.F. 2220, 1984 Iowa Acts Ch. 1230, which included the amended § 452.10, the resolution of this issue would have been far more simple. The relevant portion of Iowa Code § 452.10 (1983) authorized the investment of idle public funds in

> notes, certificates, bonds, or other evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies.

The 1984 amendment to this section inserted three additional investments between the words "bonds" and "or." Curiously, none of these new investments -- prime eligible bankers acceptances, commercial paper, or repurchase agreements -- are either indebtedness of, or guaranteed by, the United States or any of its subordinate agencies. Consequently, the logical conclusion is that the modifying phrase "evidences of indebtedness which are obligations of or guaranteed by the United States of America or any of its agencies" relates to notes, bonds or certificates, as, was previously noted, was clearly the case in § 452.10 prior to its being amended.

The practical effect of this modification is one of limitation: public body treasurers are restricted to investing in notes, certificates or bonds issued or guaranteed by the federal government. As drainage district improvement certificates do not meet either of these requirements, they do not qualify for the investment of idle public funds under Iowa Code § 452.10, as amended by 1984 Iowa Acts Ch. 1230, § 4.

This conclusion is bolstered by the fact that elsewhere in the Iowa Code the legislature, in making reference to drainage

district improvement certificates, has specifically utilized the term "improvement certificates." (See Iowa Code §§ 455.64, 455.77, and 455.81. See also Iowa Code § 427.1(5), "certificates issued by any . . . drainage or levee district . . ."). It can be presumed that if the legislature had in fact intended for improvement certificates to be a permissible investment for idle public funds, the term "improvement certificates" would have been utilized in § 452.10. Additionally, the consequences from adopting a broad or generic interpretation of the character of "notes, certificates, or bonds" as contained in § 452.10 would be significant: such a construction would permit public body treasurers to invest in items including personal, unsecured promissory notes and poorly rated private bonds. This would not be consistent with the underlying purpose of S.F. 2220, that being to provide security for the investment and deposit of public funds.

The question nonetheless remains as to whether a county may invest idle monies accumulated as a sinking fund in drainage district warrants. Preliminarily, the issue requires consideration of Iowa Code § 453.9, as amended by 1984 Iowa Acts, Ch. 1230, § 14 which authorizes the

> invest[ment] [of] any fund not an active fund needed for current use and which is being accumulated as a sinking fund for a definite purpose, the interest on which is used for the same purpose, in local certificates or warrants issued by any municipality or school district within the county . . . (emphasis added).

Chapter 453 does not define the term "municipality," nor has the Iowa Supreme Court yet decided the question as to whether a drainage district constitutes a municipality. The term "municipality," however, is not necessarily limited to incorporated cities and often includes any unit of local government. Am.Jur 20 Municipal Corporations § 13 (1981); 1 Dillon, Municipal Corporations § 19 (4th ed.). In Olson v. District Court, 243 Iowa 1211, 1213, 55 N.W.2d 339, 340 (1952), where a sanitary district was held to not constitute a "municipal corporation" within the meaning of Iowa Code § 362.11-.18 (1950), the Supreme Court indicated that in resolving such definitional ambiguity "the real question is the construction of the statute." In reviewing the substance and operation of Iowa Code § 453.9, there is no indication that the term "municipality" would exclude drainage districts; the adjective "any" immediately preceding the term would in fact lend credibility to the notion that a drainage district is a municipality for purposes of Chapter 453.

The issue of whether drainage district warrants or improvement certificates do constitute "local certificates or warrants issued by any municipality" need not necessarily be resolved, however, in view of the facts included in your opinion request. You have indicated that Osceola County is currently in possession of excess funds which apparently are not earmarked for any particular purpose. Iowa Code § 453.9, as amended by 1984 Iowa Acts, Ch. 1230, § 14, only allows for the investment of public funds in local certificates or warrants when said funds are "being accumulated as a sinking fund for a particular purpose." A "sinking fund" is a sum set apart out of current net revenue to meet an existing obligation which has not yet matured but which will mature at some stated future date. See generally, Talbott v. City of Lyons, 171 Nebr. 186, 105 N.W.2d 918 (1960); 15 McQuillin, Municipal Corporations, § 43.133 (rev. 3d ed. 1970). The monies which Osceola County currently contemplates investing in drainage district warrants or improvement certificates were not, to our knowledge, derived from taxes or some other particular source of revenue for an express purpose.

It is the opinion of this office that a county may not invest otherwise idle funds in drainage district warrants or improvement certificates.

Sincerely yours,

LYNDEN LYMAN
Assistant Attorney General

LL/cjc

COMPTROLLER: Allowable growth formula. Iowa Code § 442.7(7)(i). Comptroller's process of adding 1982-83 per pupil share of temporary school funds to basic allowable growth for the year beginning July 1, 1985 is consistent with Iowa Code § 442.7(7)(i). (Galenbeck to Krahl, State Comptroller, 1/25/85) #85-1-11(L)

January 25, 1985

William Krahl
State Comptroller
L O C A L

Dear Mr. Krahl:

You have requested an Attorney General's opinion "whether the conversion of the semi-annual apportionment monies to a per pupil cost by adding the per pupil share of the monies to the basic allowable growth for the budget year is consistent with the language of section 442.7(7)(i), Iowa Code (1983 Supplement)." Section 442.7(7)(i) provides:

> "7. The allowable growth per pupil for each school district is the basic allowable growth per pupil for the budget year modified as follows:
>
> * * *
>
> (i) For the budget school year beginning July 1, 1984, by adding to the basic allowable growth per pupil for the budget year an amount not to exceed the amount of moneys received by a school district under section 302.3 during the school year beginning July 1, 1982 and ending June 30,

1983, as certified by the board of directors to the state comptroller."

1. Initially it will be helpful to note that the "semi-annual apportionment monies" to which you refer are also known as "fine monies," "§ 302.3 monies," and "temporary school funds." Section 302.3 of the Iowa Code (1983) provided for a "temporary school fund" consisting of forfeitures, fine proceeds and proceeds from the sale of lost goods. However, the legislature has repealed § 302.3 (83 Acts, Ch. 185, § 61,62 (H.F. 562)).

In light of this repeal and reduction of funding, the legislature apparently sought to increase the "basic allowable growth per pupil" by an amount of money equal to that received from the "temporary school fund" in the fiscal year beginning July 1, 1982. Thus, § 442.7(7)(i) provides that at the time of calculation of the school district budgets for the fiscal year beginning July 1, 1984, the temporary school funds received in the fiscal year beginning July 1, 1982 should be added to the allowable growth per pupil.

"Allowable growth" per pupil is a sum calculated via a complicated formula contained in § 442.7 of the Iowa Code (1983) permitting a school district to increase its budget annually in an amount related to the state percent of growth" as defined in § 442.7.[1]

Budget calculations for a school district begin by reducing the prior year's budget (the <u>base year</u> budget) to a "district cost per pupil." <u>See</u> § 442.9. "Allowable growth," as defined in § 442.7, is added to the base year budget, yielding the <u>budget year</u> budget (subject to further modifications noted in § 442.9). County property taxes are then levied to collect the school district budget. Section 442.9.

It is my understanding that your office has included within its calculation of school district budgets for the fiscal year beginning July 1, 1985, an amount equal to the "temporary school fund" monies received by each district in the fiscal year beginning July 1, 1982. That amount was divided by the district enrollment for the fiscal year beginning July 1, 1984, then combined with (1) per pupil allowable growth and (2) district

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[1] It should be noted that § 442.7 contains several subsections which modify the basic "allowable growth formula" -- of which § 442.7(7)(i) is one.

cost per pupil to achieve the budget year per pupil cost. This figure is then multiplied by the district enrollment to reach the district budget for the fiscal year beginning July 1, 1985. This process is consistent with the directive of § 442.7(7)(i).

2. Although § 442.7(7)(i) serves, on its face, to increase school district budgets, some districts -- particularly those with declining enrollments -- will not realize a net gain from its implementation. Even in the absence of "allowable growth" calculations, a school district is permitted a 2% increase in its base year budget during the budget year. Section 442.4(5), Iowa Code (1983). The provisions of § 442.4(5) apply where the base year budget plus allowable growth (equalling the budget year budget) is less than 102% times the base year budget.

School districts which formerly received "fine monies" from the temporary school fund -- and considered these monies as miscellaneous income -- may now levy an amount equal to the "fine monies." However, there is no district in Iowa where the fine monies will exceed 2% of the base year budget. Thus, a number of districts will simply 'lose' the "fine monies" within their 2% minimum guaranteed budget increase. These districts complain that the legislature's intent in enacting § 442.7(7)(i) has therefore not been achieved. In short, such school districts protest because they receive no net gain from § 442.7(7)(i).

Whether the legislature intended this effect is not a subject of inquiry if the language of the statute is unambiguous.

> "The purpose of all rules of statutory construction is to ascertain the intent of the enacting legislature. [citations omitted] Where, however, the language of the statute is clear and plain there is no room for construction." Hinders v. City of Ames, 329 N.W.2d 654, 655 (Ia. 1983).

We find the language of § 442.7(7)(i) unambiguous. For that reason, we decline to speculate on the legislature's intent in enacting § 442.7(7)(i).

Sincerely,

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

Highways: Weeds: Under County Home Rule, the county may include bushes and shrubs as noxious weeds under county weed ordinance. Trees are not noxious weeds. The responsibility for maintenance of secondary road right of way is on the county board of supervisors §317.11. Landowners have no duty to maintain right of ways except as provided by §317.10 and §317.18. The appropriate action by a private party to force the maintenance of the right-of-way would be to file a complaint with the county attorney's office. §317.24. (Peters to Hultman, State Senator and Andersen, Audubon County Attorney, 1/25/85) #85-1-10(L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

LESTER A. PAFF
SPECIAL ASSISTANT ATTORNEY GENERAL

ADDRESS REPLY TO
DEPARTMENT OF
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DEPARTMENT OF TRANSPORTATION
AMES, IOWA 50010
PHONE: (515) 239-1521

The Honorable Calvin O. Hultman
State Senator
State Capitol
LOCAL

Mr. Brian P. Andersen
Audubon County Attorney
405 Tracy Street
Audubon, IA 50025

January 25, 1985

Gentlemen:

You both have requested an Attorney General's opinion concerning generally the county board of supervisor's authority to control vegetation in ditches along roadways. Specifically Senator Hultman asked:

1. Do "noxious weeds" include trees, shrubs and bushes?

2. If the definition of "noxious weeds" does include trees, shrubs and bushes, then whose responsibility is it to maintain the area of land between the secondary and/or primary road and the fenceline.

Mr. Andersen asked:

1. What is a landowner's duty to cut trees, shrubbery and bushes from a roadway right of way?

2. Can the Supervisors take any action to force these landowners to cut their own ditches?

3. What is the duty of a county regarding cutting road ditches?

4. Can a person force other landowners or the county to trim and maintain these ditches?

5. Can the county pass an ordinance setting forth the responsibilities of landowners and the county with regard to roadway rights of way?

Although these questions overlap somewhat, they will be answered in the order set out above.

I.

Generally, the procedure for eradication of weeds in the right of way is controlled by Iowa Code Chapter 317. Section 317.1 provides a definition of noxious weeds. Trees, shrubs and bushes are not listed under §317.1, however, individual species may be named

Traditionally, the law has treated trees differently from other forms of vegetation. See Peterson, Arboreal Law in Iowa, 44 Iowa L. Rev. 680 (1959). This special treatment is also reflected, for example, in Iowa Code §314.7 where the destruction of trees is protected. Therefore, in answer to all these questions, a distinction should be made between the treatment of trees and that for shrubs and bushes.

The Supreme Court of Mississippi gave the following definition of the term "tree":

> A tree is a woody plant, whose branches spring from and are supported upon a trunk or body, and the tree may be young or old, small or great," and cannot be denominated as a "shrub" or "undergrowth"; for a shrub is a low, small plant, whose branches grow directly from the earth, without any supporting trunk or stem, while "undergrowth" is a term applicable to plants growing under or below other greater plants.

Clay v. Postal Tel. Cable Co., 11 So. 658,659, 70 Miss. 406, 411 (1892).

Webster's New Collegiate Dictionary gives "shrubs" as a definition of bush and therefore those two terms can be treated as synonymous. Historically, some shrubs were protected by Iowa Code Chapter 318 which protected hedges along highways. The chapter was repealed by Acts 1978 (67 G.A.) ch. 1108, §24. The repeal indicates that the legislature has decided that shrubs are no longer in need of special protection. Thus they may be treated as other vegetation without the special consideration given trees. Any dispute as to the correct classification of vegetation should be addressed to the state botanist who is

charged with developing a weed erodication program. Iowa Code §317.2.

A recent Attorney General's Opinion, dated March 21, 1984, from Assistant Attorney General Timothy D. Benton to State Senator William Palmer, addressed the county supervisor's authority to control other vegetation which are not noxious weeds subject to Chapter 317. Following the reasoning of that opinion, county governments may treat shrubs as noxious weeds under county weed ordinances. Furthermore, shrubs may also be subject to the county's height limitations imposed by a county ordinance under the Home Rule laws. Therefore, shrubs may be subject to the county weed ordinances, but are not noxious weeds under Chapter 317.

Trees, however, are protected specially by Iowa Code Section 314.7. In an informal advice letter to State Senator James Gallagher, dated February 11, 1983, then Special Assistant Attorney General, J. Eric Heintz advised that all three conditions established in 314.7 must be met in order to protect trees. Furthermore, he opined that the issue of whether trees "interfere with the improvement of the road" is within the discretion of the Department of Transportation. Therefore, if a specific tree failed to meet one of the §314.7 requirements, then it could be removed. The trees, however, would not be subject to the weed control provisions of Chapter 317 and should not be considered noxious weeds.

II.

Section 317.11 defines the duties of the county supervisors and the department of transportation in destroying weeds on secondary and/or primary roads. The county supervisors are responsible for secondary roads. Iowa Code §306.3(1) defines "road" or "street" as "the entire width between property lines through private property or designated width through public property of every way or place of whatever nature when any part of such way or place is open to the use of the public, as a matter of right, for purposes of vehicular traffic." Therefore, the county's responsibilities for secondary roads include the area between fencelines.

As for trees not protected by §314.7, they may be considered obstructions in the right of way. Patterson v. Vail, 43 Iowa 142, 145 (1876); Carstensen v. Clinton County, 250 Iowa 487, 94 N.W.2d 734 (1959). Under Iowa Code §319.1 which concerns the removal of obstructions from the right of way, the board of

supervisors would be responsible to remove the trees along secondary roads since that is their jurisdiction. Section 460.12 also allows for the removal by the county supervisors of trees which obstruct ditches or drain tiles "except shade or ornamental trees adjacent to a dwelling house or other farm buildings or feedlots, or any trees or trees for windbreaks upon cultivated lands consisting of sandy or other light sails." Iowa Code §460.12.

I conclude that the statutory responsibility for keeping the right of way of secondary roads clear of weeds or trees, which are not protected by 314.7, falls on the county board of supervisors.

III.

As stated in section II above, the responsibility for cutting weeds and obstructions from the roadway of secondary roads is placed on the county board of supervisors under the Iowa Code. This is confirmed by the recent amendment to Iowa Code §317.19 by Senate File 2238 §20 (1984). The amended section allows the board of supervisors to make appropriations for road clearing or ". . .to contract with the adjoining landowner to carry out this section." This language shows a clear intent on the legislature's part to place the responsibility for clearing ditches on the county, otherwise there would be no need for the county to make an appropriation.

The statutory system places the responsibility for right-of-way maintenance on the public body, not the landowner. Under §317.10, the landowner or tenant is responsible for destroying noxious weeds on his/her land. Also under §317.18, the county board may order the destruction of all weeds other than noxious weeds on ". . . county truck roads and local county roads and between the fence lines thereof. . ." Section 317.18 requires the board of supervisors to issue an order defining the roads along which the weeds are to be eradicated. In both 317.10 and 317.18, the purpose of the landowner's weed destruction is to prevent seed production, not to maintain the right of way. Therefore, the landowner's duty as to cutting weeds and shrubs is limited to the situations covered in §§317.10 and 317.18.

Again trees pose a slightly different problem. Under §319.13, the county may remove at the owner's expense an obstruction, if the owner is responsible for its placement in the right of way. §319.13(4). The use of the language "responsible

for its placement" implies that the landowner did an affirmative act in placing the obstructions. In the situation which your question encompasses, this may arise where the landowner plants trees or shrubs in the right of way. The removal of trees which affect drainage is the responsibility of the county. Section 460.12 states, ". . .the board of supervisors shall remove such trees from highways. . ." The word "shall" imposes a duty on the named party. Iowa Code §4.36(a). Therefore, unless the landowner planted trees in the right of way, he/she doesn't have a duty to maintain the right of way free from trees.

IV

Since the landowners have limited duties in regards to the maintenance of a right of way, there are limited actions which can be brought against them. Sections 317.16 and 317.18 allow the county to assess the cost of destroying weeds to the landowner who was responsible for the work. Section 319.13 allows the county to assess the responsible landowner the cost of removing an obstruction. Under the code, the counties should do the necessary work and then assess the cost to the landowner who is liable under the statutes.

V

The duty of the county as concerns the right of way is answered by section II above.

VI

Any action by a private party to force the clearing of a right-of-way would lie against the public body which is responsible for the right-of-way's maintenance. It is clear that the statutory scheme of Chapter 317 makes the county responsible for the work of defaulting landowners. Section 317.22 imposes a duty on highway maintenance personnel to report violations of noxious weed control provisions. Section 317.23 imposes a duty on the county attorney, upon complaint of any citizen or officer, to enforce the performance of noxious weed control provisions and Section 317.24 imposes a simple misdemeanor penalty on an officer who fails to perform his/her duties under Chapter 317. In much the same way, the county attorney's office is responsible for the enforcement of county ordinances which cover shrubs, Iowa Code 331.756(1), and the county is likewise responsible for the removal of obstructions of obstacles in the right-of-way. Iowa Code Section 319.1.

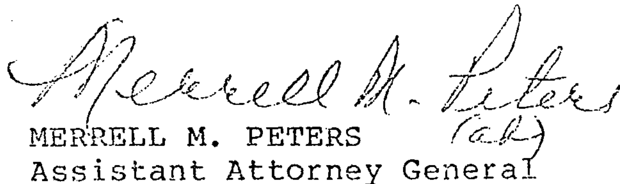
Therefore appropriate action by a private party to force the maintenance of ditches would be to file a complaint with the county attorney's office. If the county attorney fails to perform his statutory duty, then the proper cause of action would be an action for mandamus pursuant to Iowa Code Chapter 661.

VII

Any ordinance by the county board of supervisors setting forth the responsibilities of landowners and the county with regard to roadway rights of way, would be taken pursuant to the Home Rule provision of the Iowa Constitution, Iowa Const. art. III §39A, and the statutory scheme designed to implement the constitutional provision, Iowa Code Chapter 331 (1983). The Iowa Court's interpretation of these laws is well set out in Assistant Attorney General Timothy Benton's opinion to State Senator Palmer cited above.

One of the limitations on Home Rule is that the county board of supervisors do not have authority to pass ordinances ". . . inconsistent with the laws of the general assembly. . ." As I have set out above, the Iowa Code clearly delegates the duties for right of way maintenance between the Department of Transportation, the County Board of Supervisors, and in limited situations, adjacent landowners. Since the responsibilities are set out by the General Assembly, I would question the need for a county ordinance, with the exception of implementing Iowa Code section 317.18. Any ordinance passed by the county would have to be consistent with the statutory scheme.

Sincerely,



MERRELL M. PETERS
Assistant Attorney General

MMP:dlc

COUNTIES; LOCAL BOARD OF HEALTH; CHILD CARE CENTERS; LICENSING: Regulation of Child Care Center by local board of health: Iowa Const. Art. III, §39A; §§137.6, 137.21, 331,301, 331.302, 237A.4, 237A.12, The Code 1983. A local board of health may promulgate more stringent regulations regarding child care centers than those promulgated by the Department of Human Services. Those regulations may be promulgated as rules, pursuant to Chapter 137, or as ordinances, pursuant to Chapter 331. A local board of health may charge fees for inspections of child care centers. (Phillips to Bauch, Black County Attorney, Burk, Assistant Black Hawk County Attorney, 1/25/85) #85-1-9(L)

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

January 25, 1985

Dear Mr. Burk:

You have requested an opinion of this office as to whether, pursuant to Iowa Code section 237A.4, a local department of health may promulgate regulations regarding child care centers more stringent than those promulgated by the Iowa Department of Human Services. You have also inquired as to whether such regulations by the local department, if permissible, would need to be adopted as ordinances by the county board of supervisors. As a final matter, you have inquired as to whether the local health department may charge fees for its inspection of child care centers. These three inquiries will be discussed in order. For the purposes of this letter, I will consider the local department of health to be the same entity as the local board of health.

Iowa law concerning county home rule indicates that a local board of health may establish more stringent standards for child care centers than those established by the Iowa Department of Human Services. The County Home Rule Amendment of the Iowa Constitution provides, in part:

> 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....

> 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.

Iowa Constitution, Article III, section 39A. This amendment contains within itself only four basic limitations on county power. 1980 Op.Att'yGen. 54, 59. Those limitations are:

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

1980 Op.Att'yGen. 54, 59. Only one of these limitations would seem to be relevant here, that being the mandate that any exercise of county power not be inconsistent with the laws of the General Assembly. That mandate is restated in the County Home Rule Act:

> 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.

Iowa Code section 331.301(1) (1983). According to Chapter 331, an exercise of county power is not inconsistent with the laws of the general assembly unless that exercise is "irreconcilable"

with state law. Iowa Code section 331.301(6) (1983). This standard of irreconcilability is a permissible legislative statement as to how state laws are to be interpreted. See Green v. City of Cascade, 231 N.W.2d 882, 890 (1973) (construing similar interpretational standard in Municipal Home Rule Act). Supreme Court cases construing the Municipal Home Rule Act suggest that county action is not irreconcilable with state law under this standard unless it is expressly prohibited by state law, or unless it affects an area which has been "preempted" by state law demonstrating a legislative intent that the area be regulated exclusively by the state. See Chelsea Theatre Corporation v. City of Burlington, 258 N.W.2d 372 (Iowa 1977); Bryan v. City of Des Moines, 261 N.W.2d 685 (Iowa 1978); 1980 Op.Att'yGen. 54, 59-60. Hence, in addressing the question of whether a county may establish its own regulations for child care centers, one must address the questions of whether such regulations are expressly prohibited by state law and whether they would improperly affect a subject matter area that has been preempted by state law.

An examination of the Iowa Code reveals that while a plan for county regulation of child care centers may be duplicative of the legislatively established scheme for state regulation of child care centers, Chapter 237A of the Iowa Code, such a plan is neither prohibited nor preempted by that scheme. Chapter 237A provides for state licensing of child care centers (§§237A.1, 237A.2), state revocation or suspension of child care center licenses (§237A.8), and state promulgation of the standards by which child care centers are licensed (§237A.12). Nothing in that chapter prohibits the superimposing of more stringent county standards over the state standards. Such a prohibition would have to be explicit as the County Home Rule Act 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.

Iowa Code §331.301(6) (1983). Nothing in §237A demonstrates a legislative intent to preempt this area. In fact, county participation in child care regulation is provided for in the chapter itself. Section 237A.4 states that the local board of health is to conduct the inspection by which the compliance with state-imposed standards is to be ensured. This section not only suggests that county involvement in this area is proper, but also suggests that that involvement may properly be had through the local board of health. It indicates that child care center

regulation is deemed by the legislature to be "necessary for the protection and improvement of the public health" within the meaning of Iowa Code supplement section 137.6(2) (1983) (defining powers of local boards of health).

In conclusion, the answer to your first question is that a local board of health may establish regulations regarding child care centers, if those regulations are more stringent than those promulgated by the Iowa Department of Human Services.

Turning to your second question, you ask whether the regulations you propose should be adopted by the local board of health pursuant to Iowa Code §137.6(2)(a) (1983), or whether they need to be adopted as a separate ordinance by the local board of supervisors pursuant to Iowa Code §331.302 (1983). Nothing in the answer given to your previous question suggests a need for a special form of adoption. As the regulations are within the power of the local board, they may be adopted as other board regulations are--pursuant to Chapter 137. One thing should be kept in mind, however. Only the Iowa Department of Human Services is empowered to grant or deny a Chapter 237A child care center license. Therefore, the county regulations should be promulgated in a form that provides for some form of sanction for noncompliance other than the denial or revocation of a §237A license. Perhaps the simplest way to do this would be to pass the regulations as local board of health rules, subjecting the violations to the penalties of §137.21, or to pass them as ordinances, subjecting the violators to the penalties permissible under §331.302(2). A third possibility would be to set up a county licensing system for child care centers. This would be the least advisable approach, however, as one can make a strong argument that the power to license in this field has been preempted.

As a third question, you ask "May a local health department charge a fee for the inspection of day care centers within its jurisdiction?" In December 1980, this office was faced with a similar question:

> whether pursuant to §137.6(2), The Code 1979, a local board of health may adopt rules which provide for the charging of fees for various public health services such as "disposal site inspections, vehicle permits, housing permits, air pollution equipment permits, pool permits, animal control, public health nursing home visits, subdivision permits, milk

> inspection permits, and other related things."

1980 Op.Att'yGen. 877. In response to this question, we noted:

> Section 137.7(4), The Code 1979, permits local board of health to "issue licenses and permits and charge reasonable fees therefor in relation to the collection or disposal of solid waste and the construction or operation of private water supplies or sewage disposal facilities." Section 137.7(3), The Code 1979, provides that "reasonable fees for personal health services" may be charged. Personal health services might include the various services provided by public health nurses such as visits to residents of health care facilities, health screening, and home visits. Section 137.6(2), The Code 1979, lists as a power of a local board:
>
> [m]ake and enforce such reasonable rules and regulations not inconsistent with law or with the rules of the state board as may be necessary for the protection and improvement of the public health.

1980 Op.Att'yGen. 877. We then reached the following conclusion:

> The Legislature has enumerated specific items for which fees for licenses or permits may be charged, i.e., the provision of personal health services; the collection or disposal of solid waste; the construction or operation of private water supplies; and the construction or operation of sewage disposal facilities. While we can find no other provision in ch. 137, The Code 1979, which provides that fees may be charged by the board of health for additional services or permits there is no indication that the Legislature intended to prohibit the counties from charging fees for other health-related services...In this instance there is a specific grant of authority from the state for the counties to charge fees for health services and licenses for particular items. Thus, it was clearly anticipated that counties would, through the reasonable rules

provision of §137.6(2), The Code 1979, establish fees for the various enumerated services and licenses. There is no indication of any legislative intent to limit the charging of fees to those services specifically enumerated nor is there any indication of an intent to vest the state with exclusive jurisdiction in the decision for which health services fees may be charged. The language of ch. 137, The Code 1979, relating to the counties' ability to charge fees for health services and licenses is permissive rather than restrictive...

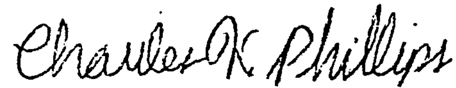
The purpose of ch. 137, The Code 1979, is to provide for the localization of public health activities. As §137.5 states, "the county board shall have jurisdiction over public health matters within the county..." Clearly, the Legislature determined that the localization of public health services would be of greater benefit to the residents of the state in that the local board of health would have a greater awareness of the health services needs of their individual locales. If local boards of health are expected to carry out these needed programs a system of reimbursement must be developed. A reasonable method would be for the board to assess fees for services it provides. This would place the local board in a better financial position to maintain and promote the health of the residents under its jurisdiction. A further benefit would be that the costs of providing the additional services would be assumed by the individuals using them which is more equitable than everyone having to bear the cost of, for example, a pool permit.

In conclusion, it is the opinion of this office that the County Home Rule Amendment, Article III, [Sec. 39A] of the Iowa Constitution permits the local board of health under the reasonable rules provision of ch. 137, The Code 1979, to adopt rules which provide for the charging of fees for pubilc [sic] health services not enumerated in that chapter.

1980 Op.Att'yGen. 877, 878-880.

As the statutory scheme relied upon above remains unchanged, there is no reason to depart from that opinion's rationale here. The local health board may charge a fee for the inspection of child care centers.

Sincerely,



Charles K. Phillips
Assistant Attorney General

CKP/jlf3

COUNTIES AND COUNTY OFFICERS; County Conservation Board. Iowa Code §§ 68B.2, 331.342 (1983). County conservation board members are county officers governed by the conflict of interest prohibition in § 331.342. (Smith to Heitland, Hardin County Attorney 1/11/85) #85-1-8(L)

January 11, 1985

Mr. Jon E. Heitland
Hardin County Attorney
321 Stevens Street
Iowa Falls, Iowa 50126

Dear Mr. Heitland:

You have requested an opinion of the Attorney General concerning whether a county conservation board member is a county officer or employee within the ambit of Iowa Code § 331.342 which prohibits a county officer or employee from having an interest in a contract with the county subject to exceptions enumerated in nine subsections. You have pointed out that neither "officer" nor "employee" is defined in Chapter 331, but that "official," "local official," "employee" and "local employee" are defined in Chapter 68B which also contains prohibitions on certain conflicts of interest. You have also noted that county conservation board members serve without compensation pursuant to § 111A.2, and that the definitions of "official" and "local official" in § 68B.2 appear to be limited to public officers who receive a salary or per diem compensation.

We do not think the legislature intended "county officer," as used in § 331.342, to be synonymous with "local official" as defined in § 68B.2. The definition of "official" in subsection 68B.2(6) includes only state "officers" who receive a salary or per diem compensation, thus impliedly excluding other state "officers" from the definition of "official."

The elements which make a position "public office" as distinguished from mere public employment have been addressed repeatedly by the Iowa Supreme Court which has adopted a five-pronged test. The five essential elements that distinguish a public office from mere public employment are summarized in State v. Taylor, 260 Iowa 634, 144 N.W.2d 289 (1966), discussed in Op.Att'yGen. #81-8-26.

The first prong of the Taylor test requires that the position be created by the constitution or legislature or through authority conferred by the legislature. Although residents of a county may decide against establishing a conservation board, Chapter 111A dictates the organization, powers and duties of any conservation board that the residents vote to establish. A county conservation board thus clearly is a statutory creation within the scope of the first Taylor prong. Likewise, Chapter 111A delegates specific duties and powers which the board is to perform without control of a superior power other than the law, satisfying the second, third and fourth prongs of the Taylor test. Finally, § 111A.2 specifies the duration of the board members' terms and requires them to conduct regular monthly meetings, thus satisfying the fifth Taylor prong. Therefore, a county conservation board member is a public officer as judicially defined by the Iowa Supreme Court in Taylor and more recent cases in which the Taylor test has been consistently applied.

Additionally, legislative intent to include county conservation board members within the ambit of the term "officer" is implied in subsection 331.342(9) which exempts from the general prohibition of contracts between the county and its officers "a contract made by competitive bid, publicly invited and opened in which a member of a county board, commission, or administrative agency has an interest, if the member is not authorized by law to participate in the awarding of the contract. . . ." The exemption in subsection 9 would be superfluous unless "members of a county board, commission, or administrative agency" are county officers generally prohibited from contracting with the county.

In conclusion, although county conservation board members may not be "local officials" as defined in § 68B.2, they are public officers under the Taylor test, and they are "members of a county board, commission, or administrative agency" as mentioned in subsection 331.342(9). Accordingly, county conservation board members are county officers governed by the conflict of interest prohibition in § 331.342.

Sincerely,

Michael H Smith
MICHAEL H. SMITH
Assistant Attorney General

MHS/cjc

ZONING: Manufactured Homes. S.F. 2228 §§ 1, 2. Enforcement of a zoning ordinance which restricts residential districts to residential structures that comply with Uniform Building Code standards and operates to exclude from residential districts manufactured homes that meet federal construction and safety standards under § 5401 et. seq. violates Senate File 2228 if the exclusion is based solely on the variation between Uniform Building Code standards and federal construction and safety standards governing the same aspect of performance. (Pottorff to Davis, Scott County Attorney, 1/10/85) #85-1-7(L)

January 10, 1985

William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You have requested an opinion of the Attorney General concerning the application of Senate File 2228 to the practice of restricting through zoning the location of certain manufactured homes. You state that Scott County has adopted the Uniform Building Code and has adopted a zoning ordinance which requires compliance with the Uniform Building Code for all residential structures. Manufactured homes which do not meet the Uniform Building Code are zoned into segregated "mobile home" districts. You point out that 42 U.S.C. § 5401 et. seq. preempts the application of state or local standards, including the Uniform Building Code, regarding construction or safety of manufactured homes. This preemption is limited to standards governing the same aspect of performance as federal standards. You further point out that Senate File 2228, which was enacted in 1984, prohibits zoning regulations or other ordinances which "disallow plans and specifications of a proposed residential dwelling solely because the proposed dwelling is a manufactured home." In view of 42 U.S.C. § 5401 et. seq. and Senate File 2228, you

specifically inquire whether Scott County may continue its past practice of utilizing zoning to restrict residential districts to residential structures which comply with Uniform Building Code standards and, thereby, exclude from residential districts manufactured homes that are within the scope of 42 U.S.C. § 5401 et. seq.

Manufactured homes are subject to federal statutes and regulations. A manufactured home is defined by federal law to mean:

> a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary and complies with the standards established under this chapter;

42 U.S.C. § 5402(6). See 24 C.F.R. § 3280.2(16). Manufactured homes, in turn, must meet federal construction and safety standards under the following language:

> The Secretary, after consultation with the Consumer Product Safety Commission, shall establish by order appropriate Federal manufactured home construction and safety standards. Each such Federal manufactured home standard shall be reasonable and shall meet the highest standards of protection, taking into account existing State and local laws relating to manufactured home safety and construction.

42 U.S.C. § 5403(a). These federal construction and safety standards expressly preempt the standards of any state or political subdivision of a state applicable to the same aspect of performance under the following provision:

> Whenever a Federal manufactured home construction and safety standard established under this

> chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d). Any structure shall be excluded from these federal statutes if the manufacturer certifies that the structure is:

> (1) designed only for erection or installation on a site-built permanent foundation;
>
> (2) not designed to be moved once so erected or installed;
>
> (3) designed and manufactured to comply with a nationally recognized model building code or an equivalent local code, or with a State or local modular building code recognized as generally equivalent to building codes for site-built housing, or with minimum property standards adopted by the Secretary pursuant to Title II of the National Housing Act [12 U.S.C.A. § 1707 et seq.]; and
>
> (4) to the manufacturer's knowledge is not intended to be used other than on a site-built permanent foundation.

42 U.S.C. § 5403(h). Exclusion under this section must be initiated by the manufacturer who submits a certification.

In light of this statutory framework, a threshold issue arises whether the zoning scheme which you describe is preempted by §§ 5401 <u>et. seq</u>. The zoning ordinance does not expressly dictate construction or safety standards but does spatially segregate homes built by manufacturers who do not opt to remove themselves from federal standards pursuant to § 5403(h) and to comply with the Uniform Building Code. Generally, preemption comes into play whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." <u>Chicago and North Western Transportation Co. v. Kalo Brick and Tile, 450 U.S. 311, 317, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258, 265</u> (1981). State law is invalidated where it conflicts with federal law, where it would frustrate a federal

scheme, or where the totality of the circumstances shows that Congress sought to occupy the field. Matter of Gary Aircraft Corp. v. General Dynamics Corp., 681 F.2d 365, 369-70 (5th Cir. 1982). Under these principles, federal law may foreclose any activity by a state in a particular area or may preempt only those provisions of state law which conflict with federal law. Congressional intent is determinative. Hayfield Northern Railroad v. Chicago & Northwestern Transportation Co., 693 F.2d 819, 821 (8th Cir. 1982). See Op.Att'yGen. #83-11-3. We need not resolve whether, under these principles, the zoning scheme which you describe is preempted, however, because state law separately prohibits this practice.

In 1984 the General Assembly enacted Senate File 2228. This statute prohibits counties and cities from adopting or enforcing zoning regulations which "disallow the plans and specifications of a proposed residential structure solely because the proposed structure is a manufactured home." S.F. 2228 §§ 1, 2. In construing this language, we note that rules of statutory construction are to be resorted to only when the terms of the statute are ambiguous. Hartman v. Merged Area VI Community College, 270 N.W.2d 822, 825 (Iowa 1978). In our view, this prohibition requires no further construction.

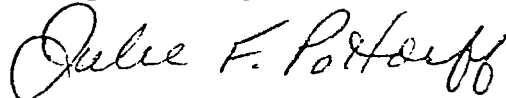
Applying this language to the zoning ordinance which you describe, we believe that continued enforcement may violate Senate File 2228. The prohibition of Senate File 2228 is triggered when the plans and specifications are disallowed "solely because the proposed structure is a manufactured home." The zoning ordinance about which you inquire does not expressly disallow manufactured homes in residential districts. The ordinance, however, disallows residential structures which do not meet Uniform Building Code standards in residential districts. Since manufactured homes must meet preemptive federal construction and safety standards, manufactured homes cannot comply with the Uniform Building Code in these respects unless the manufacturer seeks an exemption pursuant to § 5403(h). Manufactured homes may be as effectively disallowed from residential districts by imposing zoning criteria which manufactured homes cannot meet as by express exclusion. See Tyrone Township v. Crouch, 129 Mich App. 388, 341 N.W.2d 218, 219 (1983). We must conclude that utilization of the variation between the Uniform Building Code standards and preemptive federal construction and safety standards to exclude manufactured housing from residential districts effectively disallows the plans and specifications of a proposed residential dwelling "solely because the proposed dwelling is a manufactured home."

We do not suggest that the county may not impose Uniform Building Code standards to manufactured homes on matters which

are not preempted and utilize zoning to restrict residential districts to residential structures which comply with these non-preempted Uniform Building Code standards. Under such circumstances, however, the disallowance would be based on the noncompliance with criteria applicable to all residential structures rather than based on criteria which, under federal law, are integral elements of manufactured homes.

In summary, we advise that continued enforcement of a zoning ordinance which restricts residential districts to residential structures that comply with Uniform Building Code standards and operates to exclude from residential districts manufactured homes that meet federal construction and safety standards under § 5401 et. seq violates Senate File 2228 if the exclusion is based solely on the variation between Uniform Building Code standards and federal construction and safety standards governing the same aspect of performance.

Respectfully,



JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

COUNTIES: Community Action Programs; 28E Agreements. Iowa Code §§ 7A.21-.28; Ch. 28E; § 331.302(1); § 331.304(1); § 331.756(7); § 364.5. (1) A public agency or combination may establish a community action agency by ordinance or resolution under § 7A.21. (2) Public agencies should amend or terminate a Chapter 28E agreement where a significant provision is not being followed. (3) Whether employees of a community action agency are employees of a public agency is dependent upon the specific relationship in question. (4) While § 7A.22 does not require that the establishment of an advisory board or a contract with a delegate agency board be in writing, § 331.302(1) would require that a county acting as the public agency do so by motion, resolution, or ordinance. (5) The governing board of a public agency acting as a community action agency has some oversight authority over the duties of an advisory or delegate agency board under §§ 7A.22(2) and 7A.23(1). (6) We cannot determine in the abstract whether an entity which administers certain grant funds for a public agency under § 7A.22(2) can independently control other grant funds from separate sources. (7) A county board of supervisors which acts as the governing body of a community action agency by virtue of their position as county supervisors are not thereby a separate and distinct entity from the board of supervisors. (8) A county board of supervisors acting as the governing body for a community action agency may obtain advice from the county attorney upon matters in which the county is interested, but the community action agency may also engage legal counsel for the agency and the governing board as part of its authority to administer the community action program under § 7A.25. (Osenbaugh to Glaser, Delaware County Attorney, 1/7/85) #85-1-6(L)

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

January 7, 1985

Robert J. Glaser
Delaware County Attorney
Manchester, Iowa 52057

Dear Mr. Glaser:

You have requested an opinion of the Attorney General on eight questions concerning a community action agency for the City of Dubuque and Dubuque, Delaware and Jackson Counties. Operation: New View administers the community action program. It has apparently been operating with the Dubuque County Board of Supervisors acting as the governing board, at least for community service block grants although a filed 28E agreement provides for a different governing board. There is also an Administrative Board of 18 members composed as required by Iowa Code § 7A.22(1) (1983). Operation: New View has been in existence since 1974, before the enactment of the Code sections governing community action agencies, §§ 7A.21 to 7A.28. Many of your questions concern the functions of the two boards and Operation: New View in relationship to each other under these Code sections. Given the history of Operation: New View, it is not possible as a matter of law to determine the precise nature within the statutory framework of the entities involved. An Attorney General's Opinion cannot determine issues of fact. See 1972

Op.Att'yGen. 686. We cannot therefore definitely resolve many of the questions asked as more fully set out below.

The factual background you have provided us is as follows:

A 28E Agreement was entered into in February of 1974 and filed with the Secretary of State in February of 1974, creating Operation: New View, with a governing board consisting of nine members: Two members of the Dubuque County Board of Supervisors, three members of each of the boards from Jackson and Delaware County and one member of the Dubuque City Council. In addition, an Administrative Board was created to consist of 18 members representing private organizations with interest in business, industry, labor, religious, private, health, educational and welfare groups and significant minority groups. The make-up of the governing board, as provided by the 28E Agreement, did not meet the requirements of the Office of Economic Opportunity and Dubuque County was designated as the recipient for funds under the Economic Opportunity Act. Since that time, Operation: New View has operated with the Dubuque County Board of Supervisors as the governing officials of Operation: New View. No subsequent 28E Agreement has been executed showing the restructured board.

During the course of its existence, Operation: New View has administered the Community Service Block Grant Funds and has sought out other funding sources. However, a dual existence seems to have been created. CSBG Funds were applied for by the Dubuque County Board of Supervisors acting as governing officials. That accounts for approximately $150,000.00 of the funds which Operation: New View administers. The remaining amount of funds, approximately three million dollars in the present fiscal year, which is administered is, for the most part, applied for directly by the Administrative Board of Operation: New View. This was apparently done under a May 12, 1978, letter of authority given to the Dubuque County Board of Supervisors stationery. During this period, there seemed to be a question as to Operation: New View's status, specifically, was it a public agency or was it a private agency.

In July of 1984, the Administrative Board voted unanimously to incorporate Operation: New View as a non-profit organization under Iowa Law. The governing officials have not approved this move.

We are further advised that the Community Services Block Grants have been awarded to the "Dubuque County Board of Supervisors/Operation New View." Because the 28E agreement has not been followed and the documentary history is confusing, we

cannot define precisely whether the Dubuque County Board of Supervisors or Operation: New View is the "community action agency" under Chapter 7A. Nor can we determine whether the Administering Board is an "advisory board" or whether alternatively the Dubuque County Board of Supervisors (or the combination of entities which signed the original 28E agreement) have contracted with a "delegate agency" under Iowa Code § 7A.22(2).

While it is apparent that the Chapter 28E agreement's provision for composition of the governing body has been ignored, we do not know whether the signing entities have treated it as otherwise in effect or whether Operation: New View has been regarded as created by some separate procedure or document.

With this background, we proceed to your specific questions.

1. When a community action agency established under Code Section 7A.21 covers more than one political subdivision of the State, is a 28E Agreement required between these subdivisions to create the agency?

Iowa Code § 331.304(1) (1983) states that a county's "power to act jointly with other political subdivisions or public or private agencies shall be exercised in accordance with Chapter 28E or 473A or other applicable state law." Iowa Code § 364.5 (1983) provides that a city "may act jointly with any public or private agency as provided in chapter 28E."

However, § 7A.21 establishes an alternative method for joint creation of a community action agency. It states:

> Establishment. The office for planning and programming shall recognize and assist in the designation of certain community action agencies to assist in the delivery of community action programs. If a community action agency is in effect and currently serving an area, that community action agency shall become the designated community action agency for that area. If there is not a designated community action agency in the area a city council or county board of supervisors or any combination of one or more councils or boards may establish a community action agency and may apply to the office for planning and programming for recognition. The council or board or the

> combination may adopt an ordinance or resolution establishing a community action agency if a community action agency has not been designated.

Pursuant to these provisions, the Office for Planning and Programming (OPP) has adopted rules establishing procedures for the withdrawal of a political subdivision from a community action agency, 630 I.A.C. 22.13, or to redesignate a new community action agency for the political subdivision, 630 I.A.C. 22.14. Under these rules, the actions are taken by ordinance or resolution. We would note that section 28E.13 provides that the powers granted under that chapter are in addition to any specific grant for intergovernmental agreements and contracts. It thus appears that state law permits the establishment of a community action agency by ordinance or resolution of the affected political subdivisions as well as by a Chapter 28E agreement.

While we would conclude that political subdivisions could jointly establish a community action agency by compliance with the provisions of §§ 7A.21 to 7A.27, we would nonetheless recommend that Chapter 28E agreements be negotiated for several reasons. First, even though a community action agency can be established simply by ordinance, contracts between the political subdivision and the community action agency or joint undertakings between them may require compliance with Chapter 28E. Second, Chapter 28E contains provisions for the terms of any agreement which would ensure that the entities involved would clearly set out the terms of any agreement in advance and thereby avoid many of the problems raised in your opinion request. _See_ Iowa Code §§ 28E.5-28E.6. Additionally, Chapter 28E provides a body of law which could assist in resolving issues like tort liability. _See, e.g._, _Allis-Chalmers Corp. v. Emmet County Council of Governments_, 355 N.W.2d 586 (Iowa 1984).

2. If the governing body of a community action agency created by a 28E agreement is changed, must a new 28E agreement be executed?

Although § 7A.22 has provided an alternative procedure since 1982 for establishment of a community action agency, the community action agency in question was established before the effective date of that Act. According to section 7A.21, "If a community action agency is in effect and currently serves the area, that community action agency shall become the designated community action agency for that area."

This community action agency was apparently established by a 28E agreement filed with the Secretary of State in February of

1974. That agreement, between Delaware, Dubuque, and Jackson Counties and the City of Dubuque, created Operation: New View. The agreement provided for a governing board of representatives of these subdivisions. Apparently because the make-up of that board did not meet the then existing requirements of the Office of Economic Opportunity for community service block grants, the Dubuque County Board of Supervisors has acted as the governing board for those grants.[1] The Board has also, we are told, asserted that it is the governing body for all funds administered by Operation: New View in the three-county area. The governing body as specified in the 28E agreement is composed of representatives of the four political subdivisions. It has, however, never apparently acted. The 28E agreement has apparently never been amended or terminated according to its provisions. It would appear that this violates sections 28E.5 to 28E.6, which require that 28E agreements specify the precise organization of any separate entity created or, if no separate entity is created, to provide for an administrator or joint representative board. Section 28E.5(5) also requires that the permissible methods for partial or complete termination be detailed in the original agreement. Because Chapter 28E imposes these specific requirements, we do not believe that public bodies can change these terms by means other than amendment or termination of the 28E agreement.

Your third question asks us to determine the status of employees of the community action agency, as follows:

> 3. When a public agency acts as a community action agency under Section 7A.22(2), is that agency then considered a public agency and an extension of the parent agency, and, if so, are the employees of that agency public employees and subject to the responsibilities and benefits of other public employees?

Section 7A.22(2) states:

> Notwithstanding subsection 1, a public agency which is acting as a community action agency shall

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[1] We would note that the need to have one county's elected officials rather than the 28E representative body act as the governing body for community service block grants apparently no longer exists. See 1982 Op.Atty.Gen. 520.

> establish an advisory board or may contract with a delegate agency to assist the governing board. The advisory board or delegate agency board shall be composed of the same type of membership as a board of directors under subsection 1. The advisory board or delegate agency board shall comply with the duties required for the board of directors for community action agencies under section 7A.23. However, the public agency acting as the community action agency shall determine annual program budget requests.

The status of the employees who actually carry out the day-to-day activities of the community action agency will be dependent upon the facts of their specific relationship to the public agency. If one political subdivision is indeed "acting as a community action agency" and it directly employs and supervises the employees, we see nothing in Chapter 7A which would cause those employees to be treated differently than other employees of the political subdivision. If the public agency "acting as a community action agency" is a separate entity created pursuant to Chapter 28E, then that entity would be a body with a corporate identity separate from its member governmental entities. Allis-Chalmers Corp. v. Emmet County Council of Governments, 355 N.W.2d 586 (Iowa 1984). If, under § 7A.22(2), the public agency contracts with a delegate agency and the employees are hired by the delegate agency, then the contractual relationship between the public agency and the delegate agency and the private or public status of that agency would need to be examined to determine the status of the employees. See 1976 Op.Att'yGen. 823.

4. Must the establishment of an advisory board or contract with a delegate agency under § 7A.22(2) be in writing?

Section 7A.22 contains no express requirement that the duty of a public agency-community action agency to either establish an advisory board or contract with a delegate agency be accomplished by a written document. If the public agency is created under Chapter 28E, the agreement would be required to describe the "precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto . . ." § 28E.5. If the public agency-community action agency is a county, § 331.302(1) states that the board of supervisors shall exercise a power or perform a duty only by the passage of a motion, a resolution, an amendment, or an ordinance. It would therefore appear that a county acting as

a community action agency would need to have the designation of an advisory board or a contract with a delegate agency approved by action of the supervisors which would be recorded.

5. Are the duties of an advisory board or delegate agency board under §§ 7A.22(2) and 7A.23(1) exclusive to that board?

Pursuant to federal requirements for community services block grants, P.L. 97-35, § 675(c)(3), 95 Stat. 514, section 7A.22(1) establishes certain representational requirements for a community action agency board of directors. If a public agency acts as a community action agency, it must establish an advisory board which meets these requirements or contract with a delegate agency with a board meeting those requirements. Section 7A.22(2). Section 7A.22(2) goes on to state:

> The advisory board or delegate agency board shall comply with the duties required for the board of directors for community action agencies under section 7A.23. However, the public agency acting as the community action agency shall determine annual program budget requests.

Section 7A.23 states:

> 1. The governing board, delegate agency board, or advisory board shall:
> a. Provide for:
> (1) Comprehensive planning of the community action agency.
> (2) Local needs assessment surveys conducted by the community action agency.
> b. Approve overall program plans and priorities developed by the community action agency.
> 2. The governing board may:
> a. Own, purchase, and dispose of property necessary for the operation of the community action agency.
> b. Receive and administer funds and contributions from private or public sources which may be used to support community action programs.
> c. Receive and administer funds from a federal or state assistance program pursuant to which a community action agency could serve as a grantee, a contractor, or a sponsor of a project appropriate for inclusion in a community action program.

Section 7A.22(2) requires an advisory or delegate agency board to comply with "the duties" of boards listed in § 7A.23. Subsection 7A.23(1) sets forth duties. It outlines mandatory requirements by stating, "The governing board, delegate agency board, or advisory board shall . . ." By contrast, subsection 7A.23(2) is permissive in nature and refers only to the governing board by stating, "The governing board may . . ." Under § 4.1(36)(a) and (c), in statutes the word "shall" imposes a duty while the word "may" confers a power. Reading sections 7A.22(2) and 7A.23 together, the "duties" the advisory or delegate agency board is required to perform are those contained in subsection 7A.23(1) and do not include the powers listed in subsection 7A.23(2).

We would not construe sections 7A.22(2) and 7A.23(1) as precluding any function by the governing board in the areas of comprehensive planning, local needs assessment surveys, or approval of overall program plans and priorities. The term "advisory board" strongly suggests that actions of such a board are not binding. If, on the other hand, the governing board has contracted with a delegate agency board, the terms of the delegation should specify the extent of power of the two boards. The power of the governing board to determine the annual program budget requests could well impact decisions in the areas listed in § 7A.23(1). Additionally, the governing board's powers to receive and administer funds in § 7A.23(2) would necessarily entail some power over the overall program plans and priorities.

6. Is the Administrative Board solely responsible for funds it requests on its own motion?

Your request indicates that Operation: New View is the grantee of funds for which it has applied directly and is also an administering entity for funds granted to the Dubuque County Board of Supervisors. You then ask whether it is accountable to the Dubuque County Board of Supervisors for funds other than those granted to the Dubuque County Board.

Given the factual ambiguities created by the non-compliance with the 28E agreement and the fact that we are not privy to any detailed contractual agreement between the Dubuque County Board of Supervisors and Operation: New View or the grant agreements and requirements in question, we are unable to answer this question.

7. Is the Dubuque County Board's duty as a governing body of a community action agency completely separable from its duties as the board of supervisors?

Section 7A.22(2) authorizes a public agency to act as a community action agency. While sections 7A.21 to 7A.27 provide certain special requirements for community action agencies, nothing in those sections purports to change the basic nature of any public agency which acts as a community action agency. Chapter 28E authorizes the creation of a separate entity with distinct identity. § 28E.4; Allis-Chalmers Corp. v. Emmet County Council of Governments, 355 N.W.2d 586, 590 (Iowa 1984). Absent compliance with Chapter 28E, we see no similar authority in § 7A.22(2) for a county board of supervisors to be considered as a distinct, separate entity where it acts as a community action agency or the governing board of a community action agency. This conclusion is also based on the assumption that the Dubuque County Board became the governing body of the community action agency because, as "a political subdivision of a state (having elected or duly appointed governing officials)," it was eligible under then applicable federal law. 42 U.S.C. § 2790(a). See letter from David M. Fortney, Assistant Attorney General, to Ed Stanek, Director, Office of Planning and Programming (October 20, 1981).

8. Is the Board entitled to advice from the Dubuque County Attorney on questions concerning the Board's role as governing officials?

Iowa Code § 331.756(7) provides that the county attorney shall:

> Give advice or a written opinion, without compensation, to the board and other county officers and to school and township officers, when requested by an officer, upon any matters in which the state, county, school, or township is interested, or relating to the duty of the officer in any matters in which the state, county, school, or township may have an interest, but the county attorney shall not appear before the board at a hearing in which the state or county is not interested.

Because we have concluded that the supervisors are not a totally independent entity when they act as governing body of a community action agency, we would conclude that they remain county officers under this section. Therefore, they can obtain advice from the

county attorney on those questions which arise before the governing body "upon any matters in which the . . . county . . . is interested." The community action agency, we believe, also has implied authority to retain counsel to advise the community action agency, including the governing board, from its powers to "administer the components of a community action program." Section 7A.25.

In conclusion, we answer your questions as follows:

1. A public agency or combination may establish a community action agency by ordinance or resolution under § 7A.21.

2. Public agencies should amend or terminate a Chapter 28E agreement where a significant provision is not being followed.

3. Whether employees of a community action agency are employees of a public agency is dependent upon the specific relationship in question.

4. While § 7A.22 does not require that the establishment of an advisory board or a contract with a delegate agency board be in writing, § 331.302(1) would require that a county acting as the public agency do so by motion, resolution, or ordinance.

5. The governing board of a public agency acting as a community action agency has some oversight authority over the duties of an advisory or delegate agency board under §§ 7A.22(2) and 7A.23(1).

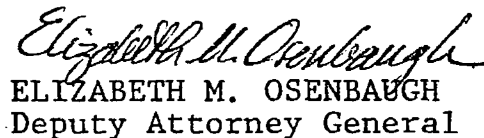
6. We cannot determine in the abstract whether an entity which administers certain grant funds for a public agency under § 7A.22(2) can independently control other grant funds from separate sources.

7. A county board of supervisors which acts as the governing body of a community action agency by virtue of their position as county supervisors are not thereby a separate and distinct entity from the board of supervisors.

8. A county board of supervisors acting as the governing body for a community action agency may obtain advice from the county attorney upon matters in which the county is interested, but the community action agency may also engage legal counsel for the agency and the governing board as part of its authority to administer the community action program under § 7A.25.

We would further note that the lack of specific agreements between the entities involved make resolution of these issues very difficult and are likely to raise many other problems for the program. We would therefore recommend that the entities involved resolve the status of Operation: New View by amendment of the Chapter 28E agreement by the administrative procedures of the Office of Planning and Programming cited under question 1, supra, or by any other appropriate means.

Sincerely,



ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO/cjc

MUNICIPALITIES; MEDICAL PAYMENTS; PENSIONS. Iowa Code §§ 85.27, 410.8, 410.18, 411.6, and 411.15 (1983). A city must pay for medical treatment for work-related injuries and diseases for members of its police and fire departments receiving accidental disability pensions for injuries and diseases incurred in the performance of duty. (Hansen to Pavich, State Representative, 1/7/85) #85-1-5(L)

The Honorable Emil Pavich
State Representative
1706 Fifteenth Avenue
Council Bluffs, Iowa 51501

January 7, 1985

Dear Representative Pavich:

You have requested an opinion of the Attorney General concerning retirement and disability benefits for police officers and firefighters. Two questions have been posed for our consideration.

Your first question is whether a city may deny participation in a group health insurance policy to employees who have retired but are not yet 65 years of age. The answer to this question is controlled by Iowa Code chapter 509A as amended by 1984 Iowa Acts, H.F. 2528, § 25, which requires 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 expense, in group health insurance plans until attaining 65 years of age. House File 2528, § 25, has recently been interpreted by this office in an opinion to County Attorney James Bauch. See Op. Att'y Gen. # 84-12-3(1). A copy of this opinion has been sent to you and should answer your questions concerning the circumstances in which a city must allow retired employees to participate in group health insurance plans.

Your second question is whether there is a requirement for a city or county to pay for medicine or treatment for those employees who receive a disability pension. The answer to your question is that a city must pay for medicine and treatment for members of its police and fire departments receiving accidental disability pensions for injuries or diseases incurred in the performance of duty.

The Iowa Code sections relating to disability pensions provided by cities are contained in Iowa Code chapter 411, which creates a retirement system for police officers and firefighters appointed after March 2, 1934, and in Iowa Code chapter 410, which creates a retirement system for other police officers and firefighters. Section 411.15 provides as follows:

> Cities shall provide hospital, nursing, and medical attention for the members of the police and fire departments of the cities, when injured while in the performance of their duties as members of such department, and shall continue to provide hospital, nursing, and medical attention for injuries or diseases incurred while in the performance of their duties for members receiving a retirement allowance under section 411.6, subsection 6 . . . . (emphasis added).

Section 411.6(6) provides for benefits upon retirement for accidental disability. Such accidental disability benefits are due any member of the pension plan who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty. Iowa Code § 411.6(5) (1983). Chapter 411 thus provides that a city must pay for hospital, nursing, and medical attention, which would include medicine and treatment, for work related injuries for persons receiving accidental disability benefits. Chapter 410 contains similar provisions. See Iowa Code §§ 410.18 and 410.8 (1983).

A city's duty to pay for medical expenses under these provisions is limited to paying medical expenses for persons receiving "accidental" disability benefits rather than "ordinary" disability benefits. It is also limited to paying medical expenses for injuries and diseases incurred while in the performance of duty. However, a city's duty is not limited in time or in amount of expense. 1978 Op. Att'y Gen. 194.

These provisions apply only to police officers and firefighters covered by chapters 410 and 411. For information on the duty of cities to pay medical expenses for persons receiving workers' compensation disability benefits see Iowa Code § 85.27 (1983).

The Honorable Emil Pavich
Page three

Very truly yours,

Steve Hansen

STEVEN K. HANSEN
Assistant Attorney General
Telephone: 515/281-5976

SKH/skb

COUNTIES: Dissolution of County Library District. Iowa Code Ch. 358B (1983); Iowa Code §§ 331.425, 358B.2, 358B.4, 358B.8(8), 358B.10, 358B.11, 358B.12, and 358B.16 (1983); Senate File 2122 (1984 Session). 1. The effective dates for county withdrawal and termination of a county library district are not specified in Iowa Code Ch. 358B. 2. A city council which moves or a board of supervisors which calls for the withdrawal from a county library district must assure that a plan for continuing adequate library services is presented, which plan must be implemented. 3. A proposition of termination requires neither a public hearing nor a plan for continuing adequate library services. 4. While county withdrawal must be approved by a majority of the voters voting on the issue, district termination and city withdrawal require the approval of a majority of the total votes cast at a general or city election and not just a majority of the votes cast on the issue. (Walding to Welsh, State Senator, 1/7/85) #85-1-4(L)

January 7, 1985

The Honorable Joseph J. Welsh
State Senator
R. R. #2, Box 37
Dubuque, Iowa 52001

Dear Senator Welsh:

We are in receipt of your request for an opinion of the Attorney General regarding Senate File 2122 (1984 Session), which amends Iowa Code Ch. 358B (1983) by providing a procedure for the withdrawal from, and termination of, county library districts. The legislation was enacted in response to a prior opinion of our office, Op.Att'yGen. #83-8-1, which concluded that a county did not have the authority, under existing law, to dissolve a county library district.

In your request, you have asked us to address several concerns as to the procedures for withdrawal or termination posed by the Dubuque County Attorney's Office. The County Attorney, in the aftermath of legislative revisions to Ch. 358B, questions:

1. The effective date of county withdrawal.

2. The effective date of system termination.

3. Who bears the responsibility for presenting the plan for alternative service at the public hearing.

4. Whether there is any obligation to act upon the alternative plan or whether the plan must be reasonable or workable.

5. Whether the hearing and alternative plan requirement applies to a termination election. As drawn, the act appears to require the hearing only for a city or county withdrawal election.

6. Whether it is intended that the Board of Supervisors retain the power to appoint the trustees and the power to call or refuse to call a termination election even after the withdrawal of the county from the district.

7. Whether there is intended to be a different requirement for passage of a withdrawal proposal ("a majority of the voters . . . voting on the issue") than for a termination proposal ("a majority vote of the electors . . ."). As stated, it is my opinion that termination requires the affirmative vote of more than half of the eligible electors of the district, regardless of the number actually voting.

In addition, you pose the following question of your own[1]:

> Can the inconsistent language of S.F. 2122 relating to the majority required for a withdrawal (a majority of the voters voting) and for a termination (a majority vote of the electors) be reconciled? It appears that this language was intended to be the same standard but the literal interpretation of the termination language would require a majority of all eligible voters (or all registered voters) to support the proposal.

Because your question regarding the voting requirements is similar to question 7, we combine our response to your question in our reply to the County Attorney's concern.

Senate File 2122, effective July 1, 1984, amended Iowa Code §§ 358B.13 and 358B.16 (1983). Iowa Code § 358B.16 (1983)

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[1] Additional questions concerning the disposition of library assets were withdrawn subsequent to the request.

authorizes a city to withdraw from a county library district if favored by a majority of the electorate of the city. The effective date of municipal withdrawal would be July 1 of the year following a general or city election, with notice of withdrawal sent to the board of library trustees and the county auditor prior to January 10. Section 358B.16, as amended, also authorizes a county to withdraw from a county library district at a general election. A majority of the voters of the unincorporated area of the county voting on the issue is required for withdrawal. Amended § 358B.16 provides that the termination of a county library district requires a motion of the board of supervisors. The amendment does not specify an effective date for county withdrawal. A proposition of withdrawal, either by a city or county, requires that a public hearing be held. Section 358B.16, as amended by S.F. 2122 § 2. At the hearing, a plan for continuing adequate library service must be presented. Id. Senate File 2122 also provided for the termination of a county library district upon a motion of the board of supervisors. Termination of a district requires a majority vote of the district electorate at a general election. Id. The effective date of a library district termination is not statutorily specified.

Turning now to your specific questions, § 358B.16, as amended, does not provide an effective date for county withdrawal from a library district. The proposed effective date should be incorporated in the proposition of withdrawal. Nevertheless, we would encourage the applicable effective date for municipal withdrawal to give the remaining entities adequate opportunities to revise their budgets. Equally, an effective date is not provided in S.F. 2122 for the termination of a county library district. However, budgetary concerns are not as prevalent when the district as a whole ceases operation and therefore our suggestion concerning the use of the July 1 effective date would not apply.

Next, we consider the inquiries related to the required plan for continuing adequate library services after withdrawal of a municipality, questions 3 and 4 of the County Attorney. As we indicated in our introductory remarks, a proposition of withdrawal requires that a public hearing be held. Supra. A motion of the City Council or a call of the Board of Supervisors is necessary for a proposition of withdrawal. Section 358B.16, as amended by S.F. 2122 § 2. Therefore, a city council which moves or a board of supervisors which calls for the withdrawal from a library district must assure that a plan for continuing adequate library services is presented. Any interested person could suggest or develop the contents of a plan for those bodies.

You ask whether an adopted plan must be implemented. The requirement for a plan would be meaningless if implementation were not required. The obvious intent of the statute is that the

plan be implemented. The act requires that "a plan for continuing adequate library service be submitted." The question of withdrawal is decided by an election. As to whether a plan is reasonable and workable, it would appear to be an electoral decision.

In response to question 5 regarding whether a public hearing and a plan is required for a proposition of termination, S.F. 2122 § 2 provides that those procedures are only required for the withdrawal from a library district. Express mention of one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Expressio Unis Est Exclusio Alterius is the legal maxim. Thus, a proposition of termination requires neither a public hearing nor a plan for continuing adequate library services.

Your sixth question concerns the authority of a board of supervisors to appoint trustees or call for a termination election after the county has withdrawn from a county library district. In our opinion, Chapter 358B contemplates that a county library district be composed of at least one county. Iowa Code § 358B.2 (1983). That conclusion is supported by the fact that a board of library trustees is required to make an annual report to the board of supervisors at the end of each fiscal year. Iowa Code § 358B.11 (1983). Members of a library board are appointed by the board or boards of supervisors. Iowa Code § 358B.4 (1983). Further, real estate purchased by a library board for buildings and grounds is to be in the name of the county. Iowa Code § 358B.12 (1983). The library fund is kept as a separate county fund. Sections 358B.10; 331.425. While a county can withdraw from a multi-county library district, it would appear that county withdrawal from a single-county district would result in termination of the county library district. Therefore, we conclude that the proper procedure for a county to opt out of a single-county library district is by termination rather than by withdrawal.

The remaining question, question 7, concerns the voting requirements for the withdrawal from and termination of county library districts. Under § 358B.16, as amended by the Act, the legislature used three different phrases to describe the required majority vote. For city withdrawal, the existing statute required "a majority vote in favor of withdrawal by the electorate of the city." Under S.F. 2122, § 2, a county may withdraw "after a majority of the voters of the unincorporated areas of the county voting on the issue favor the withdrawal." Termination of a county library district requires "a majority vote of the electors of the unincorporated area of the county and the cities included in the county library district." (A city withdrawal election is held simultaneously with a general or city election;

a county withdrawal or district termination election is held at a general election.) You ask whether these subsections of § 358B.16 impose differing requirements in computing the majority required for affirmative action.

The provision for county withdrawal establishes a clear and easily determined test -- it must be approved by a majority of the voters voting on the issue. It is then necessary to determine what the legislature intended by a "majority vote . . . by the electorate of the city" for city withdrawal or by a "majority vote of the electors" for district termination. Statutes should be given a construction which is sensible, workable, practical and logical. Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980). While the answer is far from clear, we would apply this principle to construe both of these provisions as requiring a majority of the total votes cast at the election and not just a majority of the votes cast on this issue. Arguably these statutes require a majority of all persons eligible to vote as that is the usual meaning of the term "elector." Buchmeier v. Pickett, 258 Iowa 1224, 142 N.W.2d 426 (1966). This construction, however, creates great practical difficulties. Many persons who are qualified to vote do not register, and lists of registered voters would include many who are no longer eligible by reason of death, change of voting residence, etc. For these reasons, the South Dakota Supreme Court has construed "a majority of the electors" as a majority of those who come to the polls and cast their ballots. Kuhrt v. Sully County Board of Education, 176 N.W.2d 479 (S.D. 1970). This is also the approach taken in Taylor v. McFadden, 84 Iowa 262, 269-270, 50 N.W.2d 1070 (1892), to construe the phrase "majority of the voters of the city or town." The Iowa Supreme Court there stated:

> "There was no provision for ascertaining the number of persons in the town who were qualified to vote at that election, except as they appeared and voted. It is only by the vote cast that the result of such elections can be determined. That those not voting are to be counted is at variance with our system of elections. Ample notice is provided to electors, and the result must necessarily be determined by the vote cast. The voters of the city or town, contemplated in the statute, are those who, after the required notice, come to the polls and deposit their ballots."

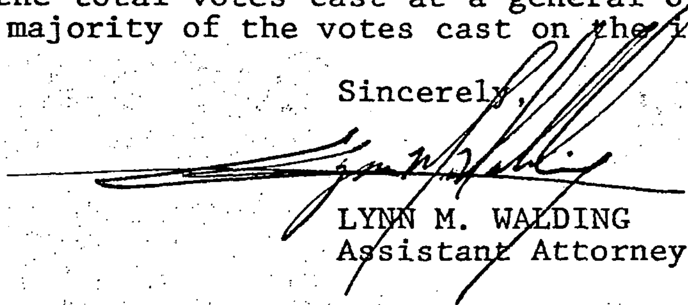
[Citations omitted]

Because district termination and city withdrawal elections are held in conjunction with general or city elections, requiring a majority of all votes cast at the election would often require

more votes than a majority of those voting on the issue, the test for county withdrawal.

In summary, we state the following conclusions: The effective dates for county withdrawal and termination of a county library district are not specified in Chapter 358B. A city council which moves or a board of supervisors which calls for the withdrawal from a county library district must assure that a plan for continuing adequate library services is presented, which plan must be implemented. A proposition of termination requires neither a public hearing nor a plan for continuing adequate library services. Finally, while county withdrawal must be approved by a majority of the voters voting on the issue, district termination and city withdrawal require the approval of a majority of the total votes cast at a general or city election and not just a majority of the votes cast on the issue.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW/cjc

COUNTY AUDITOR/Filing Fees/Clerk's Transfer of Title. Iowa Code Sections 331.507(2)(a), 558.66, 602.8102(79) (1983); Iowa Code Section 333.15 (1979); 1984 Iowa Acts, H.F. 4. County auditors are entitled to receive the five dollar per-parcel-or-lot fee provided in Section 331.507(2)(a), as amended by 1984 Iowa Acts, H.F. 4, as well as the one dollar fee provided in Iowa Code Sections 558.66 (1983) and 602.8102(79) (Supp. 83) for certificates of transfer of title by clerks of court. (Ovrom to Short, Lee County Attorney, 1/7/85) #85-1-3(L)

Mr. Michael P. Short
Lee County Attorney
609 Blondeau St.
Keokuk, Iowa 52632

January 7, 1985

Dear Mr. Short:

You have requested our opinion concerning the fee to be received by the auditor for entering a transfer of title certified by the clerk of court. In our opinion the auditor is entitled to receive the fees provided in Section 331.507(2)(a) as amended as well as the one dollar fee under Section 558.66.

Code Section 331.507(2)(a), as amended by 1984 Iowa Acts, H.F. 4, authorizes the auditor to collect for "a transfer of property made on the transfer records, five dollars for each separate platted lot . . . described in one instrument of transfer." Two other Code sections, which delineate duties of the clerks of court, authorize the clerk to collect one dollar for certificates of transfer on behalf of the auditor. Section 558.66 states that upon receipt of certification from the clerk that title to real estate has been established by judicial decree or by will the auditor shall enter it upon the transfer books, upon payment of a fee of one dollar, collected by the clerk and paid to the auditor at the time of filing. Section 602.8102(79) (Supp. 1983), states that the clerk shall collect on behalf of, and pay to, the auditor, the fee for transfer of real estate as provided in Section 558.66.[1]

In 1984 the legislature amended Section 331.507(2)(a), which contains the five dollar fee charged by the auditor. Prior to amendment, Section 331.507(2)(a) stated:

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[1] The clerk was, and still is, required to charge two dollars for certifying change in title to real estate. Iowa Code Section 606.15(29) (1979); Section 602.8105(I)(1) (Supp. 1983). This appears to be a separate charge than the one collected on behalf of the auditor.

> (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. . . . (emphasis added)

Iowa Code Section 331.507(2)(a) (1983). Thus it was explicit that Section 331.507(2)(a) applied to transfers of title certified by clerks of court. In 1984 the section was amended to read:

> (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 platted lot and five dollars for each separate parcel of contiguous land lying within one unplatted section and described in one instrument of transfer. . . . (emphasis added)

Iowa Code Section 331.507(2)(a) (1983), as amended by 1984 Iowa Acts, H.F. 4. The words "described in a deed or transfer of title certified by the clerk" were changed to "described in one instrument of transfer."

We think the fee under 331.507(2)(a) should still be charged for transfers of title certified by the clerk. Both deeds and clerks' certificates of transfer are instruments of transfer, and both cause "transfers of property made in the transfer records." The emphasis in 331.507(2)(a) is not on the method of transfer, but upon the number of parcels or platted lots described in an instrument of transfer. (Five dollars is charged for each separate parcel or platted lot. See Op.Att'yGen. #84-10-7(L).) Moreover the legislature deleted not only the reference to transfers of title certified by the clerk, but also the reference to deeds. However, it is obvious the legislature intended that five dollars continue to be charged for transfers described in deeds under Section 331.507(2)(a) as amended. It therefore seems likely that the legislature also intended that the five dollar-per-lot-or-parcel fee continue to apply to clerks' certificates of transfer.

This conclusion is supported by the purpose of Section 331.507(2)(a), which is to reimburse the auditor for costs of entering transfers of title. See Op.Att'yGen. #84-10-7(L); 1946 Op.Att'yGen. 47. The fee has been raised

periodically since 1946, when it was only twenty-five cents. See 1946 Op.Att'yGen. 47. Given that purpose it is unlikely that the legislature would have lowered the fee charged by the auditor for entering clerks' certificates of transfer, since such transfers are as much work for the auditor as transfers described in deeds, and since auditors' costs of doing business have not gone down.

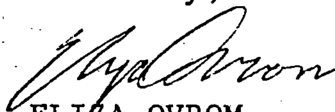
Moreover there are other differences in these fee provisions which indicate both should be collected. One is collected by the auditor, (Section 331.507(2)(a)), and the other is collected by the clerk on behalf of the auditor. (Section 558.66). They are for different amounts, which makes them appear to be different fees. Even prior to 1980, when the predecessor to Section 331.507(2)(a) contained a one dollar fee, application of both fee provisions could have resulted in different amounts being charged for clerks' certificates of transfer. Section 333.15 (1979), predecessor to 331.507(2)(a), charged a one dollar fee for each separate parcel described in a deed or clerk's certificate of transfer, with a ten dollar maximum. Section 558.66 charged one dollar per certification. In 1980 Section 333.15 was amended to raise the one dollar-per-parcel fee to five dollars per parcel. 1980 Iowa Acts, Ch. 1031, Section 5. Since these fee provisions do not directly conflict with each other, both should be presumed valid. Likewise we cannot presume that one fee provision is superfluous. Therefore we conclude that both apply.

In fact in 1981 the legislature dealt with the separate fee provisions in the same statute. In the county home rule statute the legislature moved the five dollar-per-parcel fee charged by the auditor for transfers described in deeds or certificates of transfer from Section 333.15 to 331.507(2)(a). 1981 Iowa Acts, Ch. 117, Section 506(2)(a). In the same bill the 1981 legislature provided that the clerk should collect on behalf of and pay to the auditor the fee as provided in Section 558.66 (1981 Iowa Acts, Ch. 117, Section 701(81)), which is the one dollar fee charged by the clerk for certificates of transfer of title. This is further evidence that the legislature was aware of both fee provisions and intended that both fees be charged.

We realize this opinion is contrary to a 1953 attorney general's opinion which concluded that the predecessor to Section 331.507(2)(a) and Section 558.66 were to be read together and that only one fee was to be collected for clerk's certificates of transfer. 1954 Op.Att'yGen. However, at the time that opinion was written, both sections charged the same amount for transfers (fifty cents). See 1953 Op.Att'yGen. 68. The opinion noted differences between the statutes, but concluded they should be read in pari materia and that one fee should be charged. Given the subsequent statutory amendments which establish different fee provisions we think that reasoning is no longer pursuasive and that both fees should be charged.

We therefore conclude that the fee provisions of Section 331.507(2)(a) as amended by 1984 Iowa Acts, H.F. 4, apply to certificates of transfer of title by the clerks of court, and that Sections 558.66 (1983) and 602.8102(79) (Supp. 1983) also apply to such certificates of transfer. We are aware that in some cases it is not possible to collect the fees for certificates of transfer, and that auditors must enter such transfers without the allowable fees. We do not mean to imply that this practice should change, only that when fees are collected the provisions of Sections 331.507(2)(a) as amended by 1984 Iowa Acts, H.F. 4, and Sections 558.66 (1983) and 602.8102(79) (Supp. 1983) apply.

Sincerely,



ELIZA OVROM
Assistant Attorney General

EO:rcp

ENVIRONMENTAL LAW: Licenses. A fur harvester's license does not authorize hunting of coyote or groundhog. In order for a hunter to legally take, by means of hunting, coyote or groundhog, he or she must have a hunting license. Iowa Code §§ 109.1, 109.38, 109.40 (1983); 1984 Acts, Ch. 406, § 12. (Sarcone to Wilson, Director, State Conservation Commission, 1/7/85) #85-1-2(L)

January 7, 1985

Larry J. Wilson
Director
Iowa Conservation Commission
Wallace State Office Building
L O C A L

Dear Mr. Wilson:

We have received your letter of October 15, 1984, in which you have requested an opinion of the Attorney General regarding the fur harvester license provisions of 1984 Iowa Acts H.F. 406. House File 406 contains various amendments to Chapters 109 and 110 of the Code. Specifically you ask:

> May a hunter with a fur harvester license but no hunting license take coyote and groundhog legally?

Based on our review of 1984 Iowa Acts H.F. 406 and other relevant Code provisions, it is our opinion that a hunter with a fur harvester license may take coyote and groundhog by trapping but may not take coyote and groundhog by hunting unless he or she has a hunting license.

You use the term "take" in your request which has a significant meaning involving fish and game matters and

necessitates a brief review of several Code provisions in order to understand the framework into which the new fur harvester license fits. Iowa Code section 109.1(8) (1983) defines the terms "take" or "taking" or "attempting to take" in relevant part as:

> . . . any pursuing, or any hunting, fishing, killing, trapping, snaring, netting, searching for or shooting at, stalking or lying in wait for any . . ., animal . . ., protected by the state laws or regulations adopted by the commission . . .

Under this definition it is apparent that the terms "take" or "taking" or "attempting to take" are general in nature and that they can be accomplished by the various means set forth in § 109.1(8) (1983).

The term fur-bearing animal is specifically defined in § 109.40 (1983) as follows:

> The following are hereby declared to be fur-bearing animals for the purpose of regulation and protection under this chapter: beaver, badger, mink, otter, muskrat, raccoon, skunk, opossum, spotted skunk, civet cat, weasel, coyote, wolf, groundhog, red fox and gray fox. Nothing in this chapter shall apply to domesticated fur-bearing animals.

Section 109.38 (1983) is also applicable and provides in relevant part that:

> It shall be unlawful for any person to take, pursue, kill, trap or ensnare, . . . any game, . . ., fur bearing animal, fur or skin of such animals . . . except upon the terms, conditions, limitations and reservations set forth herein, and administrative orders necessary to carry out the purposes set out in section 109.39, or as provided by the Code.

Section 110.1 (1983) sets forth the general licensing provisions governing hunting, fishing, and trapping in this state and states in relevant part:

> Except as otherwise provided in this chapter, no person shall . . . trap, hunt, pursue, catch, kill or take in any manner . . . all or any portion of

> any wild animal . . . the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate so to do and the payment of a fee . . .

Subsection 2 of § 110.1 as amended by 1984 Iowa Acts H.F. 406 governs the cost of hunting licenses and subsection 4 of § 110.1 as amended by 1984 Iowa Acts H.F. 406 sets forth the cost of a fur harvester license (formerly a trapping license).

Prior to the passage of 1984 Iowa Acts H.F. 406, § 110.1 (1983) required separate licenses for hunting and trapping fur-bearers. See § 110.1(2) (1983) and § 110.1(4) (1983) and § 109.51 (1983). However, 1984 Iowa Acts H.F. 406 § 12 creates a new section to be added to Chapter 110 which establishes a new fur harvester license allowing the hunting and trapping of all fur-bearers except coyote and groundhog with the purchase of a fur harvester license instead of requiring both a hunting license and trapping license for those who wanted to engage in each activity.

> Fur Harvester License. A fur harvester license is required to hunt all fur-bearers, except coyote and ground hog and to trap any fur-bearing animal. A hunting license is not required when hunting fur-bearers, except coyote and groundhog, with a fur harvester's license.

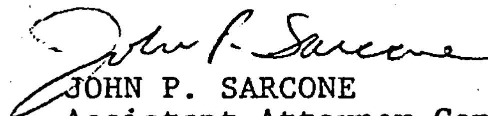
Cite 1984 Iowa Acts H.F. 406 § 12.

The goal in interpreting a statute is to determine the legislative intent and in so doing to place a reasonable construction on the statute which will best effect its purpose and not defeat it. Hansen v. State, 298 N.W.2d 263 (Iowa 1980). As a general rule of statutory construction, in instances where exceptions are made in a statute, the excepted matter would have been within the purview of the general provision absent the exception. River Bend Farms, Inc. v. M & P Missouri River Levee Dist., 324 N.W.2d 460 (Iowa 1982). In examining section 12 of 1984 Iowa Acts H.F. 406 and reading it in conjunction with the provisions referred to above, it is our opinion that the new fur harvester license provision allows the "taking" by means of trapping of all fur-bearers, as defined in § 109.40 (1983), with a fur harvester license. It is our opinion that the legislature intended that a hunter may "take" by hunting all fur-bearers as defined in § 109.40 (1983), except coyote and groundhog, with a fur harvester license and without the need of a hunting license. However, since the legislature specifically excepted coyote and groundhog from the fur harvester license provisions as they

relate to hunting of fur-bearers, it is our opinion that in order to take coyote and groundhog legally by hunting, a hunter must have a hunting license and a fur harvester's license will not be sufficient.

In summary, a hunter who has only a fur harvester's license may legally take, by means of trapping, all fur-bearers as defined in Iowa Code § 109.40 and may legally take, by means of hunting, all fur-bearers, as defined in § 109.40 (1983), except coyote and groundhog. In order for a hunter to legally take, by means of hunting, coyote and groundhog, he or she must have a hunting license.

Respectfully,



JOHN P. SARCONE
Assistant Attorney General

JRS/cjc

MUNICIPALITIES: Governmental Zoning Immunity. Iowa Code §§ 384.24(3)(d) and 384.25 (1983). A city is authorized to construct a sewage treatment plant and extension outside the corporate limits of the city. While under the test applied by the Iowa Supreme Court a city would not be subject to county zoning ordinances in the construction of such a sewage treatment plant, the city's site selection and any deviation from substantive county zoning requirements should have a reasonable basis. (Walding to Hammond, State Representative, 1/7/85) #85-1-1(L)

January 7, 1985

The Honorable Johnie Hammond
State Representative
3431 Ross Road
Ames, Iowa 50010

Dear Representative Hammond:

You have requested an opinion of the Attorney General regarding governmental zoning immunity. The issue presented is whether a city is subject to county zoning ordinances for public improvements outside of the city limits which constitute an essential corporate purpose. At issue is a proposed sewage treatment plant and the connecting pipeline for the city of Ames, Iowa. The proposed plant would be located six miles outside of the Ames corporate limits. Therefore, the narrower issue we examine is whether a city is subject to county zoning ordinances in the construction of a sewage treatment plant and related facilities outside the corporate limits of the city.

We would note at the outset that this opinion concerns only whether cities are subject to county zoning for sewage treatment plants outside the city limits. However, your request states that it deals specifically with the proposed sewage treatment plant for the city of Ames. For that specific plant, there are at least two additional issues which may affect the need for a county permit for the project. The Department of Water, Air and Waste Management (DWAWM) has approved the flood plain management regulations contained in the Story County zoning ordinance

pursuant to Iowa Code § 455B.276 (1983). We do not address whether the flood plain permit requirements of §§ 455B.275 - 455B.276 can be met by a DWAWM permit rather than a county permit, see 900 I.A.C. § 75.7(3), or whether the State delegation of authority and approval of the flood plain regulations in the Story County zoning ordinance extends to that portion requiring compliance with other zoning requirements for the use district. These issues are not raised in your request and should be answered in the first instance by DWAWM.

Additionally the City of Ames has applied for state and federal grant funding for an interceptor to be constructed in advance of the sewage treatment plant. DWAWM, the state funding agency, must certify "that a project is technically and administratively complete." 900 I.A.C. § 91.8(1). The grantee must comply with the technical procedures for facility planning. Id. Under E.P.A. regulations, facility planning requires that "the selected alternative is implementable from legal, institutional, financial and management standpoints." 40 CFR § 35.2030(a). See also, 40 CFR § 35.2030(b)(8)(v). This opinion is not intended to foreclose DWAWM from considering whether, as a condition of grant funding, the city should be required to obtain a county permit or a declaratory judgment that one is not required in order to provide adequate assurance that the project is implementable.

A discussion of the governmental zoning immunity of a state agency is found in a recent opinion of our office. In 1982 Op.Att'yGen. 392, we opined that a state agency, the Division of Adult Corrections of the Department of Social Services (now the Iowa Department of Corrections), was not subject to a municipal ordinance requiring a fence of a particular height and composition to encompass any adult security facility within the corporate limits. The opinion relied on a 1963 Iowa Supreme Court case which favored, in the absence of express statutory authority to the contrary, governmental zoning immunity -- the majority rule. City of Bloomfield v. Davis Co. Community School Dist., 254 Iowa 900, 119 N.W.2d 909 (1963) (school district immunity from city zoning). In the 1982 opinion, we observed that the court adjudicated the claim of zoning immunity based, in part, on the governmental-proprietary standard, one of three accepted theories. 1982 Op.Att'yGen. at 394. The governmental-proprietary test is described in the opinion as follows:

> The approach followed by a plurality of states is to distinguish between governmental and proprietary functions. If found to be performing a function governmental in nature, the political unit is immune from the conflicting zoning ordinance. See, e.g., City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962). Conversely, when the use is considered proprietary, the zoning ordinance prevails. See, e.g., Tabor

> v. City of Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937).

1982 Op.Att'yGen. at 393. Thus, the Iowa Supreme Court has followed the majority view in favor of governmental zoning immunity based, in part, on the governmental-proprietary standard, at least where the question is whether an arm of the State is subject to local zoning requirements.

The governmental zoning immunity doctrine in other jurisdictions has extended to municipalities exercising governmental functions. According to McQuillin:

> A municipal corporation in the exercise of a governmental function is not subject . . . to zoning laws or ordinances either within or outside of the municipal boundaries, unless by the terms of the applicable laws a contrary intent has been manifested by the legislature. [Footnotes omitted]

8 McQuillin, Municipal Corporations § 25.15 (1965). Another legal authority states:

> The state's immunity to municipal zoning regulations extends to municipal corporations which are carrying on state functions or acting pursuant to state mandate. . . . A municipality is not bound by local zoning ordinances when it acquires land and establishes a sewage disposal plant pursuant to state law and for a public purpose. [Footnotes omitted]

2 Anderson, American Law of Zoning § 1206 (2d ed. 1976). Thus, legal authorities support the applicability of governmental zoning immunity to municipalities in the exercise of a governmental function.

The construction of a plant to dispose of sewage and industrial waste in a sanitary manner is declared by state statute to be an essential corporate purpose. Iowa Code § 384.24(3)(d) (1983). A city is statutorily authorized to execute any essential corporate purpose "within or without its corporate limits." Iowa Code § 384.25 (1983). Thus, a city is authorized to construct a sewage treatment plant and extension without the corporate limits. Accordingly, a city, under the governmental immunity doctrine would not be subject to county zoning ordinances in the construction of a sewage treatment plant and extension outside the corporate limits of the city.

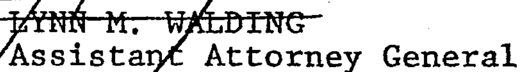
However, we would note that a court would likely scrutinize the reasonableness of a municipality's actions if a zoning permit

were not obtained and litigation ensued. In City of Bloomfield, 254 Iowa at 905-906, 119 N.W.2d at 912-913, the Court, while holding that a school district need not obtain a zoning permit, also analyzed whether the school district had abused its discretion in deciding to use the site for the purpose intended. Among the factors considered were the usefulness of the specific site to the school's functions and the approval of the site by the state fire marshal. Here also there is state agency review of site selection for municipal waste treatment plants (see Iowa Code §§ 455B.173(3), 455B.174(2); 900 I.A.C. §§ 64.2(2), 64.2(3)), and 64.2(9)(c), and the State is directly involved in the funding of sewage treatment plants, Iowa Code §§ 455B.241-246. We are also advised that this use is not prohibited in the county zoning district in question but is instead a conditional use. We cannot, however, in an Attorney General's opinion resolve whether the city's site selection would be found to be reasonable as no mechanism exists to resolve issues of fact. See 1972 Op.Att'yGen. 686.

Additionally, we would note that the trend in case law and the vast weight of scholarly authority, as we cautioned in the 1982 Opinion, advocate the rejection of the majority view of absolute governmental immunity. Instead, some courts have adopted a "balancing of interests" test rather than absolute governmental immunity. This test examines the need for the facility and its impact upon the environment. Under a balancing of interests test, if applied, the Court would look both to the city's interests in use of a site for sewage disposal and the county's interests in the particular zoning provision in question. See Annotation, Applicability of Zoning Regulations to Waste Disposal Facilities of State or Local Governmental Entities, 59 A.L.R.3rd 1244 (1974); Town of Oronoco v. City of Rochester, 293 Minn. 435, 197 N.W.2d 426 (1972); St. Louis Co. v. City of Manchester, 360 S.W.2d 638 (Mo. 1962).

In conclusion then a city is authorized to construct a sewage treatment plant and extension outside the corporate limits of the city. While under the test applied by the Iowa Supreme Court a city would not be subject to county zoning ordinances in the construction of such a sewage treatment plant, the city's site selection and any deviation from substantive county zoning requirements should have a reasonable basis.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW/cjc

SCHOOL BOARDS; CONFLICT OF INTEREST: Iowa Code §§ 71.1, 277.27, 297.7, 301.28 (1983). It is not prohibited or a conflict of interest for a school board member to vote on a contract, let after public notice and competitive bidding, on which the board member has submitted a subcontract bid. However, the school board member would be well advised to abstain from voting in such circumstances in order to avoid the appearance of impropriety. (Hansen to Angrick, Citizens' Aide/ Ombudsman, 2/22/85) #85-2-6(L)

February 22, 1985

Mr. William P. Angrick II
Citizens' Aide/Ombudsman
Citizens' Aide Office
Capitol Complex
Des Moines, Iowa 50319

Dear Mr. Angrick:

You have requested an opinion of the attorney general concerning whether a school board member may vote on a contract for which the board member has submitted a subcontract bid. Your question arises from a situation where a school board, after public notice and competitive bidding, voted to let the contract for a high school addition to a contractor to whom one of the board members had submitted a subcontract bid. You ask whether it is prohibited or a conflict of interest for the board member to vote on the contract in such a situation. We conclude that the board member may vote under these circumstances. Our reasons are as follows.

The Code of Iowa contains a number of provisions prohibiting pecuniary or personal interests in contracts. See, e.g. Iowa Code §§ 18.5, 314.2, 331.342, 362.5, and 403.16 (1983). While these sections relate to nearly every state, county, or municipal official or employee, there is no specific reference to members of school boards. In addition, neither § 297.7, which gives the school board authority to construct and repair school buildings, nor §§ 23.2 and .18, which regulate the letting of public contracts and are incorporated by reference in § 297.7, prohibit board members from voting on contracts in which they may have an interest.

Similarly, none of the statutory provisions that guard against potential conflicts of interest of school board members address whether a board member may vote on a contract

in which the member is interested. Iowa Code § 277.27 prohibits a board member from receiving compensation directly from the school board; § 71.1 prohibits a board member from appointing a relative within the third degree to a paying position unless first approved by the board; and § 301.28 prohibits a board member from being an agent for a textbook or school supply company that does business with the district. However, none of these provisions would prohibit a board member from voting in the situation here.

Although there are no specific statutory provisions applicable here, the well established common law principle of avoiding conflicts of interest is relevant. The Iowa Supreme Court has stated, "We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of governmental officials and employees nor any which has been more consistently and rigidly applied." Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969).

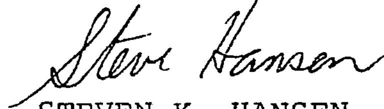
On the basis of this well established principle, this office has advised that a school board member who is a stockholder in a corporation which owns property, which must be purchased by the board for school expansion, would be prevented by reason of conflict of interest from acting as a member of the board on the transaction. 1970 Op. Att'y Gen. 466. The 1970 opinion also relied on a 1932 attorney general's opinion that advised that a school board cannot purchase coal or other supplies from a corporation where a member of the board is a managing officer or director of the corporation. 1932 Op. Att'y Gen. 110.

The situation here, however, is different from the purchase of land from a board member, in that here the contract was let after public notice and competitive bidding. Several code sections demonstrate that public notice and competitive bidding can ameliorate conflict of interest problems. For example, under Iowa Code § 331.342(3) the prohibition against an officer or employee of a county having an interest in a contract with that county does not apply to contracts made by a county of less than ten thousand population upon competitive bid in writing, publicly invited and opened. Similar exemptions in § 362.5(4) and (10) apply to city officers and employees. In addition, public notice and competitive bidding are required for public improvement contracts pursuant to § 23.18, and for the sale of goods in excess of five hundred dollars to a state agency by an official, employee, member of the general assembly, or legislative employee, pursuant

to § 68B.3.

In view of the above statutes which approve or require public and competitive bidding as a means to prevent conflicts of interest and the absence of any specific statutory prohibitions, we conclude that a school board member is not prohibited from voting on a contract, let after public notice and competitive bidding, on which the board member has submitted a subcontract bid.

Very truly yours,



STEVEN K. HANSEN
Assistant Attorney General

PHYSICAL THERAPISTS; PODIATRISTS. Iowa Code §§ 148A.1, 148.2(4), 149.1, and 149.2(1); H.F. 2211, 70th G.A. 1984. The term "physician," as used in Iowa Code section 148A.1, as amended in H.F. 2211 (70th G.A. 1984), is not construed to include the term "podiatrist." Physical therapists may not treat patients referred to them by podiatrists. (Hart to Peick, State Representative, 2/22/85) #85-2-5(L)

February 22, 1985

Ms. Doris Peick
State Representative
State Capitol
Des Moines, Iowa 50319

Dear Representative Peick:

We are in receipt of your recent request for an Attorney General's opinion concerning the interpretation of the word "physician" in H.F. 2211. You have specifically asked:

> For the purposes of determining who is permitted to authorize physical therapy treatment under Chapter 148A, should the term "physician," as used in Iowa Code section 148A.1, as amended in 1984 by H.F. 2211, be interpreted to include qualified and licensed medical practitioners and therefore include podiatrists?

Iowa Code Chapter 148A regulates the licensing of physical therapists in Iowa. Iowa Code § 148A.1 (1983), as amended by H.F. 2211, now reads:

> As used in this chapter, physical therapy is that branch of science that deals with the evaluation and treatment of human capabilities and impairments. Physical therapy uses the affective

> properties of physical agents including, but not limited to, mechanical devices, heat, cold, air, light, water, electricity, and sound, and therapeutic exercises, and rehabilitative procedures to prevent, correct, minimize, or alleviate a physical impairment. Physical therapy includes the interpretation of performances, tests, and measurements, the establishment and modification of physical therapy programs, treatment planning, consultative services, instructions to the patients, and the administration and supervision attendant to physical therapy facilities. Physical therapy evaluation of biomechanics may be rendered by a physical therapist without a prescription or referral from a physician or dentist. Physical therapy treatment shall be rendered by a physical therapist only under prescription or referral from a physician or dentist, or referral from a chiropractor. (emphasis added)

The term "physician" is not defined in Chapter 148A of the Code. We must look elsewhere to obtain a definition. 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). Thus, we believe it is reasonable to interpret the term "physician," as is provided in Chapter 148, which regulates the practice of medicine and surgery and Chapters 150 and 150A regulating the practice of osteopathic medicine and surgery. These chapters do not define the term "physician" *per se*. They do, however, define who is engaged in the practice of medicine and surgery or osteopathic medicine and surgery. Iowa Code §§ 148.1, 150.2 and 150A.1. Specifically excluded from these definitions are licensed podiatrists. Iowa Code §§ 148.2(4), 150.3(1) and 150A.2(4) (1983).

Iowa Code Chapter 149 (1983) buttresses this view. Iowa Code § 149.1 defines the practice of podiatry. Excluded from this definition are physicians. Iowa Code § 149.2(1). This section states:

> This chapter shall not apply to the following:
> 1. Physicians and surgeons, or osteopaths, or osteopathic surgeons authorized to practice in this state.

(emphasis added). From the foregoing analysis, it is clear that the Code of Iowa differentiates between podiatrists and physicians, either medical or osteopathic, making them mutually exclusive.

In conclusion, the term "physician" as used in Iowa Code § 148A.1 (1983), as amended by S.F. 2211, 70th G.A. 1984, does not include podiatrists as persons who can prescribe or refer patients for physical therapy.

Your opinion request letter suggests that we read "podiatrist" into the term "physician" as used in S.F. 2211. We are unable to do so and respectfully suggest that the legislature is the appropriate forum to resolve this issue.

Respectfully submitted,

ELIZABETH HART
Assistant Attorney General

EH/cjc

COUNTIES AND COUNTY OFFICERS; COUNTY AUDITOR. Iowa Code §§ 441.29, 441.65 (1983). Iowa Code § 441.65 does not authorize the auditor to obtain a survey-plat when the description of property boundaries in an instrument of conveyance filed for transfer refers to a stream channel whose alignment can be discerned from an aerial photograph that is reasonably available to the auditor. The auditor should maintain the plat book required by § 441.29 in accordance with the stream channel alignment as shown on a recent available aerial photograph unless a document eligible to be recorded as an instrument affecting real estate provides a reasonable basis for the auditor to use a different description contained or referenced therein. (Smith to Partridge, Washington County Attorney, 2/22/85) #85-2-4(L)

Mr. Gerald N. Partridge
Washington County Attorney
Washington County Courthouse
P.O. Box 841
Washington, Iowa 52353

February 22, 1985

Dear Mr. Partridge:

Your letter of December 14, 1984, requested an opinion concerning the authority of a county auditor to require information to enable the auditor to locate the common boundary dividing two tracts for purposes of taxation where the alignment of the stream forming the common boundary has been changed.

On the basis of the information you have supplied, the following facts are assumed in responding to your inquiry: Since 1907, ownership of a quarter-quarter section in a rural area has been divided into two tracts whose common boundary is the channel of a large creek. About 40 years ago a new artificial channel was excavated, thereby diverting most or all flow from a large meander of the natural channel. Since the straightening, title to each tract has been conveyed by instruments which have continued to describe the common boundary dividing the two tracts by reference to the creek channel. In preparing the cadastral tax plats first used by the county in 1978, the auditor was unable to discern the location of the old meander from aerial photos used for the new plat maps. The auditor therefore showed the straightened channel as the boundary between the two tracts on the new plat map prepared pursuant to Iowa Code Section 441.29 (1983). Subsequently, in response to a complaint from the owner of one of the two tracts, the auditor "corrected" the plat map by drawing an obviously crude approximation of the old channel on the plat map, creating for tax purposes a third tract of five acres taxed to the owner of the tract from which it had been cut off by the straightening. Thereafter, in response to a complaint from the owner of the other tract, the auditor again "corrected" the plat map to show the straightened channel as the boundary between the two tracts.

The authority of the county auditor to obtain additional information to enable descriptions to be entered in the plat book for tax purposes is set forth in Iowa Code § 441.65 (1983) which, in pertinent part, states:

> Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept; and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and that it must be platted within sixty days thereafter. If the grantor in the conveyance shall neglect for sixty days thereafter to file for record a plat thereof, then the auditor shall proceed as is provided in this section, and cause the plat to be made in accordance with the provisions of chapter 409 and recorded in the office of the auditor, and the office of the county recorder, and in the office of the assessor.

This language has been in the Code since 1873.

Your opinion request states: "It is apparent that Auditors several decades ago accepted the conveyances without requiring appropriate platting." Without disagreeing with your assertion, we observe that the standards for ascertaining whether a description is sufficiently definite and accurate to enable the auditor to plat the property for taxation should be related to the type of information reasonably available to assist the auditor in tax platting. At least since the advent of modern aerial photography, the main channels of most streams large enough to be natural barriers can be drawn in the auditor's plat book with sufficient accuracy for tax purposes because the auditor, with the assistance of the assessor, generally would have convenient access to aerial photo prints or slides which show the location of stream channels. If the county did not have an aerial photo of a tract in question, the auditor could reasonably request that the owner of a tract bounded by a stream provide an aerial photo obtained from the U.S. Department of Agriculture S.C.S. or A.S.C.S. In the facts as given, the auditor has a relatively recent aerial photo that shows the channel of the creek referred

to as a boundary in the instruments by which the two tracts have been conveyed during the last eight decades. In effect, the owner of one of the tracts has protested to the auditor that the creek channel as shown on a recent county aerial photograph has been changed by an artificial avulsion, and that the old channel is the legal boundary which the auditor should enter in the plat book to identify the two tracts for tax purposes.

It has long been a common practice for instruments of conveyance to refer to streams as property boundaries for practical reasons related to land use, especially agricultural land use. If the stream was not set apart by meander lines in the original government survey, i.e., if the stream is not legally "meandered" by virtue of the original survey, a reference to the stream as a property line in an instrument of conveyance has generally been interpreted as an intent to define the property line as the center line of the stream, e.g., as in Kerr v. Fee, 179 Iowa 1097, 161 N.W. 545 (1917).

Undeniably, the reference to streams as property boundaries has spawned litigation, due principally to the fact that stream alignments shift. Gradual shifts involve erosion and deposition of land by accretion. Sudden shifts cause land within meander bends to be cut off from adjoining land by avulsion. The effects of alignment shifts on title to riparian land often depends on which of these processes occurred, e.g., as in Holmes v. Haines, 231 Iowa 634, 1 N.W.2d 746 (1942). A channel-straightening project which cuts off a natural meander is, in effect, an artificial avulsion. Sieck v. Godsey, 254 Iowa 624, 118 N.W.2d 595 (1962). However, in determining whether to require a plat in lieu of accepting a description referring to a stream channel as a property boundary, the auditor should not be expected to know whether the channel as shown on the most recent available aerial photograph has shifted by avulsion.

If a relatively recent aerial photo showed two channels with neither channel distinguishable as the main channel, then, within a reasonable time after presentation of an instrument of conveyance for transfer, the auditor should give notice pursuant to § 441.65 that the instrument's reference to the creek channel as a boundary is not sufficiently definite and accurate to enable the auditor to show the property boundaries in the plat book. But the facts as given indicate that the straightened channel is now clearly the main creek channel, because the alignment of the cut-off natural channel cannot be ascertained from the aerial photo. It therefore appears reasonable for the auditor to treat the straightened channel as the boundary described in the instrument of conveyance. If the instrument describes a creek channel as the boundary, and the auditor can ascertain the location of the channel, Section 441.65 does not come into play.

The auditor does not have authority to determine title to the disputed area. The parties cannot seek to have the auditor make a legal determination as to the boundary location, which could involve legal doctrines such as accretion and avulsion, adverse possession or acquiescence. This determination is much better suited for the courts. If the parties litigate the boundary dispute and a court decides the boundary is the former channel as surveyed by one of the parties, the auditor must change the boundary on the plat book in accordance with the survey.

In conclusion, Iowa Code § 441.65 does not authorize the auditor to obtain a survey-plat when the description of property boundaries in an instrument of conveyance filed for transfer refers to a stream channel whose alignment can be discerned from an aerial photo that is reasonably available to the auditor. The auditor should maintain the plat book required by § 441.29 in accordance with the stream channel alignment as shown on a recent available aerial photograph unless a document eligible to be recorded as an instrument affecting real estate provides a reasonable basis for the auditor to use a different description contained or referenced therein.

Sincerely,

Michael H Smith
MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

INSURANCE; PUBLIC EMPLOYEES: Continuing right of retired public employee to participate in public employer's group health insurance plan. 1984 Iowa Acts, ch. 1129, §2, ch. 1285, §§24, 25; Iowa Code sections 3.7, 4.8, 97A.6(5), 97B.41(12), 411.6(6), 509A.1, 509A.2, 509A.7, 509A.11(2) (1983). A retired public employee who wishes to take advantage of amended Iowa Code ch. 509A to participate at his own expense in his employer's group health insurance plan after retirement must have continuously participated in that plan after retirement. The right to participate in the plan includes employees who retire for disability reasons pursuant to statute. An employee who retires at age 55 may take advantage of amended Iowa Code ch. 509A to continue to participate in his employer's plan until age 65 and thereafter. Whether an employee who retired prior to July 1, 1984 can opt back into the plan at the present time depends upon the facts and circumstances of each case. (Haskins to Miller, State Senator, 2/22/85) #85-2-3(L)

February 22, 1985

The Honorable Charles P. Miller
State Senator
State Capitol
LOCAL

Dear Senator Miller:

You have requested the opinion of our office regarding 1984 Iowa Acts, ch. 1285, §§ 24, 25, which amend Iowa Code ch. 509A (1983) to allow employees of governmental bodies to continue, at their own expense, to participate in the public body's group health insurance plan after they retire.

The governing body of a "public body" (defined as "an institution supported in whole or part by public funds," see Iowa Code section 509A.11(2)[1]) may establish plans and purchase group insurance for health or medical service benefits for its employees. See Iowa Code section 509A.1 (1983). The cost of the group insurance plans may be borne wholly by the employee, or wholly by the governing body, or it may be shared by the employer and employee. See Iowa Code section 509A.2 (1983); 1980 Op. Att'y Gen. 304, 306.

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[1] "Public body" includes cities. See 1976 Op. Att'y. Gen. 333.

1984 Iowa Acts, ch. 1285, §25, amends Iowa Code ch. 509A (1983) to add the following new section:

> If a governing body, a county board of supervisors, or a city council has procured for its employees accident, health, or hospitalization insurance, or a medical service plan, or has contracted with a health maintenance organization authorized to do business in this state, the governing body, county board of supervisors, or city council shall allow its employees who retired before attaining sixty-five years of age to continue participation in the group plan or under the group contract at the employee's own expense until the employee attains sixty-five years of age.

Chapter 1285 also amends presently existing Iowa Code section 509A.7(1983) as follows:

> The word "employee" as used in this division does not include temporary or retired employees except as otherwise provided in this chapter. However, this section does not prevent a retired employee sixty-five years of age or older from voluntarily continuing in force, at the employee's own expense, an existing contract.

[New language underscored]. Chapter 1285 is effective July 1, 1984. *See* Iowa Code section 3.7 (1983). Read together, the effect of these sections (hereafter, collectively referred to as "the sections") is to confirm the right of an employee of a public body to continue, "at his own expense,"[2] in the body's group health insurance plan after retiring, even though the employee retired before age 65. Regarding these sections, you ask the following questions:

1) Do these sections allow and authorize or prohibit previously employed and covered employees from obtaining continuing group plan coverage?

2) Do these sections allow and authorize or prohibit from continuing coverage employees that were previously retired with a disability pension?

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2 Presumably, this means that the retired employee pays not only his share of the plan's cost but also his employer's share.

3) Is an employee with city coverage that retired at age 55, prior to July 1, 1984, whose coverage was then terminated, who then paid for their own coverage, allowed and authorized to return to a city plan prior to age 65? Is this employee allowed or authorized to return to a city coverage plan after age 65?

As to the first question, the sections appear to require "continuing participation" in the plan by the retired employee; the retired employee cannot simply elect not to participate in the plan but instead obtain health insurance elsewhere for a period of time after retirement, and then expect to be able to resume participation in his former public employer's plan whenever he chooses. Sections 24 and 25 speak of "continuing participation" in an "existing contract." The legislature could well desire to impose a "continuous participation" requirement in order to prevent an actuarially unsound set of risks being imposed upon the public employer.

As to the second question, nothing in the language of the sections preclude treating as a "retired employee" an employee who retired for disability reasons. Thus, we believe that retirement for disability reasons pursuant to statute, see e.g. Iowa Code sections 97A.6(5), 411.6(6) (1983) is covered by these sections. The concept of "retirement" in amended ch. 509A is determined by the applicable pension statute. See e.g. Iowa Code section 97B.41(12) (1983) (defining "retired member" as one who has applied for and is receiving a retirement allowance). It is not a subjective determination made solely by the individual employee. See Op. Att'y Gen. #84-12-3(L).

The second part of your third question will be dealt with first. The issue posed is whether an employee who retires at age 55 and elects to participate in his employer's plan may continue after age 65. Section 25 of ch. 1285 makes clear that an employee who retired prior to age 65 may continue under the employer's insurance plan until age 65. Section 24 of ch. 1285 dovetails with this provision to allow that employee (or one who retires after age 65) to continue in the plan. The terms of §24 in no way limit it to employees who retire after age 65. It refers to a "retired employee [who is] sixty-five years of age or older" and not to an "employee who retires at sixty-five years of age or

older." It would be incongruous to say that an employee who retired at age 65 could continue under a plan thereafter but that an employee who retired at age 55 could remain in the plan only until age 65. Thus, the employee retired at age 55 may continue in the plan after he reaches age 65.

Turning to the first aspect of your third question, since 1963, see 1963 Iowa Acts, ch. 232, §7, Iowa Code section 509A.7 has provided that a "retired employee" (no age specified) may continue in force, at his own expense, an existing insurance contract (and thereby obtain the benefit of a group rate, which is generally more favorable). The amendment to this section, and the addition of a new section, contained in 1984 Iowa Acts, ch. 1285 merely clarify a pre-existing right on the part of a retired employee. Hence, applying the sections to employees who retired prior to July 1, 1984, is really not a retroactive application of a statute in violation of Iowa Code section 4.8 (1983). "An exception [to the principle of non-retroactivity] occurs when a law is passed to bring legal rights and relationships into conformity with what people thought they were and intended to be. . .." 2 Sands, Statutes and Statutory Construction §41.02, at 248 (1973). Section 509A.7 has undergone change during its history but its core language allowing a retired employee to continue under the employer's plan at the employee's own expense has remained throughout. See 1984 Iowa Acts, ch. 1285, §24; 1982 Iowa Acts, ch. 1101, §2; 1973 Iowa Acts, ch. 284, §5; Iowa Code section 509A.7 (1971); Iowa Code section 509.21 (1966); 1963 Iowa Acts, ch. 232, §7, Iowa Code section 365A.7 (1962). Evidencing that §509A.7 has not simply been limited to employees who retire at age 65 is that retirement at age 55 has long been permitted under various pension systems. See e.g. Iowa Code sections 97B.47, 411.6(1)(a) (1954). Together, sections 24 and 25 accomplish what section 509A.7, as found in the 1983 Code and its predecessors, did alone. Thus, on its face, the sections would apply to an employee who retired prior to July 1, 1984 at age 55 (or age 65).

But does this mean that such an employee, after a period of absence from the plan, may now simply jump back into his former employer's plan? The difficulty with so allowing is that the employee would not meet the "continuous participation" requirement discussed above and found to be implicit in the sections. Nevertheless, in the instance of an employee who desired to participate in the plan at the

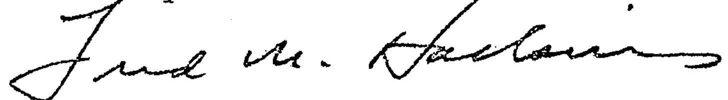
time of retirement but who was denied that opportunity by his employer, a strong equitable argument could be made for present inclusion in the plan, on the ground that the employee's failure to meet the "continuous participation" requirement was involuntary on his part. In short, whether the employee can opt back into the plan at the present time will depend upon the facts and circumstances of each case.

It should be noted that 1984 Iowa Acts, ch. 1129, §2 grants an employee (including a public employee) the right to continue, at his own expense, in his employer's health benefit plan for six months in the event of the employee's otherwise non-coverage in the plan due to termination because of "temporary layoff or approved leave of absence." We believe that bona fide retirement simply does not constitute the kind of temporary absence contemplated by this section. Hence, 1984 Iowa Acts, ch. 1129 has no applicability to your questions.

In sum, a retired public employee who wishes to take advantage of amended Iowa Code ch. 509A to participate at his own expense in his employer's group health insurance plan after retirement must have continuously participated in that plan after retirement. The right to participate in the plan includes employees who retire for disability reasons pursuant to statute. An employee who retires at age 55 may take advantage of amended Iowa Code ch. 509A to continue to participate in his employer's plan until age 65 and thereafter. Whether an employee who retired prior to July 1, 1984 can opt back into the plan at the present time depends upon the facts and circumstances of each case.

Very truly yours,

THOMAS J. MILLER
Attorney General of Iowa



FRED M. HASKINS
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Insurance Department of Iowa
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FMH/850-F

OPEN RECORDS: City Owned Gas and Electric Utilities; Applications for Service. Chp. 68A: §§ 68A.1, 68A.2; Chp. 537: §§ 537.7102, 537.7103; 1984 Iowa Acts Chp. 1014 § 1; 1984 Iowa Acts Chp. 1145 § 1; 1984 Iowa Acts Chp. 1185 §§ 5, 6. Applications which elicit personal credit history would be public records when maintained by city owned gas and electric utilities. (Pottorff to Junkins, State Senator, 2/22/85) #85-2-2(L)

February 22, 1985

Honorable Lowell L. Junkins
State Senator
State Capitol
L O C A L

Dear Senator Junkins:

You have requested an opinion of the Attorney General concerning the application of the public records law to rules proposed by the Iowa Commerce Commission. You point out that under a notice of intended action published August 15, 1984, the Commission would require each utility, including city owned gas and electric utilities, to determine the credit worthiness of an applicant or customer by eliciting through an application for service specific credit information. Cities are subject to the public records law. Iowa Code § 68A.1 (1983). This credit information, moreover, would include identification of commercial institutions where the applicant has any bank accounts, credit accounts, or loans and acknowledgement of any recent defaults. Because these rules would cause city owned gas and electric utilities to maintain applications reflecting personal credit history, you specifically inquire whether the applications would be treated as public records. In our view, these applications would be public records when maintained by city owned gas and electric utilities.

The proposed rules permit each utility to require a deposit from any customer or prospective customer to guarantee payment of bills for service. No deposit shall be required as a condition for service, however, except as determined by application of either credit rating or deposit calculation criteria or both, of the filed tariff. The proposed rules further specify general requirements for determination of credit worthiness in the following provisions:

> c. General requirements. Each utility shall determine the creditworthiness of an applicant or customer pursuant to subparagraphs 1 and 2 of this paragraph in an equitable and nondiscriminatory fashion based solely upon the credit risk of the individual applicant requesting service.
>
> (1) Applications for initial service. Upon application for service the new applicant for service shall provide the utility with the following information:
>
> 1. Name of the utility where the customer had prior service, if within the last six months.
> 2. Name and address of current employer, if any, and length of employment.
> 3. Names of commercial institutions where the applicant has any bank accounts, credit cards, charge accounts or loans.
>
> Whether the application has defaulted on any obligation listed above within the prior six-month period.
>
> 4. Whether the applicant owns or is buying his or her own home or car. [VII Iowa Administrative Bulletin, No. 4, pp. 246-49.]

Under paragraph c(1) the applicant for service must provide the utility with information concerning his or her personal credit history including the names of commercial institutions where the applicant has any bank accounts, credit cards, charge accounts or loans and whether he or she has defaulted on any obligation to these institutions in the six-month period preceding the application.

In order to determine whether this information would be public record when maintained by city owned gas and electric utilities, we must examine Chapter 68A. The term "public records" is broadly defined in Chapter 68A to include the following:

> All records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing. [1984 Iowa Acts Chp. 1145 § 1.]

Under this definition, public records include "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to . . . any city." Records maintained by city owned utilities, therefore, would fall within the definition of public records. See 1976 Op.Att'yGen. 524 (public records include city garbage assessment records).

Chapter 68A separately vests the public with the rights of access to public records. Section 68A.2(1) expressly provides that "[e]very person shall have the right to examine and copy and to publish or otherwise disseminate public records or the information contained therein." 1984 Iowa Acts Chp. 1185 § 2. These rights of access to public records conferred under § 68A.2(1) may be exercised with respect to all public records, including an application containing personal credit history, unless another statute requires the record to be kept confidential or limits the rights of access.[1]

We find no statute which would require these applications to be kept confidential or limit the rights of access. Section 68A.7 currently lists eighteen separate records which shall be

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[1] Prior to enactment of Senate File 2294 in 1984, § 68A.2 expressly stated that every citizen shall have the rights to examine, copy and publish public records "unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential." Iowa Code § 68A.2 (1983). Under Senate File 2294, § 68A.2 was struck and rewritten without inclusion of the quoted language. Nevertheless, in our view, specific statutes which require records to be kept confidential or limit the rights of access would continue to prevail over the general provisions of § 68A.2(1) under the principle that, when a general statute is in conflict with a specific statute, the specific statute prevails whether enacted before or after the general statute. See Peters v. Iowa Employment Security Commission, 248 N.W.2d 92 (Iowa 1976).

kept confidential unless otherwise ordered by a court, the lawful custodian, or another person duly authorized to release information. None of these records, however, pertain to personal credit history. See Iowa Code § 68A.7 (1983); 1984 Iowa Acts Chp. 1185 §§ 5, 6; 1984 Iowa Acts Chp. 1014 § 1. Statutes outside Chapter 68A, moreover, do not provide for the confidentiality of personal credit history in the possession of a city owned utility.

We point out a troublesome legal anomaly under provisions of the Consumer Credit Code. The Consumer Credit Code does prohibit a "debt collector" from disseminating information relating to a debt or debtor. See Iowa Code § 537.7103(3) (1983). The Consumer Credit Code, therefore, would prohibit the commercial institution, itself, from disseminating information concerning an applicant's default. The same information, however, could be disseminated by the city owned utility. A "debt collector" is defined as "a person engaging, directly or indirectly, in debt collection, whether for himself, his employer, or others." Iowa Code § 537.7102(3) (1983). This term would not appear to encompass a utility which elicits and, through compliance with the public records law, disseminates information relating to a debt owed another for whom the utility is not acting as a debt collector. Since the information elicited does not relate to a debt owed to the utility, or being collected by the utility, the prohibitions of §§ 537.7102-7103 are not applicable. But see 1976 Op.Att'yGen. 524 (disclosure by the city of debts owed the city garbage collection service violates § 537.7102).

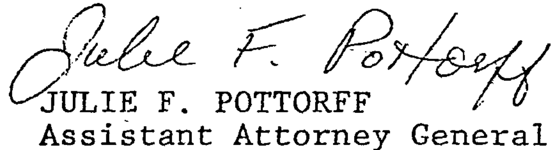
We stress that, although we find no statutory provision which would provide confidentiality for these records, applicants may seek an injunction to prevent disclosure. Persons who would be aggrieved or adversely affected by the examination or copying of a record are specifically authorized to seek an injunction under Chapter 68A. 1984 Iowa Acts Chp. 1185 § 7. An injunction, in turn, may be issued by the district court upon a finding that: (1) the examination would clearly not be in the public interest; and (2) the examination would substantially and irreparably injure any person. 1984 Iowa Acts Chp. 1185 § 7.

In order to avail themselves of an injunction, of course, applicants must be apprised that a request for disclosure has been lodged with the city owned utility. We do not believe principles of due process would require the city owned utility to notify an applicant of the request for disclosure. Cf. 1980 Op.Att'yGen. 372, 376 (requirement of notice to persons who would be aggrieved or adversely affected by decision to disclose identity of recipients of fuel set aside and quantity of fuel allocated to be based on weighing private rights at stake, government interests, type of proceeding, manner of notification,

likelihood of eliciting a response, and practical difficulties of time and cost). In the absence of an injunction, release is required by statute. The lawful custodian, therefore, is not making a decision to release records to which due process considerations would apply. Nevertheless, we would urge the lawful custodian to apprise applicants of pending requests for disclosure in order to afford applicants the opportunity to enjoin disclosure of their personal credit history.

In summary, applications which elicit personal credit history would be public records when maintained by city owned gas and electric utilities.

Sincerely,



JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

OFFICIAL NEWSPAPERS: Iowa Code § 364.1 (1985) and Iowa Code §§ 618.3 and 618.14 (1983). A city may publish a notice or other matter of general public importance in a publication which does not qualify as an official newspaper if the publication is supplemental to publication of the same material in an official newspaper and is in furtherance of the city's home rule powers and duties. (Hamilton to Huffman, Pocahontas County Attorney, 3/22/85) #85-3-8(L)

March 22, 1985

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

Dear Mr. Huffman:

We are in receipt of a request from your office for an opinion of the Attorney General regarding the ability of a city to place straight matter and display advertisements in a publication other than a newspaper as defined at Iowa Code § 618.3 (1983). Specifically, two questions were presented for our review:

> 1) Is it permissible for the Park Commission to advertise the opening of the Pocahontas municipal swimming pool and the ticket cost in an advertiser or shopper other than a newspaper as defined at Iowa Code § 618.3?
>
> 2) Is it permissible for the City of Pocahontas to publish straight matter and display advertisements in an advertiser or shopper other than a newspaper in addition to publishing the same in a newspaper as defined at Iowa Code § 618.3?

As noted in your request, a prior opinion of this office considered the issues of mandatory publication of notices and reports of proceedings as well as the publication of straight matter or display of matters of general public importance, not otherwise authorized or required by law. It was there concluded that both of these types of publications must be published in a newspaper as defined at Iowa Code § 618.3 (1983). See Op.Att'yGen. #83-4-4. The question remains as to whether or not, once the newspaper publication requirement has been met, manda-

tory notices and matters of general public importance may be published additionally in a shopper or advertiser which does not qualify as a newspaper under section 618.3.[1]

We see this issue as a matter of city home rule, governed by Iowa Code § 364.1 (1985). It is stated there that:

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

Iowa Code § 364.1 (1985).

Neither the Constitution, nor Iowa Code § 618.3 (1983) (regarding mandatory publication), nor Iowa Code § 618.14 (1983) (regarding publication of matters of general public importance not otherwise authorized or required by law) contains an express prohibition of supplemental publication in a shopper, advertiser, or similar printed materials which do not meet the statutory definition of a newspaper at issue. The stated purpose for requiring publication in a newspaper as defined is ". . . establishing and giving assured circulation. . . .", Iowa Code § 618.3 (1983). Supplemental publication in advertisers or shoppers of either mandatory notices or matters of general public importance is not therefore inconsistent with the laws of the general assembly.

It is therefore the opinion of this office that where a city deems it appropriate to publish a mandatory notice or other matter of general public importance in a shopper or advertiser, in addition to publication of the same material in a newspaper as required under Iowa Code §§ 618.3 and 618.14 (1983), it may do so where such action is in furtherance of the rights, privileges and interests included under Iowa Code § 364.1 (1985). Thus, with respect to your question regarding the advertisement of the opening of the Pocahontas municipal pool, it is our opinion that notice may be placed in an advertiser or shopper in addition to publication in a designated newspaper as defined in sec-

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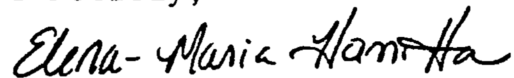
[1] For a general discussion of the requirements which must be met for a publication to qualify as a newspaper under Iowa Code § 618.3 (1983), <u>see</u> Op.Att'yGen. #83-4-4 and 1978 Op.Att'yGen. 480.

tion 618.3. With respect to other instances when the city may wish to place straight matter or display advertisements in advertisers or shoppers in addition to publication in a designated newspaper, it is our opinion that this would also be permissible where it is in accordance with Iowa Code § 364.1 (1985) home rule powers.

Sincerely,



ELENA-MARIA HAMILTON
Assistant Attorney General

EMH:rcp

OPEN MEETINGS: Reasonable Access; Parole Board; Television. Iowa Code §§ 21.4(2), 906.7 (1985). In the proper circumstances, parole board interviews with prospective parolees would be reasonably accessible to the public under the Iowa Open Meetings Statute, even when access is via closed-circuit television. (McGrane to George, 3/2 /85) #85-3-7(L)

March 22, 1985

Richard E. George
Iowa Parole Board
Jewett Building, 2nd Floor
914 Grand Street
Des Moines, Iowa 50309

Dear Mr. George:

You have requested an opinion from this office on whether the Board of Parole would provide reasonable access to parole interviews at correctional institutions within the meaning of Iowa Code Chapter 21 (1985)[1] by providing access only through closed-circuit television. The television would allow the public to remain outside of the secure area of the prisons while the prisoners who were being interviewed would remain inside. At issue is Iowa Code § 21.4(2) which states in pertinent part:

> "Each meeting shall be held at a place reasonably accessible to the public, . . . unless for good cause such a place . . . is impossible or impractical."

It is our view that Chapter 21 does not <u>per se</u> prohibit televising meetings as an alternative to actual public presence at a meeting if grounds exist to conclude that, for the meeting in question, this is reasonable access. To the extent that "reasonable access" requires resolution of issues of fact, those cannot be resolved by an Attorney General's opinion. 1972 Op.AttyGen. 686.

Several factors will have to be examined to determine whether closed-circuit television constitutes reasonable access in this setting. The primary factor is the purpose of the statute. The Legislature has mandated open meetings to enable

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[1] It should be noted that Iowa Code Ch. 21 (1985) was formerly Iowa Code Ch. 28A. Section references remain the same in the recodified Open Meetings law.

the public to know "the basis and rationale of governmental decisions . . . ." Iowa Code § 21.1 (1985). In interpreting a predecessor act the Iowa Supreme Court stated:

> "It is clear the purpose of chapter 98 is to prohibit secret and 'star chamber' sessions of public bodies, to require such meetings to be open and to permit the public to be present unless within the exceptions stated therein. The statute does not require the public body to allow any individual or group to be heard on the subject being considered."

Dobrovolny v. Reinhardt, 173 N.W.2d 837, 840-41 (Iowa 1970).

The Court in Dobrovolny also resolved a second factor, that there generally is no right of public participation. 173 N.W.2d at 841. The parole statute resolves that issue more specifically, providing that the "board shall not be required to hear oral statements or arguments either by attorneys or other persons." Iowa Code § 906.7 (1985).

A third factor is the acceptability of television as a substitute for in-person, visual contact. Courts have begun to allow broad use of television or electronic recording or communication in their proceedings. See Iowa Rule of Civil Procedure 140(b)(4) and 148(a); F.R.C.P. 30(b)(4). See also 30(b)(7) (deposition by telephone). Videotaped recordings, once made, can be used for any purpose, including for presentation of testimony at the trial. See State v. Jackson, 259 N.W.2d 796, 799 (Iowa 1977). The Supreme Court of Missouri in Kansas City v. McCoy, 525 S.W.2d 336 (1975), upheld a conviction wherein the prosecution's expert witness appeared and testified via closed-circuit television.

A critical element in these trial situations, particularly in criminal trials, is the ability to judge, "by his demeanor upon the stand and the manner in which he gives his testimony, whether [the witness] is worthy of belief." Douglas v. Alabama, 380 U.S. 415, 419, 13 L. Ed. 2d 934, 937, 85 S. Ct. 1074 (1965), citing and quoting Mattox v. United States, 156 U.S. 237, 243, 39 L. Ed. 409, 411, 15 S. Ct. 337 (1895). This element is not present in the parole interview situation. While it is desirable that the public is allowed to see the general set-up of the hearing, the general demeanor and deportment of the board and of the prospective parolee, it is not necessary that the little nuances in the demeanor be discernible, since the public observers are not being asked to decide the question at issue--i.e., whether the prisoner should be released on parole.

Also relevant would be the need to use television as compared to permitting actual presence of the public at the interviews. The Parole Board holds its parole interviews in correctional institutions. Supporting the reasonableness of these interview sites are the location of the prospective parolees in the institution, the status of these persons as prisoners, the number of these persons interviewed each month, and the cost and ease of transporting these persons to another interview site. A question that may arise in regard to the interviews at the institutions, is whether there is a facility available at the institution, with access from outside the secured area, to which prisoners can come or be brought with relative ease and appropriate security. If such an area does not exist, then, again, a Board decision to hold the meetings in the institution would appear to be reasonable.

If the Board arrives at the conclusion that going into the institution for the interviews is reasonable, then they must look at whether limiting the public attendance inside the institution is reasonable. The factors directly relevant to the question are security and the Department of Corrections rules. We cannot ignore here that the proposal for the use of television was by the Department of Corrections. The obligation to comply with the open meetings law at the interviews is the Board's. Thus, if the Board should determine that the television proposal would put them in violation of the statute, they cannot agree to it.

Security is a prime consideration in all aspects of a correctional institution. See, e.g. I.A.C. 291-20.3 (rules for visiting inmates); 291-20.4 (restrictions on inmate mail); 291-20.5 (restrictions for gifts to inmates). The Department of Corrections has written new rules to deal specifically with persons attending inmate interviews. I.A.C. 291-20.13.

The procedures and limitations imposed by the public attendance rules could be perceived as somewhat burdensome on both the institution personnel who have to enforce them, and the persons attending who are subjected to them. Those rules, duly adopted by another administrative agency, are presumed to be reasonable. Milholin v. Vorhies, 320 N.W.2d 552, 554 (1982). Beginning from that determination by Corrections, the Board could determine that security factors, and the requirements for admission to the meetings, make it reasonable to impose some limitation on attendance. Op.AttyGen. #85-1-13(L) (1985).

It is, therefore, our view that the Board could find that factors exist which make it reasonable to hold the meetings in the institutions; that factors exist which allow the imposition of limitations; that television allows the primary purpose of the

open meetings law to be achieved, and, therefore, attendance by closed circuit television provides reasonable accessibility under the statute.

Sincerely,

THOMAS D. McGRANE
Assistant Attorney General
Telephone: (515) 281-5976

TDM/cal

GENERAL ASSEMBLY; Statutes; Titles; Public utilities; Constitutionality of advertising requirements. Iowa Const., Art. III, § 29; 1984 Iowa Acts, Ch. 1225; Iowa Code Chapter 476 (1985); §§ 4.6(6); 476.1; 476.18(3). 1) 1984 Iowa Acts, Ch. 1225, an act requiring public utilities to disclose advertising costs paid by customers, is not an unconstitutional violation of Art. III, § 29; and 2) the legislature intended that Ch. 1225 apply to all public utilities rather than only to public utilities subject to rate regulation. (Weeg to Royce, Administrative Rules Review Committee, 3/11/85) #85-3-6(L)

March 11, 1985

Mr. Joseph A. Royce
Administrative Rules Review Committee
State Capitol
L O C A L

Dear Mr. Royce:

On behalf of the Administrative Rules Review Committee, you have requested an opinion of the Attorney General on two questions relating to 1984 Iowa Acts, ch. 1225, which amended Iowa Code § 476.18(3) (1983 Supp.). This amendment is now found in the second unnumbered paragraph of Iowa Code § 476.18(3) (1985), which provides in its entirety as follows:

> Public utilities subject to rate regulation are prohibited from including either directly or indirectly in their charges or rates to customers the costs of advertising other than advertising which is required by the commerce commission or by other state or federal regulation. However, this subsection does not apply to a utility's advertising which is deemed by the commission to be necessary for the utility's customers and which is approved by the commission.
>
> Every ad which is published, broadcast, or otherwise displayed or disseminated to the public by a public utility which is to be charged to the customers of the public utility and which is not required by the commerce commission or by other state or federal regulation shall include a statement in the ad that the costs of the ad are being charged to the customers of the public utility. This paragraph does not apply to a utility's product or service that is or

> becomes subject to competition as determined by the commerce commission.

(emphasis added)

Your specific questions are as follows:

> 1. Does 1984 Iowa Acts, [chapter 1225] relating to the treatment of advertising costs by public utilities, violate Article III, section 29, of the Iowa Constitution by apparently embracing ALL public utilities; while the Act's title states that it relates only to "certain" public utilities and further implies that it regulates utilities that have "customers" and "stockholders"?
>
> 2. Does [chapter 1225] evidence a legislative intent that it be applied only to rate-regulated utilities, considering its title, its text and its placement in the Code?

We shall address each question in turn.

I.

Your first question asks whether ch. 1225 is unconstitutional under Art. III, § 29. That constitutional provision states:

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

The language of ch. 1225, as it now appears in § 476.18, is set forth above. The title to that Act provides:

> AN ACT requiring certain public utilities to include in each of their ads a listing of the percentage of the ad's expenses which are to be charged to customers and the percentages which are to be charged to the stockholders.

See 1984 Iowa Acts, ch. 1225. Your question first notes that the title may be less inclusive than the Act, as the title states the Act applies to "certain public utilities" (emphasis added), while the language of the Act itself appears to apply to public utilities generally. You further note in your request that the title states utilities shall publish the percentage of advertising expenses charged to customers and stockholders, thus implying that the Act applies only to utilities which have stockholders rather than all public utilities. This arguably supports the position that only "certain," rather than all, public utilities are subject to the requirement of ch. 1225.[1]

This office recently discussed a similar issue in Op.Att'yGen. #84-10-8. In that opinion we held that a portion of an act providing for the enforcement of certain specified beer and liquor laws was unconstitutional under Art. III, § 29, because that provision affecting the jurisdiction of magistrates was not sufficiently expressed in the title. A copy of that opinion is enclosed for your review. Because the general principles to be followed in construing this constitutional language and the case law in which these principles have been applied were thoroughly discussed in that opinion, we find it unnecessary to fully reiterate that discussion.[2]

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[1] We note that the title refers to a requirement that the expenses to be charged customers and those to be charged stockholders are to be disclosed. However, the act does not refer to the expenses paid by stockholders but only those paid by customers. We do not believe this discrepancy affects the constitutionality of the act. In Knorr v. Beardsley, 240 Iowa 828, 38 N.W.2d 236 (1949), the Iowa Supreme Court held that an act was not unconstitutional under Art. III, § 29, when its title contained a provision not found in the act itself, as the constitutional provision required only that the subject of the act be expressed in the title. See also State v. Schroeder, 51 Iowa 197, 1 N.W. 431 (1879).

The question of the extent to which the reference in the title to stockholders and customers affects legislative intent as to whether the act applies only to rate-regulated utilities alone or to all public utilities is discussed in part two, below.

[2] In Op.Att'yGen. #84-10-8 we observed that Art. III, § 29, can be divided into three categories: the one subject rule, sufficiency of title, and separability. As in our earlier opinion, the one subject rule is not in issue. Because of the result we reach, the separability question also is not discussed. Thus, sufficiency of the title is the only question here in issue.

These well-established principles may be summarized briefly. First, legislation is to be accorded a presumption of constitutionality. Op.Att'yGen. #84-10-8 at 3 (and cases cited therein). See also Iowa Code § 4.4(1) (1985); Frost v. State, 172 N.W.2d 575, 578 (Iowa 1969) ("In considering the question of constitutionality, we indulge every reasonable inference in support of the legislation; . . . a law will be declared void only when it clearly violates the constitution; and a statute must be construed so as to make it valid if there is any reasonable ground for doing so.").

Second, Art. III, § 29, is to be given a liberal construction "to permit one act to embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto." See, e.g., Motor Club of Iowa v. Department of Transportation, 265 N.W.2d 151, 153 (Iowa 1978); Long v. Board of Supervisors of Benton County, 258 Iowa 278, 142 N.W.2d 378, 381 (1966). See also Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626, 631-632 (1966); State v. Talerico, 227 Iowa 1315, 290 N.W. 660, 663 (1940). This constitutional language "is to be liberally construed rather than interpreted in a narrow, technical or critical manner." Frost v. State, supra, 172 N.W.2d at 580 (and cases cited therein).

Finally, we stated in Op.Att'yGen. #84-10-8 that the purpose of the sufficiency of title requirement of Art. III, § 29, is:

> . . . to prevent surprise and fraud upon the people and the legislature. (citation omitted) In determining the sufficiency of a title, courts examine whether anyone reading the title of an act could reasonably assume that the reader would be apprised of all of its material provisions. (citations omitted)

Op.Att'yGen. #84-10-8 at 4.

Applying these principles in the present case, we conclude that ch. 1225 is not unconstitutional under Art. III, § 29. Chapter 1225 imposes a notice requirement for advertising by a "public utility." The title of this act states the requirement applies to "certain public utilities." We believe construing the term "certain" as restricting application of the act to some public utilities and not others is a "narrow, technical, and critical" construction which runs contrary to the liberal construction to be accorded title language. Use of the word "certain" in no way misleads the public or the legislature as to the substance of the act itself. Therefore, the purpose of the

constitutional requirement has been fully satisfied. This is not a case, such as that in Op.Att'yGen. #84-10-8, where the title, although very specifically detailing its provisions, completely omitted reference to significant provisions relating to changes in magistrates' jurisdiction. Given that this title otherwise sufficiently, indeed exactly, expresses the subject of the act, we find no reason to accord the word "certain" a technical meaning of greater importance than the actual language of the act itself.

For these reasons, it is our opinion that the title to ch. 1225 is not unconstitutional under Art. III, § 29.

II.

Your second question is whether the legislature intended ch. 1225 to apply only to rate-regulated utilities, given: 1) that the title refers to "certain public utilities" while the act itself refers to "public utilities" generally; 2) that notice is to be provided under the act as to what advertising costs are charged to customers and stockholders, which arguably supports the notion that the act applies only to those utilities that have stockholders, i.e., rate-regulated utilities; and 3) placement of this requirement in a code section where all other subsections apply only to rate-regulated utilities, not to public utilities generally. It is our opinion that the legislature clearly intended that ch. 1225 apply to all public utilities rather than to rate-regulated utilities alone.

Iowa Code Ch. 476 (1985) sets forth provisions for public utility regulation. Section 476.1 defines a public utility as including:

> . . . any person, partnership, business association, or corporation, domestic or foreign, owning or operating any facilities for:
>
> 1. Furnishing gas by piped distribution system or electricity to the public for compensation.
>
> 2. Furnishing communications services to the public for compensation.
>
> 3. Furnishing water by piped distribution system to the public for compensation.
>
> Mutual telephone companies in which at least fifty percent of the users are owners,

> co-operative telephone corporations or associations, telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines, municipally owned utilities, and unincorporated villages which own their own distribution systems are not subject to the rate regulation provided for in this chapter.
>
> This chapter does not apply to water works having less than two thousand customers, municipally owned water works, or rural water districts incorporated and organized pursuant to chapters 357A and 504A, or to a person furnishing electricity to five or fewer customers from electricity that is produced primarily for the person's own use.

* * *

This section clearly sets forth the chapter's applicability to all varieties of public utilities. All entities providing gas, electricity, communications services, or water to the public for compensation are subject to regulation under this chapter. However, certain telephone companies, all municipal utilities, and unincorporated villages providing these services are not subject to the rate regulation provisions of Ch. 476. Additionally, certain water works and water districts, as well as individuals providing electricity to five or fewer customers, are completely exempt from Ch. 476.

Section 476.18 provides in its entirety as follows:

> 1. <u>Public utilities subject to rate regulation</u> are prohibited from including either directly or indirectly in their charges or rates to customers the costs of lobbying.
>
> 2. Legal costs and attorney fees incurred by <u>a public utility subject to rate regulation</u> in an appeal in state or federal court involving the validity of any action of the commission shall not be included either directly or indirectly in the public utility's charges or rates to customers except to the extent that recovery of legal costs and attorney fees is allowed by the commission. The commission shall allow a public utility to recover reasonable legal costs and

> attorney fees incurred in the appeal. The commission may consider the degree of success of the legal arguments of the public utility in determining the reasonable legal costs and attorney fees to be allowed.
>
> 3. Public utilities subject to rate regulation are prohibited from including either directly or indirectly in their charges or rates to customers the costs of advertising other than advertising which is required by the commerce commission or by other state or federal regulation. However, this subsection does not apply to a utility's advertising which is deemed by the commission to be necessary for the utility's customers and which is approved by the commission.
>
> Every ad which is published, broadcast, or otherwise displayed or disseminated to the public by a public utility which is to be charged to the customers of the public utility and which is not required by the commerce commission or by other state or federal regulation shall include a statement in the ad that the costs of the ad are being charged to the customers of the public utility. This paragraph does not apply to a utility's product or service that is or becomes subject to competition as determined by the commerce commission.
>
> 4. This section does not apply to a rural electric cooperative.

(emphasis added) Subsections one and two are expressly applicable only to public utilities subject to rate regulation, as is the first unnumbered paragraph of subsection three. The second unnumbered paragraph of subsection three (the act in question) refers to public utilities generally.

Throughout Ch. 476, the legislature has expressly imposed certain requirements on only those utilities subject to rate regulation (see, e.g., § 476.5: "No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, . . ."), while imposing other requirements on all public utilities subject to Ch. 476 regulation (see, e.g., § 476.9(1): "Every public utility shall keep and render to the commission in the manner and form prescribed by the commission uniform accounts

of all business transactions."). Careful delineation between rate-regulated utilities and public utilities generally is not only evident throughout Ch. 476, but necessary for accurate application of its requirements. Thus, we believe that the phrase "subject to rate regulation" would have been added to ch. 1225 had the legislature intended the advertising disclosure requirement to be imposed only on rate-regulated utilities rather than on all public utilities. Absent inclusion of that phrase, we must conclude that the legislature intended the advertisement disclosure requirement to apply to all public utilities.

This conclusion is consistent with the Iowa Commerce Commission's interpretation of ch. 1225. Acting pursuant to ch. 1225, the Commission recently adopted amendments to their rules in 250 I.A.C. § 16.8 governing advertising costs. Iowa Administrative Bulletin, September 12, 1984, ARC 4959. Following the public comment period of the rulemaking process, the Commission reported the following:

> The Iowa Association of Municipal Utilities submitted that municipal utilities should be exempt from the rule. 1984 Iowa Acts, House File 2068 amending Iowa Code section 476.18, subsection 3 (1983 Supplement), refers to a "public utility." This term encompasses both rate-regulated and nonrate-regulated utilities. Therefore, municipal utilities will not be exempt from the tag line requirement.

Iowa Administrative Bulletin, December 5, 1984, ARC 5152.

Section 4.6(6) provides:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
>
> * * *
>
> 6. The administrative construction of the statute.

Further, the Iowa Supreme Court has consistently held that an agency's interpretation of its own statute is entitled to deference. See, e.g., Saydel Education Association v. Public Employment Relations Board, 333 N.W.2d 486, 489 (Iowa 1983); Churchill Truck Lines v. Transportation Regulation Board, 274 N.W.2d 295, 298 (Iowa 1979); Iowa National Industrial Loan Company v. Iowa State Department of Revenue, 224 N.W.2d 437, 440

(Iowa 1974). Thus, to the extent use of the term "public utility" in ch. 1225 can be viewed as ambiguous, the Commerce Commission's interpretation of that term as encompassing both rate-regulated and nonrate-regulated utilities is entitled to weight.

We do not believe use of the term "certain" in the title affects our conclusion, though it has been argued that use of this term evidences the legislature's intent that the act be applied only to public utilities subject to rate regulation. As discussed above, the plain language of the act referring to "public utilities" generally evidences the legislature's intent that the act apply to all public utilities regulated under Ch. 476. In the absence of an ambiguity in the act itself, the Iowa Supreme Court has held that a court may not refer to the preamble or title of the act to ascertain legislative intent. May's Drug Stores v. State Tax Commission, 242 Iowa 319, 45 N.W.2d 245, 251 (1951); State v. Linsig, 178 Iowa 484, 159 N.W. 995, 996 (1916) (act prohibiting work on Sunday is unambiguous and cannot be limited to work disturbing the public peace because the title stated "Of Offenses against the Public Peace"). Because we believe ch. 1225 is unambiguous, use of the term "certain" in the title is of no consequence. See also Sutherland Statutory Construction, § 47.03 (4th ed.) ("Although the title is part of the act, it may not be used as a means of creating an ambiguity when the body of the act itself is clear.") (footnote omitted).

In addition, reference in the title of the act to "customers" and "stockholders," while there is no mention of stockholders in the act itself, is of little importance. See footnote 1, supra. Apart from this discrepancy, reference in the title to "customers" and "stockholders," when some public utilities do not have stockholders, is not inconsistent and therefore is of no impact in determining legislative intent as to the scope of the act. By use of the term "public utilities," the legislature sought to impose the disclosure requirement on all utilities subject to Ch. 476 regulation. Utilities with stockholders would be required to state the cost of an ad paid for by stockholders and the cost paid by customers. Utilities with no stockholders would obviously be required to only state the cost paid by customers. In either case, the apparent purpose of the act, i.e., to inform utility customers who pay the costs of advertising, would be served.

Sincerely,

Theresa O'Connell Weeg by EMO

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES; Board of Supervisors; County Judicial Nominating Commission; Incompatibility of office: Iowa Code § 331.216 (1985); Iowa Code §§ 602.6501, 602.6503 (Supplement 1983). A board of supervisors may appoint themselves as members of a county judicial nominating commission. (Weeg to Herrig, Dubuque County Attorney, 3/7/85) #85-3-5(L)

March 7, 1985

Mr. James W. Herrig
Dubuque County Attorney
Dubuque County Courthouse
Dubuque, Iowa 52001

Dear Mr. Herrig:

You have requested an official opinion of the Attorney General on several questions which have arisen since members of the Dubuque County board of supervisors have appointed themselves to the county judicial magistrate appointing commission. Your questions are as follows:

> 1. Does Section 331.216, the Code, permit Supervisors to appoint themselves to incompatible offices?
>
> 2. If a Supervisor may hold incompatible offices simultaneously, is there a limitation on the number of full-time salaried positions which an individual Supervisor may hold?
>
> 3. Are the positions of County Supervisor and Commissioner of a County Judicial Magistrate Appointing Commission incompatible positions?
>
> 4. Does the appointment of a Supervisor to the position of Commissioner of a County Judicial Appointing Commission work a vacation of the Office of County Supervisor?
>
> 5. Is this true if the appointment is conditional?

> 6. Does a person voting nay on such appointment suffer the consequence of his or her position by virtue of such appointment?

Introduction

Iowa Code §§ 602.6501-.6505 (1983 Supplement) governs county magistrate appointing commissions. Members of such a commission include a district judge designated by the chief judge, one or two attorneys elected by the attorneys in the county, and two or three members appointed by the board of supervisors. § 602.6501(1). Section 602.6503 provides guidelines to be followed by the supervisors in appointing the commissioners:

> 1. The board of supervisors of each county shall appoint three electors to the magistrate appointing commission for the county for six-year terms beginning January 1, 1979 and each sixth year thereafter. However, if there is only one attorney elected pursuant to section 602.6504, the county board of supervisors shall only appoint two commissioners, and if no attorney is elected, the board of supervisors shall only appoint one commissioner.
>
> 2. The board of supervisors shall not appoint an attorney or an active law enforcement officer to serve as a commissioner.

* * *

Thus, the only express statutory requirements for the commissioners appointed by the supervisors are that they be electors and that they are not attorneys or active law enforcement officers.

The 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), citing State v. Anderson, 155 Iowa 271, 136 N.W. 128, 129 (1912). However, Iowa Code § 331.216 (1985) provides:

> 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.

This provision was enacted in 1981. See 1981 Iowa Acts, ch. 117, § 215. This law effectively overruled the common law doctrine of incompatibility of public offices with regard to members of boards of supervisors serving in other appointive positions.

I.

We turn now to your specific questions. First, in response to your third question, we do not believe the positions of supervisor and commissioner of a county judicial magistrate appointing commission are incompatible, as § 331.216 authorizes supervisors to serve on other appointive commissions. Judicial magistrate appointing commissions are appointive positions. See §§ 602.6501(1), 602.6503. Given this conclusion, we find it unnecessary to answer your other questions.

II.

Your first question asks whether § 331.216 permits the supervisors to appoint themselves to incompatible offices. Because we have concluded the offices in question are not incompatible, it is not necessary to reach this exact question. However, a question remains as to whether the supervisors may appoint themselves as members of this commission.

There is no express prohibition in § 602.6503 against the supervisors appointing themselves as members of the commission. We can find no other legal prohibition against such appointments. Accordingly, if the supervisors are otherwise qualified under § 602.6503, i.e., they are electors and are not attorneys or active law enforcement officers, it is our opinion that the supervisors may appoint themselves to the commission. Cf. Iowa Constitution, Art. III, § 39A (granting counties home rule authority "to determine their local affairs and government" to the extent it is not inconsistent with state law); Iowa Code § 331.301 (1985). We do not take any position with regard to the wisdom of this action.

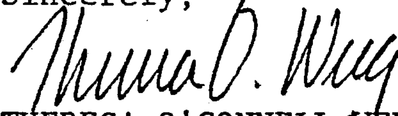
In conclusion, we note the conflict of interest doctrine is likely to be inapplicable in this situation. We have previously stated that a conflict of interest "generally develops whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. It is hard to see how the supervisors in the present case could gain any private advantage from serving on a magistrate nominating commission. Members of the commission

serve without compensation and are reimbursed for only actual and necessary expenses. § 602.6501(3). We can identify no other private advantage the supervisors could gain from this dual service.

We also do not believe a conflict exists between the duties of each position. The commission's function is limited. See § 602.6403. There are few, if any, situations in which we can foresee that the responsibilities of one position would overlap or conflict with the responsibilities of the other. Further, § 331.216 contemplates such dual service.

In conclusion, it is our opinion that a board of supervisors may appoint themselves as members of a county judicial nominating commission.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

STATE OFFICERS AND DEPARTMENTS; Merit compensation and pay plans; Comparable worth. 1984 Iowa Acts, Ch. 1314, §§ 3 and 4; Iowa Code §§ 19A.9(1) and (2) (1983). It is not necessary to follow the procedures prescribed in §§ 19A.9(1) and (2) to implement the comparable worth adjustments required by Ch. 1314. (Weeg to Mitchell, Chairperson, Iowa Merit Employment Department, 3/5/85) #85-3-4(L)

March 5, 1985

Ms. Joan Mitchell, Chairperson
Iowa Merit Employment Department
Grimes Building
L O C A L

Dear Ms. Mitchell:

You have requested a formal opinion of the Attorney General on the following question:

> Are the pay grade adjustments provided for in 1984 Iowa Acts, Chapter 1314, Sections 3 and 4, first subject to the procedures required in the administrative rules of the Merit Employment Commission, promulgated in accordance with Iowa Code §§19A.19(1) and (2)(1983)?

It is our opinion that the provisions of §§ 19A.9(1) and (2) are inapplicable to the comparable worth adjustments of Ch. 1314. Our reasons are as follows:

Section 19A.9 provides the merit employment commission is to adopt rules which shall provide, _inter alia_, as follows:

> 1. For the preparation, maintenance, and revision of a position classification plan from a schedule by separate department for each position and type of employment _not otherwise provided by law_ in state government as approved by the executive council for all positions in the merit system . . . Schedules of positions and types of employment _not otherwise provided by law_ shall be reviewed at least once each year by the governor and submitted to the executive council for continuing approval.

> 2. For a pay plan within the purview of an appropriation made by the general assembly and <u>not otherwise provided by law</u> 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 ....
>
> * * *

(emphasis added). 570 I.A.C. §§3.1-4.15 contain the rules promulgated by the merit employment commission pursuant to these statutory provisions.

1984 Iowa Acts, Chapter 1314, establishes comparable worth salary adjustments for state employees based on a comparable worth pay system. Sections 1.2-1.4 of that Act describe the process by which job titles are assigned a factor determined score. Upon completion of this process, a table contained in § 1.1 assigns a pay grade to each factor determined score.[1] Section three of that Act provides for implementation of comparable worth adjustments for noncontractual employees under the merit system on or after January 1, 1985. Section four provides for implementation for contractual employees consistent with Chapter 20, the Iowa Public Employment Relations Act.

Your question arises because §§ 19A.9(1) and (2) require certain procedures to be followed before classification and pay plans become effective, such as public hearings, review by the merit employment commission and the governor, and approval by the executive council. Implementation of comparable worth adjustments involves modifications to the classification and pay plans. The question is whether these adjustments may be implemented without complying with §§ 19A.9(1) and (2).

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[1] It is our understanding that the merit classification plan consists of job classifications and assignment of those classifications to a pay grade; the merit pay plan assigns each pay grade to a specific salary.

This question may be answered by referring to the express language of §§ 19A.9(1) and (2). As emphasized above, these sections impose certain requirements for, inter alia, preparation, review, and approval of a classification and pay plan "not otherwise provided by law." In brief, § 19A.9 applies only if the legislature has not established alternative provisions.

This reading is consistent with the Iowa Supreme Court's decision in Peters v. Iowa Employment Security Commission, 235 N.W.2d 306 (Iowa 1975). In Peters, the IESC challenged inclusion of their employees under the merit classification and pay plans, arguing that a separate statutory provision, which was enacted prior to the creation of the state merit system, authorized IESC to establish a classification and pay plan for its employees. The Supreme Court noted that Ch. 19A was the later enacted statute, that IESC employees were not among the expressly exempted employees in Ch. 19A, and that uniformity was the goal sought to be attained by creation of the merit system. The Court also stated:

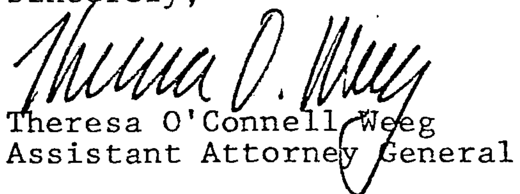
> In reviewing a uniform classification and pay plan "for each position and type of employment not otherwise provided by law" we believe the legislature intended to exclude only positions or types of employment in which a statute might directly classify a position or fix the compensation for it. We accord this meaning to the expression "not otherwise provided by law" each time it is used in §§19A.9(1) and (2).

235 N.W.2d at 310. For these reasons, the Court found the two statutes irreconcilable and that Ch. 19A had impliedly repealed the statutory provisions creating a separate classification and pay plan for IESC employees.

The Supreme Court's definition of the phrase "not otherwise provided by law" leads us to conclude that the provisions of Ch. 1314 which affect the classification and pay plans are "otherwise provided by law" and therefore are not subject to the requirements of §§ 19A.9(1) and (2). Chapter 1314 directly provides for assignment of job classifications to a certain pay grade; indeed, a table is provided to make these assignments. Thus, Ch. 1314 "directly [classifies] a position or [fixes] the compensation for it," and therefore is "otherwise provided by law" and outside the scope of §§ 19A.9(1) and (2).

In conclusion, it is our opinion that it is not necessary to follow the procedures prescribed in §§ 19A.9(1) and (2) to implement the comparable worth adjustments required by Ch. 1314.

Sincerely,



Theresa O'Connell Weeg
Assistant Attorney General

TOW:js

PUBLIC SAFETY, DEPARTMENT OF: Private Investigations. 1984 Iowa Acts, chapter 1235, §1(6). The definition of "private detective businesses" subject to licensing in 1984 Iowa Acts, chapter 1235, §1(6), does not encompass individuals engaged simply to analyze evidence, photograph evidence, or give expert testimony. It does include persons who conduct searches or investigations to locate and secure evidence so that it can be analyzed or photographed (Hayward to Welsh, State Senator, 3/5/85) #85-3-3(L)

March 5, 1985

The Honorable Joseph J. Welsh
Iowa State Senator
Statehouse
L O C A L

Dear Senator Welsh:

You have asked this office for an opinion regarding the definition of the "private investigation business" set forth in 1984 Iowa Acts, chapter 1235, §1, which states in pertinent part:

> As used in this chapter unless the context otherwise requires:
>
> * * *
>
> 6. "Private investigation business" means the business of making, for hire or reward, an investigation for the purpose of obtaining information on any of the following matters:
>
>   a. Crimes or wrongs done or threatened.
>   b. The habits, conduct, movements, whereabouts, associations, transactions, reputations, or character of a person.
>   c. The credibility of witnesses or other persons.
>   d. The location or recovery of lost property.
>   e. The cause, origin, or responsibility for fires, accidents, or injuries to property.
>   f. The truth or falsity of a statement or representation.
>   g. Detection of deception.

> h. The business of securing evidence to be used before authorized investigating committees, boards of award or arbitration, or in the trial of civil or criminal cases.

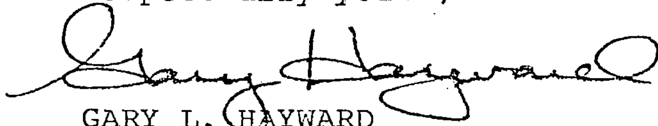
Specifically you ask whether this section includes within its coverage the activities of individuals, such as doctors, engineers or photographers, who prepare or examine evidence for the purpose of giving opinions at trials or hearings for parties at such proceedings. It is our opinion that this definition includes only those persons engaged to seek out evidence and that it does not include those persons whose activities are limited to examining or photographing of evidence or to persons whose activities are limited to providing expert opinions on such examinations or photography.

The first question is whether the individual involved is "making . . . an investigation." The word "investigation" should be given its meaning in general usage unless the context of the statute clearly indicates a contrary intent. Iowa Code §4.1(2) (1983). To "investigate" means "to search into so as to learn the facts; inquire into systematically." Webster's New World Dictionary 741 (2d ed. 1972). An individual who is engaged solely for the purpose of expressing an expert opinion does not conduct a search and, therefore, does not conduct an investigation. Similarly, an individual who conducts an analysis of evidence on behalf of a party to litigation or in anticipation of litigation, but who is not engaged for the purpose of locating or gathering the evidence to be examined, does not conduct an investigation. This sense of the word "investigation" is strengthened by 1984 Iowa Acts, chapter 1235, §1(6)(h), which refers to the "business of securing evidence" for use in trials or hearings.

Similarly, a photographer who is engaged to photograph a particular place or thing is not conducting an investigation because no search is involved. If, on the other hand, the individual is in the business of first finding and then photographing evidence, the camera is but a tool of that individual's private investigation business.

For these reasons, it is our opinion that the definition in 1984 Iowa Acts, chapter 1235, §1(6), does not encompass individuals engaged simply to analyze evidence, photograph evidence, or give expert testimony. It does include persons who conduct searches or investigations to locate and secure evidence so that it can be analyzed or photographed.

Respectfully yours,



GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

COUNTIES; Board of Supervisors; County Compensation Board; Reductions to compensation board's recommendations. Iowa Code § 331.907(2) (1983). Reductions to the compensation board's recommendations are to be made in the total amount of the recommended compensation rather than in the amount of the recommended increase. There are no limitations in the percentage amount by which the supervisors may reduce the recommendations, so long as the percentage is equal for each officer, even if the equal percentage reduction may result in an officer receiving a salary which is less than that received the preceding year. (Weeg to Martens, Iowa County Attorney, 3/4/85) #85-3-2(L)

March 4, 1985

Mr. Kenneth R. Martens
Iowa County Attorney
1060 Court Avenue
Marengo, Iowa 52301

Dear Mr. Martens:

You have requested an opinion of the Attorney General on several questions relating to the salary recommendations the county compensation board submits to the board of supervisors. Your questions are as follows:

> 1. Does the board of supervisors lower the compensation board's salary increase for each of the officers by an equal percentage or does the board of supervisors lower the total recommended compensation schedule, which includes the salary plus the recommended increase for the next year, by an equal percentage?
>
> 2. If the board of supervisors cannot reduce the recommended increase of the compensation board by 100 percent, what percentage limitation, if any, is there on the amount of reduction the board of supervisors can make regarding the compensation board recommended salary schedule?
>
> 3. If the board of supervisors has the power to reduce equally the recommended compensation board salary schedule, which would include any raises granted by the compensation board, and if the salaries of the officers are not all equal, if an equal reduction of salary applied to all officers

> would reduce a particular officer's salary less than what he was receiving for the prior year, is the board of supervisors authorized to reduce salaries to this level?

Introduction

Iowa Code § 331.907 (1983) governs preparation and adoption of a compensation schedule for elected county officers. Subsection 1 requires the county compensation board to, *inter alia*, prepare "a recommended compensation schedule" for these officers. Following a public hearing, the compensation board is to prepare a "final compensation schedule recommendation." Subsection 2 then provides:

> Annually during the month of December, the county compensation board shall transmit its recommended compensation schedule to the board of supervisors. The board of supervisors shall review the recommended compensation schedule and determine the final compensation schedule for the elected county officers which shall not exceed the recommended compensation schedule. In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, <u>the annual salary or compensation of each elected county officer shall be reduced an equal percentage</u>.

(emphasis added)

I.

We have previously opined that § 331.907(2) allows the supervisors only two alternatives when the final compensation schedule recommendations are submitted to them by the compensation board: they may not increase the recommendations, but may either accept the recommendations in their entirety or reduce the recommendations an equal percentage. Op.Att'yGen. #83-3-21(L); 1982 Op.Att'yGen. 316; 1982 Op.Att'yGen. 146; 1980 Op.Att'yGen. 701; 1978 Op.Att'yGen. 111. Your question is whether, in the event the supervisors wish to reduce the recommendations, those reductions are to be made in the total salary, i.e., the previous salary plus the recommended increase, or the amount of the recommended increase alone.

We believe the express language of § 331.907(2) provides an answer to your question. As emphasized above, if the supervisors

wish to reduce the compensation board's recommendations, it is "the annual salary or compensation" of each officer which is to be reduced an equal percentage rather than the amount of the proposed increase.[1]

II.

Your second question refers to the language contained in 1977 Op.Att'yGen. 111 quoted above and asks whether there are limitations on the percentage amount by which the supervisors may reduce the compensation board's recommendations. In 1977

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[1] You noted in your opinion request that language contained in a previous opinion from this office would suggest a contrary interpretation. In 1978 Op.Att'yGen. 111 we stated:

> We agree with your conclusion that [§ 331.907(2)] allows the board of supervisors only two alternative actions for determining the final compensation schedule of salaries. The board of supervisors may (1) accept the nominations of the county compensation board as submitted; or (2) the board may determine that lower salaries or compensation should be fixed, and if it does so, it must reduce the recommended salary or compensation of each officer by an equal percentage.
>
> Accordingly, it is our view that the boards of supervisors are not empowered by the act to adjust recommended salaries by reducing <u>the recommended increase</u> by 100% for each of the elected officials, nor are they empowered to adjust the recommended salaries or compensation of some county officers and not other county officers.

(emphasis added) The emphasized language suggests that it is the recommended increase rather than the recommended salary which is to be reduced. However, we believe this was simply a misstatement; in this opinion, in the sentence prior to the one quoted above, we correctly stated that if the board of supervisors wished to reduce the compensation board's recommendation "it must reduce <u>the recommended salary or compensation</u> of each officer by an equal percentage." (emphasis added). *Id.* This latter language is in fact the language used by the statute. To the extent that the language emphasized above is inconsistent with our present conclusion, it should be ignored.

Op.Att'yGen. 111 we stated that the supervisors may not reduce "the recommended increase by 100%." However, as noted in footnote one above, this language is inconsistent with the express statutory language of § 331.907(2), which we construed in our answer to your first question as requiring equal percentage reductions in the amount of the entire salary recommendation rather than in the amount of the increase alone. Language to the contrary in 1978 Op.Att'yGen. 111 should simply be disregarded.

Instead, we believe there are no limitations on the percentage amount by which the supervisors may reduce the compensation board's recommendations. As set forth above, our previous opinions make clear that under § 331.907(2) the supervisors have only two options upon receipt of the compensation board's recommendations: they may either accept the recommended salaries as they are, or reduce the salaries of each officer by an equal percentage. There is no express restriction on the amount of the reduction the supervisors may make, nor can we find a basis for implying such a restriction. Accordingly, it is our opinion the supervisors may exercise their discretion in reducing the recommended salaries by any percentage they choose, so long as that percentage reduction is equal for each officer.

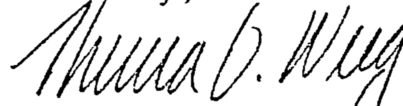
III.

Your third question asks whether, in making an equal percentage reduction, the supervisors may reduce an officer's salary below the amount of the previous year's salary. As you state in your opinion request, this possibility arises because all officers do not receive the same compensation, nor are the recommended increases always equal. As set forth in response to your second question, we do not believe there is any limitation on the percentage amount by which the supervisors may reduce the compensation board's recommendations. Therefore, it is feasible that in applying the equal percentage requirement, some officers who receive less compensation than others could have their salaries reduced below what they were paid the preceding year. There is no legal prohibition against this. The wisdom of this action is left to the discretion of the supervisors.

In conclusion, it is our opinion that reductions to the compensation board's recommendations are to be made in the total amount of the recommended compensation rather than in the amount of the recommended increase. There are no limitations in the percentage amount by which the supervisors may reduce the recommendations, so long as the percentage is equal for each officer, even if the equal percentage reduction may result in an officer

receiving a salary which is less than that received the preceding year.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

HEALTH: Insurance. Iowa Code §§ 509.3(6), 514.7, 514B.1(2) (1985); 1984 Iowa Acts, ch. 1290. Covered diabetic outpatient self-management programs must be provided by knowledgeable health care professionals and directed by a physician, but the legislature did not mandate that each program be provided by registered nurses and licensed pharmacists. The Department of Health has authority to adopt standards for covered programs. (McGuire to Pawlewski, Commissioner of Public Health, 4/25/85) #85-4-9(L)

Mr. Norman Pawlewski
Commissioner of Public Health
Lucas State Office Building
L O C A L

April 25, 1985

Dear Mr. Pawlewski:

This is in response to your request for an opinion of the Attorney General regarding 1984 Iowa Acts, ch. 1290. Specifically you ask whether this act, which provides for health insurance coverage for diabetes education programs, requires that each program include a licensed pharmacist.

The specific statutory language in question[1] states:

> Covered diabetic outpatient self management education programs shall be provided by health care professionals including, but not limited to, physicians, registered nurses, and licensed pharmacists who are knowledgeable about the disease process of diabetes and the treatment of diabetic patients.

Aside from the requirement that the providers be health care professionals, the statute is susceptible to different interpretations as to the specific personnel requirements for covered programs. Whether each program must include physicians, registered nurses, and licensed pharmacists is unclear from the language and so must be ascertained through determining the legislative intent.

Legislative intent is determined from the statute as a whole, not solely from a particular part. DeMore v. Dieters, 334 N.W.2d 734, 737 (Iowa 1983). The language used, the object to be

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[1] This language appears in Iowa Code §§ 509.3(6), 514.7, 514B.1(2) (1985).

accomplished, and a construction which effects the statute's purpose are all considerations in determining the legislative intent. Pearson v. Robinson, 318 N.W.2d 188, 190 (Iowa 1982).

The purpose of this statute is to provide insurance coverage for diabetes education programs. Eligible programs must also "meet standards developed by the state department of health in consultation with American diabetes association, Iowa affiliate for certification of outpatient diabetes education programs."

It is our opinion that this section requires that programs be provided by health care professionals who are knowledgeable about diabetes and its treatment but does not require that every program include physicians, registered nurses, and licensed pharmacists. We believe the phrase "including, but not limited to, physicians, registered nurses, and licensed pharmacists" defines the preceding phrase, "health care professionals." The phrase specifies particular examples of those in a general class. See United States v. Thevis, 474 F.Supp. 134 (N.D. Ga. 1979). The legislature has determined that persons in these three professions are health care professionals and that other professions may also qualify. Had the legislature intended to require that each program include members of each of these professions, we believe it would have stated that each program shall include a physician, a registered nurse, and a licensed pharmacist and may include other health care professionals meeting the knowledge requirement. The legislature did specifically state elsewhere in each section that "[c]overage shall apply only to programs directed and supervised by a physician . . ." We believe it would have used similar language had it intended to impose a mandatory minimum requirement as to the types of professionals required in each program. Thus we conclude that the legislature did not require that each program necessarily be provided by physicians, registered nurses, and licensed pharmacists.

Each section of the Act also confers express authority for the Department of Health to develop standards for certification of these programs in consultation with the American Diabetes Association. The Department could promulgate rules requiring that each program include persons from certain professions under this authority if it had a reasonable basis for the requirements and if the standards were consistent with the statute. The department could not, for example, define health care professionals to exclude registered nurses or licensed pharmacists who are knowledgeable about the disease process of diabetes and the treatment of diabetic patients as the legislature has expressly included these professions within the term "health care professionals."

We have provided our construction of the statute and the authority of the Department under that section. The language of the final rule should be determined based on the statutory criteria as construed in this opinion and the expertise of the Department, after consideration of comments submitted in rulemaking.

In conclusion, it is the opinion of this office that while this statute mandates that health care professionals provide the diabetic education programs, the language "including but not limited to, physicians, registered nurses, and licensed pharmacists" does not require that each program be provided by persons in all three health professions.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

COURTS; COUNTIES. Jury Selection; Computer Selection Process. Iowa Code Chapter 609, § 609.24(2) (1983 Supp.). Section 609.24(2), which allows for either manual drawing or computer selection of persons to be called to serve as petit jurors, does not eliminate the duties of the clerk of court, the county sheriff or the ex officio jury commission members as set forth in Chapter 609. (Ryan to Davis, Scott County Attorney, 4/25/85) #85-4-8(L)

April 25, 1985

Mr. William E. Davis
Scott County Attorney
Scott County Courthouse
416 West Fourth Street
Davenport, Iowa 52801

Dear Mr. Davis:

You have posed two questions regarding Iowa Code section 609.24(2) (Supp. 1983), which governs the drawing of petit jurors. Chapter 609 sets forth the procedures for selection of grand jurors, petit jurors and talesman, and details the duties of the appointive jury commission members, the ex officio jury commission members (the county auditor, county recorder and county clerk) and the county sheriff.

Chapter 609 historically has had a two-fold purpose: to ensure that the burden of serving on a jury is equitably distributed among the residents of a county and, more importantly, to ensure that jurors are drawn from a representative cross-section of the community, as is constitutionally required. See State v. Lohr, 266 N.W.2d 1, 4 (Iowa 1978); State v. Wilson, 166 Iowa 309, 144 N.W. 47 rehearing denied 166 Iowa 309, 147 N.W. 739 (1913). These goals are accomplished by providing uniform procedures to formulate and certify lists, by protecting the integrity of the lists and by selecting names at random.

See Iowa Code §§ 609.1, 609.11, 609.17, 609.21, 609.24 (1983 and 1983 Supp.). Substantial compliance with those procedures is required. See State v. Lohr, 266 N.W.2d at 6; State v. Carney, 20 Iowa 82 (1866).

Before the widespread use of computers, all drawing of petit jurors was accomplished by the manual drawing of names. The Iowa legislature recognized the changing technology when, in 1983, it amended Iowa Code section 609.24 to read as follows:

> 1. At the time of the drawing the appropriate box shall be first thoroughly shaken in the presence of the commissioners attending the drawing. Next the seal on the opening of the box shall be broken in the presence of the commissioners. One of the commissioners shall then, without looking at the ballots, successively draw the required number of names from the box, and successively pass the ballots to one of the other commissioners, who shall open the ballots as they are drawn, and read aloud the names on the ballots, and enter the names in writing on an appropriate list.
> 2. Instead of the method provided in subsection 1 for the drawing of ballots, a computer selection process may be used.

You pose two questions regarding subsection 2 above. First, you ask whether the computer selection process "supercede[s] the duties and obligations previously prescribed for the Clerk and Sheriff by § 609.30 and § 609.31 of the 1983 Code." Second, you ask whether section 609.24(2) "exempt[s] the ex officio jury commission members from the duties regarding petit juries." In applying several rules of statutory construction, it appears that the answer to both questions is "no."

The primary rule of statutory construction is to give effect to legislative intent. State v. Berry, 247 N.W.2d 263 (Iowa 1976). In construing statutes, courts will consider the object to be accomplished and the evil to be remedied, and will seek a reasonable construction that will best effect the purpose of the statute. State v. Billings, 242 N.W.2d 726 (Iowa 1976).

In section 609.24(2), it appears that the legislature merely intended to substitute a computer selection process for the manual drawing of names. The legislature provided that instead of the manual process of the "drawing of ballots," a computer selection process can be substituted.

There is no indication in the statute that the legislature intended to change the purpose of Chapter 609. The statutory goals of ensuring an equitable and representative distribution of jurors remains the same whether the selection is made by hand or by computer. The goals of the statute will be served only if the respective duties of the ex officio commissioners and the sheriff remain unchanged. Because the legislature intended to allow for a computer selection process, it is reasonable to conclude that the duties of the county auditor and clerk of court might be modified in order to facilitate the computer selection so long as these modifications can be accomplished without compromising the goals of the statutory selection process.

For example, the auditor might apportion the number of jurors by use of a computer. See Iowa Code § 609.4 (1983). The auditor and clerk of court might prepare a computer list of names that can be ensured secrecy via limited computer access. See Iowa Code § 609.15-.17 (1983). The same notice provisions should apply for the actual drawing procedure in order to ensure that an unbiased selection process is employed. See Iowa Code §§ 609.20-.22 (1983). The clerk should retain the duty to keep the computer list secret after the drawing. See Iowa Code § 609.29 (1983).

Regardless of the selection process used, the clerk should file the list and upon court order issue precepts to the sheriff and the sheriff should summon the jurors. See Iowa Code §§ 609.30-.31 (1983). The list should be filed as a public record in order to ensure the integrity of the list and to provide public notice of the list. The sheriff should summon the jurors because a law enforcement agent more effectively conveys the importance of the duty to appear, the failure of which can result in contempt. See Iowa Code § 609.33 (1983 Supp.).

In conclusion, it is our opinion that the computer selection alternative in Iowa Code section 609.24(2) (1983 Supp.) does not eliminate the duties of the clerk of court and the sheriff, as set forth in Iowa Code sections 609.30-.31 (1983), and that a computer selection process will, at most, only modify the duties of ex officio jury commission members under Chapter 609.

Sincerely,

ROXANN M. RYAN
Assistant Attorney General

RMR/cjc

CLERK OF COURT; Duty or Power to Conduct Lien Searches. Iowa Code §§ 22.2, 22.3, 321.24, 321.50(7), 409.9 (1985); Iowa Code chs. 570, 571, 572, 574, 580, 581, 582, 584, §§ 554.9407(2), 613A.2, 613A.8, 811.4, 903A.5 (1983); Iowa Code interim supplement §§ 602.1215(2), 602.8102(44), (57), (82), (130), 602.8104(2)(g), 602.8105(1)(p), 602.11101(5) (1983). The clerk of the district court has no general statutory duty to conduct lien searches at the request of a private party. However, the clerk has a limited statutory duty to conduct lien searches and certify the results thereof in connection with certain real estate transactions. In addition, the clerk may search public records in order to make them available for public examination and copying. With the exception stated above, the clerk has no statutory duty to certify or warrant the results of any search undertaken. A clerk could voluntarily search lien records for only a limited class of persons if a reasonable basis exists for the discrimination. (Kirlin to Vanderpool, Cerro Gordo County Attorney, 4/24/85) #85-4-7(L)

April 24, 1985

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

Dear Mr. Vanderpool:

You have asked this office for an opinion on several questions regarding the duties and powers conferred by the Code of Iowa on clerks of district court to perform lien searches at the request of private parties. Specifically, you have asked:

1. Whether the clerk has a statutory duty to perform a lien search upon request and, if so, whether the results of such a search must be certified;

2. Whether the county, the clerk or the clerk's employees are liable if a lien search is performed negligently or fails to comply with applicable laws.

3. Whether the clerk can perform lien searches for some individuals and not for others;

In response to your first question, the clerk has no statutory duty to perform lien searches upon the request of a private party.

Iowa Code Supp. § 602.8102 (1983) sets out the general duties of the clerk of the district court. Section 602.8102(82) provides that the clerk shall "[c]arry out duties relating to liens as provided in chapters 570, 571, 572, 574, 580, 581, 582, and 584." Section 602.8102(130) provides that the clerk shall "[d]ocket undertakings of bail as liens on real estate and enter them upon the lien index as provided in section 811.4." Section 602.8104 sets out the clerk's duties to maintain certain records and books including "a lien book in which an index of all liens in the court are kept." Section 602.8104(2)(g). None of the provisions cited above imposes any duty upon the clerk to search dockets or indexes of liens.*

A prior opinion of this office, 1972 Op.Att'yGen. 541, relied in part on the public records law, Iowa Code ch. 22 (1985) (formerly ch. 68A), to conclude that county treasurers could charge a fee to search motor vehicle records to ascertain the ownership of a certain car and that fees for the search would be for official service and go to the county.[1] The language of the opinion suggests that § 22.3 (formerly § 68A.3) imposed a duty on the treasurer to make the search. As the question there presented concerned the imposition of fees and not the duty to make the search, the opinion does not explain the underlying rationale for this statement. It may have been based on the statutory requirement that treasurers provide certificates of title for motor vehicles, Iowa Code § 321.24 (1985), or on facts indicating that the public did not otherwise have access to these records.

Our prior opinion, 1972 Op.Att'yGen. 541, should not be read to require that public agencies must always actually conduct searches of public records for the public upon request.

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[1] The specific question addressed in that opinion is now resolved by statute. Iowa Code § 321.50(7) (1985).

* Addendum, 7/12/85 - Section 602.8102(57) does refer to the clerk's duties under § 409.9. This section requires the clerk to conduct lien searches and certify the results in connection with the preparation of chapter 409 subdivision plats. Thus, the clerk has a limited statutory duty to conduct lien searches and certify the search results. This does not change the conclusions in the opinion as to searches not specifically required by statute.

Section 22.2 provides two rights -- a right to examine records and a right to copy records. 1982 Op.Att'yGen. 207,210. Section 22.3 provides for agency supervision of the examination. It does not expressly require that the public body itself conduct a search.

In our view, a public agency has no duty to search for public records except as necessary to make records available for public examination and copying. The statutory requirements for maintenance of a lien book and an index, § 602.8104(2)(g), ensure that the records in question here are readily available for public examination and for copying. Thus, while chapter 22 would require a clerk to provide a copy of a specific record upon request and to make its lien records reasonably accessible to the public, it does not impose a requirement that the clerk's office actually conduct an examination of its records to determine what records of liens do or do not exist.

Our conclusion that a public agency need not itself conduct searches for records where the records are readily accessible to the public for inspection, as where an index is maintained, does not preclude the agency from conducting searches for the public. Chapter 22 is to be interpreted liberally "to provide broad public access to public records." 1982 Op.Att'yGen. 207, 210. Agencies may take steps upon request to facilitate examination and copying of records and be reimbursed for the costs involved. Id. at 211. Thus, clerks could agree to search any records in their possession, including the lien book, in order to provide copies of records.

The more difficult question is whether the clerk's office may certify the existence or non-existence of liens upon the request of a member of the public.[2] There is clearly no requirement that it do so. The Code provides a very detailed listing of the duties of clerks and requires clerks to certify certain facts. See, e.g., Iowa Code Supp. §§ 602.8102(44), 903A.5 (1983) (certification of time served in county jail). We have found no statute requiring clerks to certify the existence or non-existence of liens. The legislature has specifically required certain other agencies, which maintain filing systems for liens, to provide certifications or reports of the existence or non-existence of lien records. For example, county treasurers are required to issue a certificate showing whether there are any security interests noted on a motor vehicle certificate of title.

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[2] We are not here concerned with the clerk's authority to certify that a specific document is a true and accurate copy of a record filed in that office.

Iowa Code § 321.50(7) (1985). The Secretary of State, who maintains a filing system for financing statements for certain Uniform Commercial Code security interests, is also required to issue certificates showing whether there are on file any financing statements naming a particular debtor. Section 554.9407(2). Given the specificity of the statutes governing the clerks' duties and the existence of statutes expressly requiring certifications by other public bodies which maintain filing systems for certain types of liens, we do not believe that a duty to certify whether liens exist can be implied.

Although clerks have no duty to provide certificates or other reports of lien searches, it is difficult to define in advance, as a matter of law, the extent of their discretion to provide any reports concerning liens.[3] A clerk does not, we believe, have authority to represent that any report of the non-existence of liens by the clerk is entitled to any greater weight than the unsworn certificate of any other person. See Farmers State Bank of Riverton v. Investors Guaranty Corporation, 45 P.2d 1057, 1059 (Wyo. 1935). Nor do we believe that clerks have implied authority in their official capacity to effectively warrant clear title. Yet clerks and other custodians of public records do have authority to search their records in an effort to make records available to the public and to advise persons whether records have been found. We believe clerks should not issue "certificates" concerning the existence or non-existence of liens but may, under the public records law, advise persons of records listed in the lien index.

The difficulty in the clerks providing any report of lien searches for other persons is the possibility that those persons might detrimentally rely on the clerk's information as indicating the existence of clear titles. In determining whether to engage in lien searches upon request, a clerk should consult with the county attorney to determine whether adequate protection could be provided to prevent potential liability resulting from reliance on the information provided by the clerk's office.

You have asked us to determine whether the county and/or individual county employees would be liable if employees

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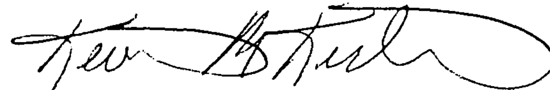
[3] After July 1, 1986, the clerks of court will be state employees. Section 602.11101(5). The judicial department, the Supreme Court, and the judicial district can adopt rules to specify what clerks may do in this regard for the future. See § 602.1215(2), (4).

negligently performed a lien search. We would not speculate concerning potential tort liability for errors and omissions or negligence as that would not resolve a question of state law but is instead an attempt to predict how liability might arise based on existing law. We would note that, if liability were found, employees could be held individually liable if the alleged act or omission was found not to be "within the scope of their employment or duties." Iowa Code §§ 613A.2; 613A.8 (1983). Whether any liability would exist or whether employees would be found personally liable would be dependent upon the facts of the case and cannot, therefore, be determined by an Attorney General's Opinion. 1972 Op.Att'yGen. 686.

You further ask whether the clerk could perform lien searches for some persons and not others. Absent any statutory command, it would appear that the clerk could provide the service for some classes and not for others, but only if a reasonable basis exists. For example, a clerk could decide to provide the service to governmental agencies but not to individuals because of inadequate resources or potential liability. (We have found no authority to charge any fee other than actual costs under chapter 22. See § 602.8105(1)(p).) A clerk could also, we believe, agree to conduct a search only for entities entering into agreements which adequately indemnify the county, the clerk, and employees.

In conclusion, it is our opinion that clerks of court in their official capacity may, but are not required to, search their records for liens; they should not issue "certifications" of the existence or non-existence of liens. A clerk could search lien records for only a limited class of persons if a reasonable basis exists for the discrimination.

Sincerely,



KEVIN M. KIRLIN
Assistant Attorney General

KMK/cjc

TAXATION: Sales Tax. Iowa Code § 422.45(12) (1985). The sales tax imposed on purchases of food sold through vending machines does not violate the equal protection clause of the United States Constitution. (Barnett to Van Camp, State Representative, 4/24/85) #85-4-6(L)

April 24, 1985

The Honorable Mike Van Camp
State Representative
State Capitol
L O C A L

Dear Representative Van Camp:

You have requested an opinion of the attorney general concerning the constitutionality of placing a sales tax on food sold through vending machines. For purposes of the following opinion, we assume that you are asking whether Iowa Code § 422.45(12) violates the equal protection clause of the United States Constitution.

A legislative enactment classifying property for purposes of taxation is presumed to be in compliance with the equal protection clause if the enactment neither infringes on a fundamental right nor involves a suspect classification.[1] _See, e.g._, _Chicago Title Insurance Co. v. Huff_, 256 N.W.2d 17, 28 (Iowa 1977). _See generally_, _Borden v. Selden_, 259 Iowa 808, 812, 146 N.W.2d 306, 310 (1966) (general principles governing resolution of constitutional challenges summarized in a privileges and immunities case).

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[1] Federal and state constitutional provisions which guarantee similar rights are generally construed as having the same scope thereby prohibiting the same conduct. _Chicago Title Ins. Co. v. Huff_, 256 N.W.2d 17, 23 (Iowa 1977). Therefore, this opinion is applicable to the constitutionality of § 422.45(12) under the equal protection clause of the United States Constitution and the uniformity clause of the Iowa Constitution. _See generally_, U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 6.

Such enactments are upheld unless the challenger discharges his burden of demonstrating that the classifications drawn by the legislature are totally arbitrary or capricious and lacking any rational relationship to a legitimate, governmental interest. See, e.g., Kahn v. Shevin, 416 U.S. 351, 355, 94 S. Ct. 1734, ____, 40 L. Ed. 2d 189, 1983 (1974). A classification does not violate the equal protection clause simply because in practice it results in some inequality. E.g., Avery v. Petersen, 243 N.W.2d 630, 634 (Iowa 1976). Classifications are constitutional if any conceivable set of facts exists which could rationally justify the classifications chosen by the legislature. E.g., In re Bishop, 346 N.W.2d 500, 505 (Iowa 1984). Historically, legislatures have been accorded great latitude when defining tax classifications in cases in which the only federal right implicated is equal protection. See Kahn v. Shevin, 416 U.S. at 355, 94 S. Ct. at ___, 40 L. Ed. 2d at 193; Borden v. Selden, 259 Iowa at 814, 146 N.W.2d at 311.

In pertinent part, Iowa Code section 422.45(12) (1985) provides that the gross receipts from the sales of foods for human consumption are not subject to sales tax if the foods are eligible for purchase with United States food coupons, the foods are not meals prepared for immediate consumption, and the foods are not sold through vending machines. The practical effect of this exemption is to subject to sales tax food sold primarily by restaurants and vending machines. In both instances the price of the food purchased is inflated by the services of the seller which facilitate the immediate consumption of the food. The classifications as drawn further the legislative objective of exempting from taxation only those purchases of food which are viewed as economical purchases. See Associated Food Services, Inc. v. Commissioner of Taxation, 298 Minn. 277, ___, 216 N.W.2d 253, 256-57 (1974) (legislative intent to exempt "necessary" food purchases but not "luxury" food purchases furthered by classifications taxing food sold in restaurants but not grocery stores); cf. Kentucky Fried Chicken Inc. v. United States, 449 F.2d 255, 257 (5th Cir. 1971) (secretary's decision to allow food stamp purchases only in grocery stores furthered legislative objective of providing a low-cost, nutritionally balanced diet for the poor); Capricorn Coffees, Inc. v. Butz, 432 F. Supp. 917, 919-20 (N.D. Cal. 1977) (secretary could rationally conclude that store selling only expensive coffee and tea should be excluded from the food stamp program as its inclusion would not further the nutritional goals of the program).

The fact that section 422.45(12) might exempt from taxation some food purchases which are not viewed as economical purchases does not lead to the conclusion that the exemption violates the equal protection clause. See Avery v. Petersen, 243 N.W.2d at 634; accord Guilliams v. Commissioner of Revenue, 299 N.W.2d 138, 143 (Minn. 1980). Statutory classifications concerning economic matters need not be the most direct or effective way of accomplishing a legislative goal in order to withstand an equal protection challenge. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812-14, 96 S. Ct. 2488, ____, 49 L. Ed. 2d 220, 232-34

(1976). It is sufficient if the classifications chosen are not arbitrary and further a legitimate, governmental goal; "practical problems of government permit rough accomodations." Avery v. Petersen, 243 N.W.2d at 634.

Classifying food for taxation purposes based upon the way in which food is marketed is constitutional if the classifications further a legitimate, governmental interest. Courts have upheld taxation schemes which classify vending machines as restaurants and which tax foods sold in restaurants but not comparable foods sold in grocery stores. See Seiler Corp. v. Commissioner of Taxation, 384 Mass. 625, ___, 429 N.E.2d 11, 13-14 (1981); Associated Food Services, Inc. v. Commissioner of Taxation, 298 Minn. at ___, 216 N.W.2d at 256-57. In Associated Foods the court specifically rejected the assertion that similiar food products were required to receive the same tax treatment regardless of the way in which the product was marketed. Associated Foods Services Inc. v. Commissioner of Taxation, 298 Minn. at ___, 216 N.W.2d at 256.

The equal protection clause does not prohibit tax classifications based upon marketing methods when the classifications drawn further the legitimate, governmental interest of exempting from taxation food purchases which contribute to a low-cost, nutritional diet while taxing those which do not. Section 422.45(12) rationally accomplishes this objective and does not violate the equal protection clause.

Yours truly,

Sherie Barnett

WP1

CRIMINAL LAW AND PROCEDURE: Child Restraint Law; Appearance in Court. Iowa Code §§ 321.446, 805.9, 805.10. Defendants charged with violation of the child restraint law, § 321.446, must appear in court under § 805.10. (Hansen to Draheim, Chief Judge, 2nd Judicial District, 4/11/85) #85-4-5(L)

Honorable Newt Draheim
Chief Judge
2nd Judicial District of Iowa
Wright County Courthouse
Clarion, Iowa 50525

April 11, 1985

Dear Judge Draheim:

You have requested an opinion of the Attorney General concerning Iowa Code § 321.446, the child restraint law, and Iowa Code § 805.10, which regulates the circumstances under which a defendant charged with a scheduled violation must appear in court.

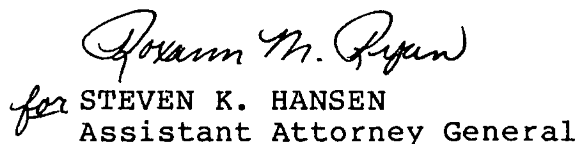
The question posed for our consideration is whether a defendant charged with violating § 321.446 must appear in court if an appearance is required under § 805.10. For the following reasons the answer to this question is that in some circumstances an appearance is required.

Iowa Code § 321.446, as enacted by 1984 Acts, ch. 1016, § 1, requires children of certain ages to be restrained when transported in motor vehicles. Section 5 of ch. 1016 makes the violation of § 321.446 a "scheduled violation" under § 805.8. Pursuant to § 805.9, defendants charged with scheduled violations may admit the violation and mail the fine, rather than appear in court. See also 1980 Op.AttyGen. 684 (Richards to Holetz). However, pursuant to § 805.10 (Supp. 1983), § 805.9 does not apply to a scheduled violation if either (1) the violation charged involved or resulted in an accident or injury to property, and the total damages are two hundred fifty dollars or more or in injury to person, or (2) the violation created an immediate threat to the safety of other persons or property because of highway conditions, visibility, traffic, repetition, or other circumstances. Thus, under § 805.10 if either of the above two sets of circumstances accompany a scheduled violation, then the violator must appear in court. For example, a defendant charged with violating § 321.446 (a scheduled violation) would be required to appear in court if the violation involved or resulted in injury to person.

Your question arises because of the following provision in § 321.446(6): "Failure to use a child restraint system, safety belts, or harnesses as required by this section does not constitute negligence nor is the failure admissible as evidence in a civil action." It is suggested that a primary purpose of § 805.10 is to ensure that defendants charged with scheduled violations are informed of the possible civil consequences of admitting the violation (e.g., the admission could be introduced into evidence at a later civil proceeding arising from the same accident). Because § 321.446(6) prohibits the use of the violation as evidence in a civil action, it is further suggested that the purpose underlying § 805.10 is fulfilled, and it would be unnecessary for the defendant to appear in court.

However, these suggestions neglect to consider purposes of § 805.10 other than to forewarn defendants of the possibility of civil consequences. An examination of the section as a whole and as it existed prior to its amendment by 1983 Acts, ch. 125, § 9, indicates that there are other purposes underlying § 805.10, such as impressing on the defendant the gravity of the violation. Furthermore, even if the presumed purpose of a statute is fulfilled or obviated by another statute, the former statute is not deemed repealed. See generally 1A C. Sands, Statutes and Statutory Construction § 23.09, at 223-24 (1972). Thus, even if we believed that the underlying purpose of § 805.10 is satisfied by § 321.446(6), § 805.10 retains its validity. As long as the provisions do not conflict, any problem is properly left to the legislature.

Sincerely,



for STEVEN K. HANSEN
Assistant Attorney General

SKH/cal

cc: Magistrate John R. Cherry
Magistrate R. P. McGee
Magistrate Matthew F. Berry

SCHOOLS: Area Colleges: Athletics: School Rules: U.S. Constitution, Equal Protection clause. Iowa Code Chapter 280A (1985); Iowa Code §§ 280A.16, 280.25(5) (1985). Area school athletic rules which limit participation in sports on the basis of where the student attended or graduated from high school are not facially unconstitutional. (Osenbaugh to Lonergan, State Representative, 48/85) #85-4-4(L)

April 8, 1985

The Honorable Joyce Lonergan
State Representative
Eighty-Seventh District
L O C A L

Dear Representative Lonergan:

You have asked for our opinion as to the legality of certain rules of the State Executive Committee for Area School Athletics. That Executive Committee is the rulemaking body for interscholastic athletic competition among area schools organized pursuant to Iowa Code Ch. 280A (1985).

The Executive Committee functions under a Constitution which may be amended by action of the State Board of Public Instruction. See Executive Committee Constitution, Article VIII. That Constitution in Article II entitled Purpose directs the Executive Committee to promote a number of objectives including the following:

(a) The athletic program of the community college shall be a meaningful part of the total instructional program of the institution.

. . .

(f) The athletic program of the community college shall be developed in such a manner that it serves as a unifying force for the entire student body and becomes a focal point for student interest and identification with the institution.

. . .

(h) The major emphasis on the selection of participants in the athletic program of the community college shall be placed on residents of Iowa and the normal geographic area serviced by the institution.

. . .

The rules which are of concern to you are somewhat complicated and detailed but, in effect, are rules which limit the participation in interscholastic competition by students of the area schools who attended high school outside of Iowa. The rules divide geographic areas into two categories: Region A, which includes the State of Iowa and "that area outside of the State of Iowa within a 50 mile radius of the campuses of member institutions." see Bylaws of State Executive Committee for Area School Athletics, January 1983 Revision, Art. 1; and Region B, which includes all geographic area that is not in Region A. Athletes are divided into two groups: those who graduated or last attended a high school in Region A, and those who graduated from or last attended a high school in Region B. See Rules, supra. The rules establish a maximum number of Category "B" athletes who may participate in any one contest. See Rules, supra, Article VII. For example, 10 is the maximum number of Category B players of the 24 members of a baseball or softball squad for a particular contest. No more than six Category B players may be members of the squad for basketball and 18 Category B players may be members of the 44 member football squad for a particular contest. Similar restrictions are imposed on other sports. Coaches are required to exchange "certified lists" before each contest, noting Category B athletes eligible to participate in said contest. See Rules, supra, Art. VI, § 3. Students "remain in the same category or residence for purposes of athletic participation, unless changed through an application to the State Executive Committee for Area School Athletics." Rules, Art. IV, § 1.

These rules are clearly rules of an association made up of area schools. Thus, these rules, as applied and enforced by the member area schools, are enforced by a governmental body in that a merged area school is a school corporation. See Iowa Code

§ 280A.16 (1985) (status of merged area). As an Attorney General's opinion cannot resolve issues of fact, 1972 Op.Att'yGen. 686, our inquiry is limited to the question whether the rules are unreasonable or unconstitutional on their face.

In determining whether the rules are facially constitutional, we are guided by the same principles that the courts apply in such a challenge. State statutes are presumed to be constitutional, Hearth Corp. v. C-B-R Development Co., Inc., 210 N.W.2d 632 (Iowa 1973). Similarly, "there is a rebuttable presumption of regularity attending official acts" of a governing body. Anstey v. Iowa State Commerce Com'n., 292 N.W.2d 380, 390 (Iowa 1980). A challenger to rules carries the burden to prove that the rules are invalid. See Davenport Community Sch. Dist. v. Iowa Civ. Rights Com'n., 277 N.W.2d 907, 909 (Iowa 1979). The standard of review for determining the validity of rules is that of rationality. Id. Doubts are resolved in favor of constitutionality. Pottawattamie County v. Iowa D.E.Q., 272 N.W.2d 448, 452 (Iowa 1978).

If a rule or statute is challenged on Equal Protection grounds and the interest at stake is not an interest that gives rise to a "strict scrutiny" analysis, (e.g., race, religion or fundamental rights), a court uses a "minimum rationality" analysis. See L. Tribe, American Constitutional Law, Foundation Press 1978, pp. 994-999 and the cases cited therein. Professor Tribe said "equal protection came to be seen as requiring 'some rationality in the nature of the class singled out;' with 'rationality' tested by the classification's ability to serve the purpose intended by the legislative or administrative rule: . . .," Id. at 995 (footnotes omitted).

A rational athletic committee could, we believe, decide that the rules decrease the incentive of any school to engage in full-scale national recruiting of athletes and thereby furthers the goal of keeping the schools' athletic programs in proper perspective. See the Constitution of the State Executive Committee for Area School Athletics, Art. III, § 2(j).

The area school athletic rules, hereinafter rules, establish a classification based on the location of a high school from which a student graduated or last attended high school.[1] The

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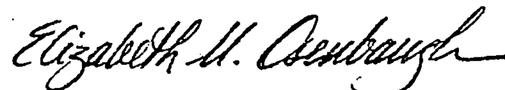
[1] The provision for "high school last attended" covers students who have not graduated from high school but have obtained G.E.D. certificates.

United States Supreme Court has upheld regulations which impose higher tuition rates on out-of-state students. See Starns v. Malkerson, 326 F.Supp. 234 (D.Minn. 1970) aff'd, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971). See also, Clark v. Redeker, 259 F.Supp. 117, 122-23 (S.D. Iowa 1966). The regulations in those cases created a rebuttable presumption of non-residency, in contrast to the irrebuttable presumption of non-residency rejected by the Supreme Court in Vlandis v. Kline, 412 U.S. 441, 452-53, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). Because the rules permit a student athlete to make application to change category, the rules do not suffer from the infirmity of the regulations in Vlandis. See Michelson v. Cox, 436 F.Supp. 1315 (S.D.Iowa 1979) (affirmed decision to reject application for residency status). Thus, we cannot say the rules establish an unconstitutional classification.

In summary, it is our opinion that the rules which classify area school student athletes on the basis of the high school attended are not facially unconstitutional.

Sincerely,



ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO/cjc

RACING COMMISSION: Horse Track Pari-Mutuel Tax. Iowa Code §99D.15(2) (1985). The tax credit provided by Iowa Code §99D.15(2) (1985) applies only to facilities constructed by pari-mutuel licensees which have a genuine bona fide use in the operation of the pari-mutuel enterprise. The credit is only applicable to debt incurred after the enactment of §99D.15(2) and is not applicable to debt incurred as a result of renovation or remodeling projects. (Hayward to Priebe, State Senator, 4/4/85) #85-4-3(L)

April 4, 1985

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

Dear Senator Priebe:

You have asked this office for our opinion regarding the construction of Iowa Code §99D.15(2) (1985) which allows a tax credit to holders of pari-mutuel licenses authorized by the Iowa State Racing Commission to conduct horse races in this state. That provision states:

> 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.

Specifically you have asked three questions.

1. Does the term "facility" include only that portion of a track complex which directly relates to horse racing?

2. Does the tax credit apply only to debt incurred after the effective date of §99D.15(2), or may it be applied to pre-existing construction debt?

3. Does the phrase "cost of construction" include such things as major renovations and remodeling?

1. Applicable Rules of Statutory Construction

Although the general rules of statutory construction are applicable to the review of tax statutes, American Home Products v. Iowa St. Bd. of Tax Review, 302 N.W.2d 140 (Iowa 1981), there are two special rules applicable to such statutes. First, when construing a statute that imposes a tax, the statute is to be strictly construed against the taxing authority. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d 760, 762 (Iowa 1981). However, Iowa Code §99D.15(2) (1985) does not impose a tax. Rather it creates an exemption to the tax. The second rule of construction of tax statute applies to such provisions. That rule is that tax exemptions are strictly construed in favor of the taxing authority. Iowa Auto Dealers Ass'n. v. Iowa Dept. of Revenue, 301 N.W.2d at 762-763; Southside Church or Christ v. Des Moines Bd. of Review, 243 N.W.2d 650, 654 (Iowa 1976). The Iowa Supreme Court has held that in order to come within a tax exemption, it is necessary to fall within both the letter and the spirit of the law. Jones v. Iowa St. Tax Com'n., 247 Iowa 530, 74 N.W.2d 563 (1956).

Also of relevance to this opinion are the general rules of construction. The purpose of any exercise in statutory construction is to ascertain the intent of the legislature behind the enactment of the law. This is to be accomplished through analyzing the language actually used in the statute and not by conjecturing on alternative language which the legislature could have, or which we might preferred it to have, used. LeMars Mut. Ins. Co. v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981). Words and phrases are to be accorded their meaning in general usage unless they have a particular technical or legal meaning. Iowa Code §4.1(2) (1985). Furthermore, words or phrases are not be considered alone. Rather, they must be considered in the context of the statute as a whole. See, Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980).

2. Previous Construction of Iowa Code §99D.15(2) (1985).

We have had a previous opportunity to express our opinion of the intent of the legislature behind the enactment of Iowa Code §99D.15(2) (1985). In Op. AttyGen. #84-12-2(L) (Hayward to Davis, 12/11/84), we noted that the tax credit in that provision was created because it would not have been feasible to finance a major horse racing facility in Iowa under the tax scheme

originally enacted by the legislature. The cost of financing the construction of a first rate horse racing facility would have precluded the construction of such a facility. Thus, the legislature created the tax credit in §99D.15(2), to promote the construction of a major horse track in the State of Iowa.

3. The Tax Credit in §99D.15(2) Is Only Applicable to Costs of Construction of Pari-Mutuel Facilities.

The application of the rules of construction to Iowa Code §99D.15(2) (1985) leads us to the opinion that it provides a credit only for the retirement of debt on the construction of facilities which have a genuine and bona fide use in the pari-mutuel operation. The intent of the legislature was to promote the construction of a race track. It was not concerned with the ability or disability of a pari-mutuel licensee to branch out into other sorts of activities. Also, the word "facility" is modified by the word "licensed", which indicates that it is only applicable to those facilities under the regulatory jurisdiction of the Iowa State Racing Commission. Thus, construing §99D.15(2) to provide a tax exemption or credit for the cost of construction of facilities unrelated to the pari-mutuel operation of a licensee is consistent with neither the letter nor the spirit of the statute.

This does not mean that the credit is only available to offset facilities exclusively used for pari-mutuel horse racing. It is expected that licensees will supplement racing revenues with other uses for their facilities, and there is nothing in the chapter which prevents a pari-mutuel licensee from being engaged in other activity consistent with its nonprofit status. Also, it is important to note that the statute contemplates racing at county fairs and/or the Iowa State Fair. Iowa Code §99D.8 (1985). As is stated above, it is only necessary that the facility have a genuine and bona fide use in the operation of the pari-mutuel business. This is a question which will turn upon the facts of a given case. It would appear to include at least the construction costs of the grandstand, offices, barns, dormitories, and practice facilities.

4. The Credit in §99D.15(2) Does Not Apply to Debt Incurred Prior to Its Enactment.

It is our opinion that the tax credit in Iowa Code §99D.15(2) (1985) is only applicable to construction debt incurred after its enactment. The credit was created to facilitate the financing of horse race facilities in Iowa which was not otherwise feasible. While the letter of the statute is silent, the purpose and intent of the statute is not served by applying it to financing which was obtained without its assistance. Noting that the statute does not affect revenues which have yet been generated, we are of the opinion also that the credit is applicable to construction debt incurred in reliance on the provision between its enactment and effective date.

5. The Credit in §99D.15(2) Does Not Include Debt Incurred For Renovation or Remodeling Projects.

In response to your third question, it is our opinion that the credit in Iowa Code §99D.15(2) (1985) is not applicable to debt incurred in renovation or remodeling projects. As is noted above, the general rules of statutory construction are applicable to tax statutes. This includes the rule codified in Iowa Code §4.1(2) (1985) that words are to be given their usual and ordinary meaning. American Home Products Corp. v. Iowa St. Bd. of Tax Review, 302 N.W.2d at 142-143. The word "construction" means "the act or process of constructing", and to "construct" means "to build, form, or devise by fitting parts or elements together systematically." Webster's New World Dictionary 305 (2d ed. 1972). Thus, the word construction means to create something new. Had the legislature intended to extend the credit to renovation and remodeling projects it could have done so. We must construe this provision strictly in favor of the tax and in light of the language the legislature chose to employ.

6. Summary

It is our opinion that the tax credit in Iowa Code §99D.15(2) (1985) is only applicable to debt incurred in the construction of facilities which have a genuine bona fide use in the pari-mutuel operation of a licensee, and that it only applies to such debt incurred after its enactment. That credit does not apply to debt incurred from renovation or reconstruction projects.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

STATE OFFICERS & DEPARTMENTS: COMPTROLLER; DEPARTMENT OF TRANSPORTATION: Interest on Funds. Iowa Code §§ 453.7(2), 327H.18, 327H.21, 49 U.S.C. § 1654. The federal share of repaid funds loaned for rail assistance may be placed in an interest-bearing account with the accumulated interest to be used for further loans or grants for rail assistance as provided by 49 U.S.C. § 1654 pursuant to Iowa Code §§ 453.7(2), 327H.18-.21. (Hansen to Krahl, State Comptroller, 4/4/85) #85-4-2(L)

April 4, 1985

William Krahl
State Comptroller
State Capital
Des Moines, Iowa 50319

Dear Mr. Krahl:

We have received your request for an Attorney General's Opinion concerning a possible conflict between Iowa Code § 453.7(2) (1983) and 49 U.S.C. § 1654(o)(4). Your question arises because the Department of Transportation has requested that a separate interest bearing account be established for the federal share of repaid funds loaned for rail assistance as required by 49 U.S.C. § 1654(o)(4). You ask whether the federal statute conflicts with the Iowa statute. We conclude that it does not.

Iowa Code § 453.7(2) (1983) provides:

> Interest or earnings on investments and time deposits made in accordance with the provisions of section 12.8, 452.10, 453.1 and 453.6 shall be credited to the general fund of the governmental body making the investment or deposit, with the exception of specific funds for which investments are otherwise provided by law, constitutional funds, or when legally diverted to the state sinking fund for public deposits.

This statute applies to funds which are required to be deposited pursuant to other specified statutes. For example, § 453.1 (1983) provides: "All funds held in the hands of the following officers or institutions shall be deposited in banks first approved by the appropriate government body as indicated: For the treasurer of state, by the executive council . . . ." Accordingly, funds such as those in the state rail assistance fund, which is established by Iowa Code § 327H.18 (1983) in the office of the treasurer, are within the purview of § 453.7(2) unless one of the exceptions applies.

The question in this case concerns financial assistance provided to the state by the federal government pursuant to 49 U.S.C. § 1654(o). Section 1654(o)(4) provides:

> The State shall place the Federal share of repaid funds in an interest-bearing account or, with the approval of the Secretary, permit any borrower to place such funds, for the benefit and use of the State, in a bank which has been designated by the Secretary of the Treasury in accordance with section 265 of Title 12. The State shall use such funds and all accumulated interest to make further loans or grants under paragraph (2) of subsection (f) of this section in the same manner and under the same conditions as if they were originally granted to the State by the Secretary. The State may, at any time, pay to the Secretary the Federal share of any unused funds and accumulated interest. After the termination of a State's participation in the rail service assistance program established by this section, such State shall pay the Federal share of any unused funds and accumulated interest to the Secretary.

This statute requires that the federal share of repaid funds be placed in an interest-bearing account, with the accumulated interest to be used for further loans or grants. This provision would conflict with the requirements of § 453.7(2) unless one of the exceptions in § 453.7(2) applies.

This situation comes within the exception for "specific funds for which investments are otherwise provided by law." § 453.7(2). This conclusion follows because 49 U.S.C. § 1654(o) is a "law" providing for the investment of "specific funds," and is supported by Iowa Code § 327H.21, which provides: "All federal funds received under this section are appropriated for the purposes set forth in the federal grants." The legislature has specifically authorized grant agreements with the United States to carry out the purposes of chapter 327H. §§ 327H.20, 327H.21.

It is unimportant that 49 U.S.C. § 1654 is a federal statute, because § 453.7(2) places no restriction on the law except that it provide for the investment of specific funds. Therfore, the investment of funds pursuant to 49 U.S.C. § 1654(o)(4) comes within the exception of § 453.7(2), and there is no conflict between the statutes.

In conclusion, it is our opinion that the federal share of repaid funds loaned for rail assistance may be placed in an interest-bearing account with the accumulated interest to be used for further loans or grants for rail assistance as provided by 49 U.S.C. § 1654 pursuant to Iowa Code §§ 453.7(2), 327H.18-.21.

Sincerely,

Roxann M. Ryan
for STEVEN K. HANSEN
Assistant Attorney General

SKH/cal

STATE OFFICERS AND EMPLOYEES; Iowa Development Commission and Development Commission Foundation; Mileage Reimbursement; Acceptance of gifts. Iowa Code §§ 18.117; 28.11-28.16; 68B.2(5), (6) and (9); 68B.5; 79.11 (1983). 1) in this instance the Foundation should not be considered a state agency; 2) Commission employees may claim mileage reimbursement under § 18.117 for the business use of vehicles leased for them by the Foundation; 3) use by Commission officials and employees of vehicles leased by the Foundation for business and personal purposes does not violate § 68B.5; and 4) § 79.11 does not prohibit payment of mileage reimbursement to Commission employees using Foundation-leased vehicles on state business. (Weeg to Johnson, State Auditor, 4/4/85) #85-4-1(L)

The Honorable Richard D. Johnson
State Auditor
State Capitol
L O C A L

April 4, 1985

Dear Mr. Johnson:

You have requested an opinion of the Attorney General on several questions relating to the Iowa Development Commission Foundation's [hereafter the Foundation] practice of leasing vehicles for use by Iowa Development Commission [hereafter the Commission] employees. These questions have arisen following an audit your office has conducted of the Commission. You describe the relevant facts in your request letter and the accompanying draft audit as follows.

The Foundation leases vehicles for the use, both business and personal, of certain Commission employees. The primary reason for this arrangement is that prospective economic development clients in Iowa often request confidentiality when traveling throughout the state. Use of marked state motor pool vehicles prevents compliance with this request.[1] In addition, the Foundation pays a portion of the automobile insurance costs for these vehicles. Other operating costs, such as gas, oil, tires, and maintenance, are paid by the Commission employees who use these vehicles. However, the leased vehicles are generally new and under warranty; further, some of the vehicles are replaced as

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[1] See Iowa Code § 18.115(7) (1983) ("The state vehicle dispatcher shall cause to be marked on every state-owned vehicle a sign in a conspicuous place which indicates its ownership by the state except cars requested to be exempt by the commissioner of public safety or the director of the department of general services.")

often as every three to four months. Thus, operating costs aside from gas and oil are likely to be minimal. The Commission reimburses these employees at the rate of twenty-four cents per mile for their business mileage. In turn, the employees reimburse the Foundation eight cents per mile for their personal mileage.

Your questions are as follows:

1) Is the Iowa Development Commission Foundation, Inc., a State agency? And, are the operations of the Foundation governed by the same laws as the Iowa Development Commission?

2) Can employees charge the State 24¢ per mile for use of vehicles which are leased by the Foundation?

3) Do the conditions cited in the audit finding constitute a violation of Section 68B.5 of the Code of Iowa?

4) Would Section 79.11 of the Code of Iowa prohibit the mileage reimbursement claimed by Commission employees as described in the audit finding?

5) Does the unreimbursed private use of the leased vehicles or Commission reimbursements in excess of actual cost incurred by the employees represent additional compensation and, as such, does the Commission or the Foundation have any responsibility to report the compensation to the appropriate taxing authorities?

I.

Your first question is whether the Foundation is a state agency and whether the Foundation is governed by the same laws as the Commission. Iowa Code Chapter 28 (1983) governs the Iowa Development Commission; the provisions setting forth the authority to create the Iowa Development Commission Foundation are found within that chapter and provide in their entirety as follows:

> 28.11 Corporation for receiving and disbursing funds. The Iowa development commission is hereby authorized to form a

> corporation under the provisions of chapter 504 [corporation not for pecuniary profit] for the purpose of receiving and disbursing funds from public or private sources to be used to further the overall development and well-being of the state.
>
> 28.14 Incorporators. The incorporators of the corporation formed under sections 28.11, 28.15 and 28.16, shall be:
>
> 1. The chairman of the Iowa development commission.
> 2. The director of the Iowa development commission.
> 3. A member of the Iowa development commission selected by the chairman.
>
> 28.15 Board of directors. The board of directors of the corporation formed under sections 28.11, 28.14 and 28.16 shall be the members of the Iowa development commission or their successors in office.
>
> 28.16 Accepting grants in aid. The corporation formed under sections 28.11, 28.14 and 28.15 is hereby authorized to accept grants of money or property from the federal government or any other source and may upon its own order use its money, property or other resources for any of the purposes herein.

Thus, the Foundation is authorized to receive money from private as well as public sources, and may spend this money "to further the overall development and well-being of the state, § 28.11, and "for any of the purposes herein," § 28.16. We believe this broad language authorizes the Foundation to use its funds for any of the purposes expressly or impliedly authorized in Ch. 28.

As set forth above, the Foundation is a Ch. 504 not-for-profit corporation, and therefore is a private, rather than public, entity. Nonetheless, there may be situations in which the Foundation should be considered a public agency for certain purposes. See, e.g., 1972 Op.Att'yGen. 434 (Foundation qualifies as a state agency under federal Rivers and Harbors Act for purpose of acquiring property for development from army corps of engineers). Because of the variety of situations in which

this question could arise, we cannot answer your question generally.

In this situation, which involves a question of mileage expenses submitted by state employees using cars leased by the Foundation, we do not believe the Foundation should be considered a public agency. First, the Foundation is a private legal entity. In leasing cars for use by Commission employees, the Foundation is not acting in a governmental capacity or exercising governmental authority in any manner. Cf. 1972 Op.Att'yGen. 434. While the Foundation is authorized to receive public as well as private monies, see § 28.11, mere receipt of public funds does not alone convert the Foundation into a public agency, just as receipt of public funds by other private organizations does not convert those organizations into public agencies.[2] We believe legislative intent further supports our conclusion in this instance. While the Foundation acts as "an adjunct or arm of the development commission," 1972 Op.Att'yGen. at 435, the legislature did expressly provide for its creation as a private entity to receive and expend public and private funds for economic development purposes. Presumably the legislature foresaw the likelihood that the Foundation would generally not be subject to state laws governing public agencies, indeed, that was one of the likely purposes in creating the Foundation.

For these reasons we thus conclude the Foundation should not be considered a public agency in this instance.[3] However, we do not by this opinion foreclose the possibility that the Foundation may be considered a public agency in other situations, such as that discussed in 1972 Op.Att'yGen. 434; nor do we suggest that the factors considered in reaching this conclusion are exclusive.

The additional question of what laws apply to each entity is also a broad one, the answer to which again depends on each

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[2] Furthermore, you have informed us that the Foundation is funded primarily from private sources. While public monies are received primarily in the form of registration fees from governmental subdivisions attending Foundation-sponsored activities, at this time they constitute only a small percentage of the Foundation's budget.

[3] In Op.Att'yGen. #83-5-6, we held that private use of property leased in the name of a public agency and acquired with public funds is prohibited by Iowa Const., Art. III, § 31, and Iowa Code § 721.2(5) (1983), unless the private use is incidental to a public purpose. Because we conclude that in this instance the Foundation should not be considered a public agency, this opinion is inapplicable.

situation in which the question arises. Rather than attempt to provide a comprehensive answer, if that is even possible, we will instead discuss the laws applicable to each of your remaining questions.

II.

Your second question asks whether Commission employees may charge the state twenty-four cents per mile for use of vehicles which are leased by the Foundation.

The primary statutory provision governing mileage reimbursement for state employees is § 18.117, which provides as follows:

> A state officer or employee shall not use a state-owned motor vehicle for personal private use, nor shall the officer or employee be compensated for driving a privately owned motor vehicle unless it is done on state business with the approval of the state vehicle dispatcher, and in that case the officer or employee shall receive twenty-two cents per mile effective July 1, 1981, and twenty-four cents per mile effective July 1, 1982. A statutory provision stipulating necessary mileage, travel, or actual expenses reimbursement to a state officer falls under the mileage reimbursement limitation provided in this section unless specifically provided otherwise. Any peace officer employed by the state as defined in section 801.4 who is required to use a private vehicle in the performance of official duties shall receive reimbursement for mileage expense at the rate specified in this section. However, the state vehicle dispatcher may delegate authority to officials of the state, and department heads, for the use of private vehicles on state business up to a yearly mileage figure established by the director of general services and approved by the executive council. If a state motor vehicle has been assigned to a state officer or employee, the officer or employee shall not collect mileage for the use of a privately owned vehicle unless the state vehicle assigned is not usable.

> This section shall not apply to officials and employees of the state whose mileage is paid by other than state agencies and, except for the provisions relating to mileage reimbursement, this section shall not apply to elected officers of the state, judges of the district court, judges of the court of appeals or judges of the supreme court.

(emphasis added). This section provides that mileage reimbursement may be paid to a state officer or employee who uses "a privately owned motor vehicle" on state business if that use is approved by the state vehicle dispatcher.[4] The phrase "privately owned motor vehicle" is not defined further. We believe the meaning of this phrase may be easily discerned from the plain language used: "privately owned" means simply a vehicle owned by a private person, as distinguished from a vehicle provided by the state motor pool. The simple phrase "privately owned" cannot be read as including a requirement that the vehicle actually be owned by the person who uses the vehicle on state business and who subsequently collects mileage reimbursement for that use. While such a requirement could arguably be seen as desirable, the legislature did not impose such a requirement. One reason it did not, perhaps, is the difficulty likely to be encountered in verifying that the person claiming mileage reimbursement actually owned the vehicle used. It is likely that mileage reimbursement is occasionally paid to state employees for using vehicles legally owned by spouses, relatives, or friends. The legislature has left allocation of mileage reimbursement to these private parties rather than to the state.

Because a state employee may claim mileage reimbursement for operating a private vehicle that the employee does not actually own, we conclude that Commission employees may claim mileage reimbursement for using a Foundation-leased vehicle on state business. Of course, as set forth in § 18.117, use of any privately owned vehicle for state business must in all cases be approved by the state vehicle dispatcher.

This conclusion is also consistent with the overall statutory scheme for use of vehicles on state business. As set forth above, § 18.117 governs reimbursement for use of a private

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[4] We note that as an alternative to reimbursing mileage expenses as they are incurred, § 18.117 allows the vehicle dispatcher to authorize state officials and department heads to use private vehicles up to an approved yearly mileage figure.

vehicle on state business. Section 18.115 governs the use of state motor pool vehicles on state business; in particular, § 18.115(9) provides for purchasing gas and oil and obtaining other normal automobile maintenance for state-owned vehicles. There is no provision for paying actual expenses for privately owned vehicles used on state business, even though a person using a private vehicle owned by another may incur expenses which are less than the mileage reimbursement paid by the state.

III.

Your third question is whether a Commission employee's use of a vehicle leased by the Foundation constitutes a violation of § 68B.5. You do not distinguish between business or personal use of the vehicle in your question, so we shall consider both aspects of this question.

Section 68B.5 provides as follows:

> An official, employee, local official, local employee, member of the general assembly, candidate, or legislative employee shall not, directly or indirectly, solicit, accept, or receive any gift having a value of fifty dollars or more in any one occurrence. A person shall not, directly or indirectly, offer or make any such gift to an official, employee, local official, local employee, member of the general assembly, candidate or legislative employee which has a value in excess of fifty dollars in any one occurrence.

Commission officials and employees clearly fall within the scope of this prohibition given the definition of the terms "official" and "employee" in §§ 68B.2(5) and (6). Further, annual use of an automobile leased by another for business and personal purposes is a service which on its face is worth more than fifty dollars. Indeed, in your audit report you state the Foundation's monthly lease payment is $300.00.

An initial question is whether use of the vehicles in question for business and personal purposes constitutes a gift as that term is used in § 68B.5. "Gift" is defined in § 68B.2(9) as follows:

> "Gift" means a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness, or anything else of

> value in return for which legal consideration of equal or greater value is not given and received. However, "gift" does not mean any of the following:
>
> a. Anything received by a donee whose official action or lack of official action will potentially have no material effect, distinguishable from material effects on the public generally, on the interests of the donor.

* * *

Subsequent exceptions detailed in subsections (b) through (h) are clearly inapplicable. The Foundation's provision of a leased vehicle for use by Commission employees is clearly a rendering of property which is not paid for by these employees. The issue that remains is whether the Commission employees' official actions will have any material effect, distinguishable from material effects on the public generally, on the interests of the Foundation. We believe the answer to this question is no.

The prohibition in § 68B.5 against the acceptance or solicitation of gifts by state employees was enacted "to prevent outsiders from attempting to influence state employees and state employees from using their decision-making powers to solicit favors from others." 1978 Op.Att'yGen. 139. Even before Ch. 68B was amended[5] to exclude from its coverage those gifts which would likely have no special material effect on the interests of the donor (<u>see</u> § 68B.2(9)(a)), we used this rationale to conclude that gifts which would not be likely to influence the interests of the donor would not be barred by Ch. 68B. <u>See</u>, <u>e.g.</u>, 1978 Op.Att'yGen. 139 (distribution of free grandstand tickets by Iowa State Fair Board to each board member permissible under Ch. 68B). Following the enactment of the 1980 amendments, we concluded in 1980 Op.Att'yGen. 705 (#80-5-17(L))[6] that, absent special circum-

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[5] <u>See</u> 1980 Iowa Acts, Ch. 1015.

[6] In this opinion we discussed a number of pre-1980 opinions on the question of whether payment of travel expenses was a gift prohibited under Ch. 68B. To the extent those opinions may be relevant to this situation, our 1980 opinion noted that the varying conclusions of these opinions were difficult to reconcile and implied that the 1980 amendments to Ch. 68B would likely affect those conclusions. Op.Att'yGen. #80-5-17(L) at 2-3. For this reason we do not find it necessary to discuss these previous opinions.

stances, a legislator's trip to a foreign country with expenses paid by that country's government would not likely be found to constitute a "gift" under the exception in § 68B.2(9)(a), as it is unlikely the legislator could materially effect the interests of the foreign government.

In addition, we have previously concluded that Ch. 68B is a penal statute and must therefore be construed narrowly "to give all persons a 'clear and unequivocal warning in language that people would generally understand as to what actions would expose them to liabilities for penalties.'" 1982 Op.Att'yGen. 496, 501, citing Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 437-38 (Iowa 1978).

Given the conclusions of our prior opinions and the requirement to construe this statute narrowly, we believe there is little question that use by Commission employees of vehicles leased by the Foundation is not prohibited by § 68B.5. As set forth above, the Foundation is a not-for-profit corporation created by statute to receive and spend funds from public or private sources "to further the overall development and well-being of the state." § 28.11. Section 28.16 expressly authorizes the Foundation to use its funds or other resources for any of the purposes expressed in Ch. 28, which governs the Commission. See also § 28.11 (Foundation funds "to be used to further the overall development and well-being of the state."). The Foundation's incorporators are the members of the Commission and its director, § 28.14, and the Foundation's board of directors is comprised of members of the Commission, § 28.15. Thus, though the Commission and the Foundation are separate legal entities, the purposes of the Commission and the Foundation are by statute the same, their top-level leadership identical. Accordingly, it is difficult to see how the Foundation's act of providing Commission employees with a leased vehicle for business and personal use will have any material effect on the interests of the Foundation when the interests of the Commission and Foundation are the same.

IV.

Your fourth question asks whether § 79.11 prohibits Commission employees from claiming mileage reimbursement incurred when using vehicles provided by the Foundation on state business. This section provides as follows:

> No public officer or employee shall be allowed either mileage or transportation expense when he is gratuitously transported by another public officer or employee who is

> also entitled to mileage or transportation expense.

We believe this section clearly prohibits a public employee from claiming mileage reimbursement or actual expenses for trips on which that employee incurs no expenses whatsoever: specifically trips when that employee is transported by another at no cost, or trips when the employee is transported by another public employee who is entitled to reimbursement. Thus, this provision has previously been construed as prohibiting several public employees who travel together from individually collecting reimbursement for that travel. Only the person who has incurred actual travel expenses is entitled to reimbursement. See 1934 Op.Att'yGen. 305.

Applying § 79.11 to the facts of your opinion request, it is clear that Commission employees are not being transported by another public officer or employee who is entitled to travel reimbursement. Arguably, however, these employees are being "gratuitously transported by another" in that the Foundation is providing the employees' vehicles. However, use of the term "gratuitously" renders § 79.11 inapplicable to this situation: though Commission employees are not using vehicles owned by them personally for their travel, they nonetheless incur operating expenses, such as gas, oil, and routine maintenance, when using these vehicles and therefore are not transported "gratuitously." These Commission employees are in the same position as other state employees who are reimbursed for mileage incurred while using vehicles legally owned or provided by another. In either case, § 79.11 does not prohibit mileage reimbursement for such use so long as the person claiming reimbursement pays the actual expenses of that travel.

V.

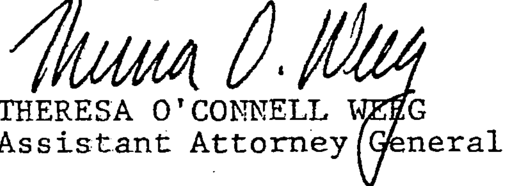
Your fifth question asks whether the private use of vehicles leased by the Foundation or reimbursements in excess of actual cost constitutes additional compensation which should be reported to taxing authorities. This office cannot determine in the first instance the extent of the potential income tax liability in this situation. This question should be addressed by the Iowa Department of Revenue and the Internal Revenue Service rather than this office.

CONCLUSION

In conclusion, it is our opinion that: 1) in this instance the Foundation should not be considered a state agency; 2) Commis-

sion employees may claim mileage reimbursement under § 18.117 for the business use of vehicles leased for them by the Foundation; 3) use by Commission officials and employees of vehicles leased by the Foundation for business and personal purposes does not violate § 68B.5; and 4) § 79.11 does not prohibit payment of mileage reimbursement to Commission employees using Foundation-leased vehicles on state business.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:js

SCHOOLS; Sale or Lease of School Sites. Iowa Code §§ 278.1(2); 297.22; 297.23; 297.24. A school district may sell part of a tract of land without submitting the issue to the voters if the value of the land to be sold does not exceed $25,000. All sales of property owned by a school district are subject to the competitive bidding requirements of Iowa Code §§ 297.23 and 297.24. A school district may not evade the competitive bidding statutes by executing a lease containing an option to buy. (Fleming to Hultman, State Senator, 5/1/85) #85-5/2(L)

May 1, 1985

The Honorable Calvin O. Hultman
State Senator
L O C A L

Dear Senator Hultman:

You have asked for our opinion on a series of issues with regard to the operation of Iowa Code § 297.22 (1985) which grants power to school districts to sell or lease schoolhouses, sites or other property. That code section and Iowa Code §§ 297.23, 297.24 and 297.25 (1985) have not been construed by the Iowa Supreme Court; therefore we must apply the principles of statutory construction in responding to your questions. _See generally_, Iowa Code Ch. 4 (1985). _Welp v. Iowa Dept. of Res._, 333 N.W.2d 481, 483 (Iowa 1983); _Iowa Nat. Indust. Loan Co. v. Iowa State Dept. of Rev._, 224 N.W.2d 437 (Iowa 1974).

Your questions will be addressed separately. The first is:

1. May an Iowa school district sell _part_ of a tract of land, without submitting the sale in the form of a question to the voters, even though the value of the _whole_ tract is more than $25,000?

It is our opinion that a school district may sell part of a tract of land without submitting the matter to the voters if the part that is to be sold has a value that does not exceed $25,000. The first unnumbered paragraph of § 297.22 provides:

> The board of directors of a school district may sell, lease, or dispose of, in whole or in part, a schoolhouse, site, or other property belonging to the district for which the value does not exceed twenty-five thousand dollars. If the value exceeds twenty-five thousand dollars, the board shall submit the question at an election under section 278.1, subsection 2, to authorize the sale, lease or disposal.

(Emphasis added).[1] The statute also provides that any real estate that is to be sold must be appraised as provided by § 297.22, third unnumbered paragraph. We note that school districts exercise only the powers granted to them by the legislature. See e.g., Barnett v. Durant Com. Sch. Dist., 249 N.W.2d 626, 627 (Iowa 1977). Moreover, the General Assembly has assigned certain powers to the board of directors of school districts and other powers to the voters of the district. Cf. Iowa Code § 278.1 (1985) and Iowa Code Ch. 297 (1985).

The meaning of the first paragraph of § 297.22 is clear. The district may sell, lease or dispose of property without a vote of the people if the value of the property does not exceed $25,000. There is nothing in that code section or in any other section of the code that requires a school district to sell an entire site owned by the district if it is determined that a portion of the site is no longer needed for school purposes. Indeed, the power to sell, lease or dispose of "part" of a site is included in § 297.22.

In considering statutes, we must avoid strained, impractical or absurd results. Welp v. Iowa Dept. of Rev., 333 N.W.2d at 483. To require the sale of a portion of a site, the value of which did not exceed $25,000, to be submitted to the voters because the value of the entire tract exceeded $25,000 would be a

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[1] Iowa Code § 297.22 has been amended frequently. See 13 Iowa Code Ann. 324 and 13 Iowa Code Ann., 1984-85, pocket part, p. 137, for history of section. Earlier opinions of this office related to earlier versions of the statute and were not concerned with issues presented here. See e.g., 1972 Op.Att'yGen. 427; 1972 Op.Att'yGen. 691.

strained and absurd construction. On the other hand, if the appraised value of the "part of a tract" that is to be sold exceeds $25,000, a vote to approve sale of the "part of a tract" would be required by § 297.22 and § 278.1(2).[2]

Your second question is as follows:

> 2. If such a sale must be submitted in the form of a question to the voters, may the question to the voters be worded to allow the school district to sell the parcel of the whole tract to a specifically named buyer, or must the school district place the parcel for sale on a competitive basis only? Must the school district place the whole tract up for competitive bidding?

As we stated above, if the value of the property to be sold does not exceed $25,000, the matter need not be submitted to the voters. But if the value of the property to be sold exceeds $25,000, the issue must be submitted to the voters. It is our opinion that in either case, the sale must be accomplished by competitive bidding as provided by Iowa Code §§ 297.23 and 297.24 (1985). It is very important that the bidding requirement is separate from the section that sets out the alternative methods for selling and leasing property. Moreover, the competitive bidding requirement does not include an exception based on value of the property to be sold.

In our opinion the decision to sell property, either by the voters pursuant to Iowa Code § 278.1, or by the board, pursuant to § 297.22, is the first step in the process. Neither of those sections provide for a decision to be made that a sale will be made to a particular person. The requirement for appraisal of real estate contained in the third unnumbered paragraph of § 297.22 serves two purposes. First, the appraisal permits a school board to determine whether authority to sell the property must be sought from the voters because the value is more than $25,000. Second, it provides a basis for the board to "decline to sell if all the bids received are deemed inadequate." Iowa Code § 297.24 (1985).

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[2] We have assumed in answering your questions that the transactions described do not involve land that would be subject to Iowa Code § 297.15 through 297.20 (1985). We have also assumed that the transactions are not between the school district and a county, municipal corporation, or township. See Iowa Code § 297.22, fourth unnumbered paragraph.

Inasmuch as "the only powers of a school district are those expressly granted or necessarily implied in governing statutes," Barnett, 249 N.W.2d at 627, we have examined with care the statutes which provide for the sale of real estate. There is an express grant of authority in Iowa Code § 278.1 for the voters to authorize sale of property and "the application to be made of the proceeds thereof," Iowa Code § 278.1(2). In our opinion, that subsection does not provide, expressly or by implication, for submission of a question to the voters that includes authorization to sell real estate to a particular person. This view is augmented by the sequence of the sections pertaining to such sales and to the requirements for competitive bidding in Iowa Code §§ 297.23 and 297.24.

Finally, as we stated above, if the school district decides, pursuant to Iowa Code § 278.1(2) or § 297.22, to sell a part of a tract of land, there is no need to sell the entire tract. On the other hand, subdividing a tract into portions with values less than $25,000, before selling each and every portion, to avoid the voting requirement of § 278.1(2) would not be appropriate. See e.g., West Harrison Com. Sch. Dist. v. Board of Public Instruction, 347 N.W.2d 684 (Iowa App. 1984).

Your third question is:

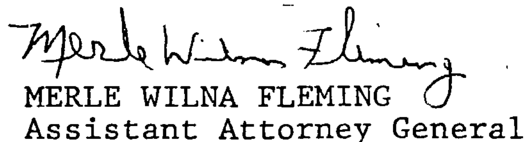
> 3. If the school district cannot sell the parcel of the whole tract and/or if it cannot word the question to the voters to allow the school district to sell the parcel to a specifically named buyer, may the school district enter into a long-term lease with the otherwise specific buyer, now dealing with the school district as a specific lessee, with an agreement allowing the lessee an option to buy the parcel in question, if the school district sells the rest of the whole tract to another possible buyer?

We apply the same principles of statutory construction to this final question as we did to the others. In our view, the power to lease property that is not in use for school purposes does not include, expressly or by implication, the power to grant the lessee an option to buy in the present or future. Such an option in a lease would serve to avoid the competitive bidding requirements in §§ 297.23 and 297.24. Competitive bidding statutes are "employed for the protection of the public to secure

by competition among bidders, the best results at the [highest] price, and to forestall fraud, favoritism and corruption in the making of contracts." Istari Construction, Inc. v. City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983). The grant of a lease with an option to buy would surely be a form of favoritism to the lessee and would be a means "to circumvent the competitive bidding procedure set out in the statute." West Harrison, 347 N.W.2d at 688. In other words, a school district does not have power to enter into a lease of school property with an option to the lessee to buy the real estate. Our opinion is the same whether the lease is for a "part of a tract," or the entire tract.

In summary, a school district may sell part of a tract of land without submitting the issue to the voters if the value of the land to be sold does not exceed $25,000. All sales of property owned by a school district are subject to the competitive bidding requirements of Iowa Code §§ 297.23 and 297.24. A school district may not evade the competitive bidding statutes by executing a lease containing an option to buy.

Sincerely yours,



MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

TAXATION: Apportionment of Net Income of Non-Farm Corporations Which Ship Goods to Non-Iowa Destinations. Iowa Code §422.33(2)(1985). The mere shipment of goods via common carrier to non-Iowa destinations by a non-farm corporation conducting its business within Iowa would not render the corporation's business partly within and partly without Iowa so as to allow apportionment of net income pursuant to Iowa Code §422.33(2). Whether apportionment of net income would be allowed if the goods were shipped in the corporation's own vehicles would depend on the facts and circumstances of the case. (Kuehn to Bair, Director of the Iowa Department of Revenue, 5/6/85) #85-5-3(L)

May 6, 1985

G. D. Bair, Director
Department of Revenue
Hoover Building
L O C A L

Dear Mr. Bair:

You have requested the opinion of the Attorney General pertaining to whether a non-farm corporation, doing business in Iowa, which ships its goods to non-Iowa destinations would be allowed to apportion its income pursuant to Iowa Code §422.33(2)(1985). The questions you have posed are as follows.

1. Would a non-farm corporation doing business in Iowa be considered to be doing business partly outside of Iowa within the meaning of Iowa Code §422.33(2)(1985) if that corporation's only non-Iowa business activity was mere shipment of goods via a common carrier to non-Iowa destinations?

2. If the answer to question number one is yes, would the corporation be required to apportion its income pursuant to subsection 422.33(2)?

3. Would the answers to numbers one and two change if the goods were shipped from Iowa via the corporation's own vehicles?

The answer to question one is clearly no.[1] If a non-farm corporation conducted all of its business operations in Iowa and shipped its goods outside of Iowa, the mere shipment of such goods via common carrier to non-Iowa destinations would not render the corporation's business to be partly within and partly without Iowa so as to authorize apportionment of income by the Iowa sales formula. Under the circumstances presented in question one, the corporation's entire net income would be derived from business carried on exclusively in Iowa. See Irvine Co. v. McColgan, 26 Cal. 2d 160, 157 P.2d 847 (1945); W.J. Dickey & Sons, Inc. v. State Tax Commission, 212 Md. 607, 131 A.2d 277 (1957); State of Georgia v. Coca-Cola Bottling Co., 214 Ga. 316, 104 S.E.2d 574 (1958); E.F. Johnson Company v. Commissioner of Taxation, 224 N.W.2d 150 (Minnesota 1975). Since question one was answered in the negative, question two is moot.

Question three queries whether the answer to question one would change if the goods were shipped from Iowa via the corporation's own vehicles. Occasional deliveries from Iowa to another state in a corporation's own vehicles are not enough non-Iowa business activity to constitute doing business outside the state. See In the Matter of State Sales or Use Tax Liability of Webber Furniture, 290 N.W.2d 865, 868-869 (S.D. 1980).However, substantial deliveries in a corporation's own vehicles may be enough business activity outside of Iowa to constitute doing business outside the state. In the Matter of State Sales or Use Tax Liability of Webber Furniture, supra. Thus the answer to question three will have to be initially determined by the Department of Revenue based on the facts and circumstances of the particular case.

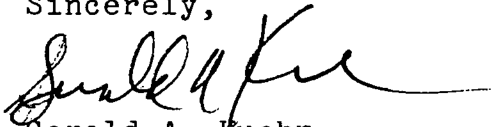
Based upon the foregoing, it is the opinion of the Attorney General that the mere shipment of goods via common carrier to non-Iowa destinations by a non-farm corporation conducting its business within Iowa would not render the corporation's business partly within and partly without Iowa so as to authorize apportionment of net income pursuant to Iowa Code §422.33(2).

---

[1]Such a non-farm corporation is not doing business outside of Iowa when it ships its goods via common carrier to non-Iowa destinations because the corporation is performing no business activity outside of Iowa. It is the common carrier rather than the corporation that is performing a business activity outside of Iowa.

Furthermore, whether apportionment of net income would be allowed if a non-farm corporation would ship goods from Iowa in the corporation's own vehicles would depend on the facts and circumstances of the particular case.

Sincerely,



Gerald A. Kuehn
Assistant Attorney General

WP5

STATE OFFICERS AND DEPARTMENTS; MERIT SYSTEM EXEMPTIONS; IOWA STATE FAIR BOARD. Iowa Code sections 19A.1, 19A.3, 19A.3(17), 173.14(7) (1985); 570 I.A.C. 7.4(2), 8.5 and 8.8. Part-time employees of the Iowa State Fair who are hired by the Fair Board pursuant to section 173.14(7) as patrol officers are subject to coverage under the Iowa merit system and Iowa Code Chapter 19A. (Benton to Van Winkle, Director, Iowa Merit Employment Department, 5/6/85) #85-5-4(L)

May 6, 1985

Mr. B. Frances Van Winkle
Director, Iowa Merit
Employment Department
L O C A L

Dear Mr. Van Winkle:

This is in response to your request for an Attorney General's opinion concerning the status under the Iowa merit system of part-time patrol personnel employed by the Iowa State Fair Board. The Fair Board employs both full and part-time patrol officers pursuant to Iowa Code section 173.14(7) which provides:

> The president of the state fair board may appoint such number of special police as he may deem necessary and such officers are hereby vested with the powers and charged with the duties of peace officers.

The part-time patrol officers perform miscellaneous duties such as cleaning buildings and animal stables, gardening and security work. Security work may include being on call to patrol the grounds and work traffic and crowd control during either interim events or the fair itself. The hours of the part-time patrol officers are determined generally by the requirements of a particular event or the need to cover in a patrol shift when a full time patrol officer has taken vacation or sick leave. The

part-time officer generally works a total of three to four months per year. Under the present system, these part-time officers are not part of the merit system, that is, they are not hired pursuant to merit procedures nor included in any merit classifications.

This situation has prompted your request for our opinion in which you ask:

> Are part-time employees of the Iowa State Fair who perform patrol duties subject to coverage under the Iowa Merit Employment System and Iowa Code chapter 19A, excluding summer employment during the period May 15 through September 15? What authority prevails, Iowa Code subsection 173.15(7) or Iowa Code chapter 19A(3)?

Your letter requires that we examine the Fair Board's authority to appoint peace officers under the requirements of the merit system found in Iowa Code Chapter 19A.

Chapter 19A establishes the state's merit employment system with the express purpose of establishing a system of personnel administration based on merit principles. Iowa Code section 19A.1 (1985). The Merit Employment Department has promulgated regulations at 570 I.A.C. et seq. establishing methods for the appointment of state employees, a classification system and related pay schedules, and procedures for disciplinary actions and appeals. The operative provision concerning the scope of the merit system is found at section 19A.3 which states in part:

> The merit system shall apply to all employees of the state and to all positions in the state government now existing or hereafter established, except the following:
>
> . . . .
>
> (17) Summer employment appointments during the period May 15 through September 15.

Under this language, the state's merit system applies to all employees of the state except those employees statutorily excluded. See 1982 Op.Att'yGen. 392. Subsection seventeen specifically excludes summer employment appointments during the May 15 through September 15 period.

The Fair Board's authority to employ its patrol officers derives from section 173.15(7) which authorizes the president to appoint special police charged with the duties of peace officers. However, despite this power to hire patrol officers, the Fair

Board is not excluded from the coverage of Chapter 19A. Since the legislature has not chosen to exempt the Board from the provisions of the merit system, we must conclude that the part-time employees hired by the Board should be within the merit system. In reaching this conclusion, we do not perceive any conflict between the Board's authority to hire and the requirements of Chapter 19A. The authority to hire certain personnel does not itself operate to exclude those personnel from the merit system. There is no language within section 173.14(7) which establishes a classification or pay system, consequently, there is no direct conflict between this provision and either the various merit provisions in Chapter 19A or the department's regulations. We do note that the Board's hiring authority precedes the establishment of the Merit Department. However, section 19A.3 states specifically that the system is to apply to all state employees and all positions "now existing or hereafter established." The requirements of the merit system apply to the part-time patrol officers hired under the authority of section 173.14(7).

As we understand the facts, the part-time patrol officers work at various times throughout the year. Section 19A.3(17) does exclude from the merit system summer appointments "during the period May 15 through September 15." We believe that this exclusion is limited by its terms to those employees hired to work for the May 15 through September 15 period. Accordingly, this exclusion would not apply to the Fair's part-time officers who are expected to work on different occasions during the course of the year. Of course, section 19A.3(17) would apply to any Fair employees, whether or not hired pursuant to section 173.14(7), who are to work exclusively during the May 15 through September 15 period.

Finally, we note that the merit system does provide a mechanism through which part-time positions can be filled by a state employer. See, e.g., 570 I.A.C. 7.4(2), 8.5, and 8.8. These regulations pertain generally to intermittent, emergency and part-time appointments. As we read these regulations, they may be utilized by the Fair Board to fill part-time positions throughout the year as the need arises. In filling its part-time positions however, the Fair Board is bound by Chapter 19A and the Merit Department's regulations.

Sincerely,

TIMOTHY D. BENTON
Assistant Attorney General

TDB/cjc

SCHOOLS: Certification of Teachers. Iowa Const., art. IX, § 15; Iowa Code §§ 258A.1, 258A.2(1) and 260.12 (1985). Recertification procedures which would require teachers to demonstrate that they are up-to-date in the materials they present and in the methods of presentation are related to the general welfare and are "applicable to the profession." Thus, the repeal of the statutory provision for permanent teaching certificates in order to impose recertification requirements would not result in the deprivation of property rights without due process to those currently holding such certificates where the procedures for obtaining or demonstrating the requisites for recertification would be attainable by reasonable study or application and reasonably suited to accomplish the purpose of protecting the general welfare. (Hamilton to Brown, State Senator, 5/14/85) #85-5-6(L)

May 14, 1985

The Honorable Joe Brown
State Senator
State Capitol
L O C A L

Dear Senator Brown:

We have received your request for an opinion of the Attorney General. You asked whether current holders of permanent teaching certificates governed by Iowa Code § 260.12 (1985) have any property rights that would render the immediate repeal of that Code section constitutionally inapplicable to those permanent certificate holders.

The provision at issue states:

> The minimum requirements for the board [of educational examiners] to award a permanent professional certificate to an applicant are:
>
> 1. Possession of a valid certificate to teach.
>
> 2. Completion of four years of successful experience.
>
> 3. Possession of a master's degree or a professional degree beyond the baccalaureate level.

Iowa Code § 260.12 (1985).

You stated in your letter that the purpose for repealing this Code section would be to replace it with a section that would be "more in the spirit of the new emphasis on educational excellence." In particular, it is expected that educational professionals and classroom teachers will be asked to recertify periodically to keep up-to-date with changes in both subject matter and methods of teaching.

The leading case on the issue of professional licensing is Dent v. West Virginia, 129 U.S. 114 (1889). A doctor who had been practicing medicine in the state for six years did not meet the new statutory requirements for the issuance of the requisite certificate to practice medicine. Id. at 118. He claimed that the denial of his right to continue in the practice of medicine constituted a deprivation of his previously acquired vested right and estate in the profession. Id. at 121. Writing for the Court, Justice Field stated:

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. . . . The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But, there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity. . . . The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they

> can operate to deprive one of his right to pursue a lawful vocation.

Dent v. West Virginia at 121-122 (emphasis added). The Court further explained that the same reasons which control in imposing conditions to practicing the profession in the first instance may call for the imposition of additional conditions as advances in the field occur. Id. at 123.

While Dent dealt with certification to practice medicine, the language referred to above indicates that the same principles would be applicable to any profession which relates to the general welfare of the people. Indeed, the Dent reasoning has been relied on in cases upholding state legislation regulating dentists, lawyers, chiropractors and engineers. (See Douglas v. Noble, 261 U.S. 165 (1923); Martin v. Walton, 368 U.S. 25 (1961); Week v. Wisconsin State Board of Chiropractic, 30 N.W.2d 187 (Wis. 1947); and Smith v. State of California, 336 F.2d 530 (9th Cir. 1964), respectively).

The Iowa Supreme Court has applied similar reasoning in upholding state legislation pertaining to the certification of barbers and cosmetologists. In Green v. Shama, 217 N.W.2d 547 (Iowa 1974), the Court determined that a statute prohibiting any but licensed barbers from cutting men's hair did not constitute a denial of due process through its exclusion of cosmetologists, even though cosmetologists provided similar services to women. In reaching its decision, the Court stated that:

> Constitutional provisions prohibiting a state from depriving any person of life, liberty or property without due process of law do not prohibit the state from exercising its police power to pass and enforce laws as will benefit the health, morals, and general welfare of the people.

Green v. Shama at 554. Thus, the right to pursue a trade or calling was deemed subordinate to the state's right to limit such freedom by statutory regulation where the welfare of society so requires. Id. The only limit to the state's right to regulate under this theory is that the legislation may not be an arbitrary, unreasonable or improper use of state police power. Id. at 555.

It should first be noted that the Iowa Constitution grants broad powers to the legislature in the area of education. The general assembly is given the power to provide for the educational interest of the state in any manner that seems best and proper. Iowa Const., art. IX, § 15. In exercising this power,

Dent indicates that legislation which regulates educational professionals would be proper and not a denial of property rights if the regulations are appropriate to the calling or profession and the requirements are attainable by reasonable study or application. Similarly, under Green v. Shama the repeal of section 260.12 for the purpose of imposing recertification requirements would be within the recognized limits of state police power if such action is reasonably related to the general welfare of the public and reasonably suited to accomplish the purpose of protecting such general welfare.

Teaching certainly relates to the general welfare of the people. Educational professionals are responsible for presenting vast amounts of information to their students in such a manner that the students can comprehend the material and accumulate knowledge. Students must rely on their instructors to provide accurate information. In our view, recertification procedures designed to ensure that educational professionals are up-to-date in the materials they present as well as in methods of presentation would meet the "applicable to the profession" requirement set forth in Dent. The "reasonably related to the general welfare of the public" requirement established in Green v. Shama would likewise be met under this analysis.

With respect to imposing some type of continuing education requirements, Iowa Code chapter 258A explicitly provides for the same. The licensing boards for professionals in areas ranging from accounting through veterinary medicine are required to issue rules for continuing education requirements as a condition to license renewal. Iowa Code §§ 258A.1 and 258A.2(1) (1985). In addition, Iowa Court Rule 123.3 requires that attorneys complete a minimum of fifteen hours of continuing legal education per year. Failure to comply may result in suspension of the right to practice law. Iowa Court Rule 123.5. Extending a similar requirement to professional educators is simply a recognition of the fact that they too must maintain, improve or expand their skills and knowledge in a changing field.

It is not possible for this office to speculate as to whether procedures that might be established for obtaining or demonstrating familiarity with up-to-date materials and methods of presentation would be "attainable by reasonable study or application." Neither is it possible for this office to speculate as to whether procedures that might be established would be "reasonably suited to accomplish the purpose" of protecting the stated area of general welfare. However, if the Dent and Green v. Shama requirements are met, it is the opinion of this office that it is within the legislative power to repeal the current permanent certification statute through the imposition of a periodic recertification process and that this action would not

constitute a denial of due process with respect to those teachers who currently hold permanent certificates.

Sincerely,

ELENA-MARIA HAMILTON
Assistant Attorney General

EMH:rcp

SCHOOLS: Teacher Termination: Coaching Contracts. Iowa Code § 279.19A (1985); § 279.19B (1985); 1984 Iowa Acts, Ch. 1296. If a school district terminates the contract of a tenured teacher who held one contract that encompassed both teaching and coaching duties for the past year, the entire contract must be terminated. For the year beginning July 1, 1985, coaching duties must be assigned in a separate contract and such contracts will be governed by Iowa Code § 279.19A and § 279.19B (1985). (Fleming to Pellett, State Representative, 5/15/85) #85-5-7(L)

May 15, 1985

The Honorable Wendell C. Pellett
State Representative
206 E. 21st Street
Atlantic, Iowa 50022

Dear Representative Pellett:

You have asked for our opinion with respect to the operation of former law and the new law in the transition period for individuals who hold both teaching and coaching positions in Iowa school districts. It is important to keep in mind that the new law pertaining to coaching contracts took effect on March 15, 1985, for the school year commencing July 1, 1985. See 1984 Iowa Acts, Ch. 1296, § 4. You seek clarification of the law in reference to a recent case, Slockett v. Iowa Valley Community School Dist., 359 N.W.2d 446 (Iowa 1984). The first issue is:

1. In light of the recent decision by the Supreme Court in the Slockett case:

   (a) Is the coaching assignment of a tenured teacher when that contract is a part of the teaching contract, subject to termination at the end of the school year pursuant to Section 279.15 through 279.19 independently and of itself?
   OR
   (b) Must the whole contract (coaching and teaching) be terminated pursuant to 279.15 through 279.19?

It is our view that the entire contract of such a teacher must be terminated pursuant to Iowa Code §§ 279.15 through 279.19 (1985). The Slockett case involved the status of a person who held two contracts; one contract controlled her teaching duties and the other was an appointment as a coach which was an extra-duty assignment. See Slockett, 359 N.W.2d at 447-448. The court in Slockett distinguished the facts of that case, i.e., two separate contracts, from the facts in two earlier cases in which teachers held only one contract which encompassed coaching duties. In Bd. of Ed. of Fort Madison Com. Sch. Dist. v. Youel, 282 N.W.2d 677 (Iowa 1979), the tenured teacher was terminated but the conduct that gave rise to the termination was related to his coaching duties only. The court pointed out, however, that Youel had not requested to stay on as mathematics teacher, and expressed no view on whether partial dismissal was possible. Id. at 684. In Munger v. Jesup Com. Sch. Dist., 325 N.W.2d 377 (Iowa 1982), however, the teacher raised the partial dismissal question. As in Youel, the conduct at issue pertained to coaching only. Munger tendered his resignation as wrestling coach but not as a social studies teacher. Munger, 325 N.W.2d at 378. The court distinguished the case from Youel as follows:

> We touched on this matter in Youel, but did not decide it because in that case the teacher did not want to remain on those terms. The question is whether Munger could voluntarily resign from only a part of his duties under the contract. In other words, is the contract severable. Although some contracts may be so worded, this one is not. Munger's contract is indivisible, requiring him to render certain services, including coaching duties. Munger cannot unilaterally pick and choose the duties which he wishes to retain and those which he wishes to relinquish. He must render all the services required by his agreement.

Id. (emphasis in original and added). The issue you present was decided in Munger. In other words, if a school district this year terminates a certified person who held a single indivisible contract that encompassed both teaching and coaching duties, the entire contract must be terminated.

The court's ruling in Slockett, however, provides guidance for your second question:

2. Under the provisions of SF 2215, codified as Iowa Code § 279.19A and § 279.19B (1985), separate contracts must be issued for specified head coaching assignments. If a

> teacher coach has tenure in 1984-85, will his/her coaching contract continue to be protected by tenure as a separate coaching contract during 1985-86?

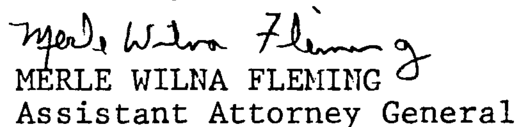
It is our opinion that a coaching contract for the school year beginning July 1, 1985, must be issued as a separate contract. In Slockett, the court ruled that:

> no duplicate tenure protections arose from the requirement that coaches be certified. We believe, and hold, that the legislature intended for tenure to attach to the teaching position, not the coaching assignment.
>
> The administrative requirement that coaches must be certified does not carry teachers' tenure rights into coaching assignments. . . .

Slockett, 359 N.W.2d at 450. Tenure did not exist for coaching as a separate right. Stated another way, the new law, Iowa Code §§ 279.19A and .19B, will apply to tenured teachers who held a contract in the past school year that included one or more coaching assignments. In other words, a school district must sever the contracts for the new year. The assignment of coaching duties and termination of coaching contracts for the school year commencing July 1, 1985, and thereafter will be governed by Iowa Code §§ 279.19A and .19B. The court was quite specific in holding that the General Assembly intended to change the law when it enacted 1984 Iowa Acts, Ch. 1296. See Slockett, 359 N.W.2d at 448. The rulings in Youel, Munger, and Slockett governed contracts for past years. All future coaching contracts and disputes arising under those contracts will be governed by the new law.

In summary, if a school district terminates the contract of a tenured teacher who held one contract that encompassed both teaching and coaching duties for the past year, the entire contract must be terminated. For the year beginning July 1, 1985, coaching duties must be assigned in a separate contract and such contracts will be governed by Iowa Code § 279.19A and § 279.19B (1985).

Sincerely,



MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

COUNTIES: RELIEF. Iowa Code §§ 252.1, 252.24, 252.25, 331.301(1). A county may, at its option, provide general relief to "needy persons". However, there is no statutory authority which requires the county of legal settlement to reimburse the county relief for such general relief provided to "needy persons". (Williams to Huffman, Pocahontas County Attorney, 5/21/85) #85-5-8(L)

May 21, 1985

Mr. H. Dale Huffman
Pocahontas County Attorney
15 Northwest Third Avenue
Pocahontas, Iowa 50574

Dear Mr. Huffman:

You ask whether counties may provide general relief to persons who do not have physical or mental disabilities, but who are otherwise "needy", as defined by Iowa Code § 252.1. You also ask whether a county of legal settlement may be required to reimburse a county providing general relief to such "needy" persons.

The answer to your first question is yes. The answer to your second question is no.

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 ...". Iowa Code § 252.1 defines "poor persons" as "those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor". However, § 252.1 expressly states that "this section shall not be construed to forbid aid to _needy persons_ who have some means, when the board shall be of the opinion that the same will be conducive to their welfare and the best interests of the public". _Id_.

The purpose of Iowa Code Ch. 252 is to provide, as the chapter is titled, for the "support of the poor". It is well settled that the provisions of Ch. 252 "shall be liberally construed with a view to promote its objects ...". Iowa Code

§ 4.2. Thus, given the express grant of authority contained within Iowa Code § 252.1, a county board of supervisors may elect to provide aid to needy persons "when the board shall be of the opinion that the same will be conducive to the welfare and in the best interests of the public". Id. This conclusion is consistent with the county's home rule authority, described in Iowa Code § 331.301(1).

Your second question asks whether the county of legal settlement may be forced to reimburse a county providing general relief to a needy person. At common law, public authorities have no duty to support or pay for services to poor or other needy persons. Such a duty, where it exists, rests entirely on statute. Michael v. Bd. of Social Welfare, 245 Iowa 961, 65 N.W.2d 89, (1954); In Re Frentress's Estate, 249 Iowa 783, 89 N.W.2d 367 (1956); In Re O'Donnell's Estate, 253 Iowa 607, 113 N.W.2d 246 (1962). Iowa has such a statutory scheme delineated in Iowa Code Ch. 252.

Under the Iowa scheme, the county where a person resides is responsible for providing general relief to poor persons. Iowa Code § 252.25. A county may provide general relief to a "needy" person. Iowa Code § 252.1.

Iowa Code § 252.24 requires the county of legal settlement to reimburse the county of relief for relief expenditures "incurred in the relief and care of a poor person". Id.

Nowhere in the Code is there an express requirement that the county of legal settlement pay for general relief provided to "needy persons" in another county. As the duty to reimburse the county of legal settlement is purely statutory, the answer to your second question is that the county of legal settlement is not required to reimburse the county of relief for needy persons.

It is important for both the county of legal settlement and the county providing relief to understand the distinction between payment for services and provision of services. Absent a specific statutory requirement, the county of legal settlement has no obligation to pay for services provided by the county of relief. However, failure, by the county of relief, to provide assistance to needy persons in a uniform fashion might be construed as a denial of services to those without legal settlement. Such a denial might constitute a durational residency requirement, and be unconstitutional. 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, 98 S.Ct.

1322, 22 L.Ed.2d 600 (1969); Sheard v. Department of Social Welfare, 310 F.Supp. 544 (N.D. Iowa 1968); 1978 Op.Att'yGen. 546; 1972 Op.Att'yGen. 328.

In sum, a county may, at its option, provide general relief to "needy persons". However, there is no statutory authority which requires the county of legal settlement to reimburse the county for such general relief provided to "needy persons".

Cordially,

Matthew W. Williams
Assistant Attorney General

MWW/jaa

BEER AND LIQUOR CONTROL: Sunday Sales. Senate File 395, §§ 3, 4, 9, 24, 28, 41, 42, 69 and 70; Iowa Code Ch. 123; Iowa Code §§ 1, 4, 2(8), 21(11), 24(2), 24(3), 34(3), 36(6), 49(2), 49(2)(b), 49(2)(k), 49(4), 79(2), 134(5) and 178(1). The General Assembly, in enacting Senate File 395, contemplated the Sunday sale of wine by Class "B" wine permittees if authorization is obtained. The Iowa Beer and Liquor Control Department should implement this provision by rulemaking. The Department may not impose an additional twenty percent of the permit fee for this authorization. (Walding to Hutchins, State Senator, 6/28/85) #85-6-8(L)

June 28, 1985

The Honorable Bill Hutchins
State Senator
306 S. Division
Audubon, Iowa 50025

Dear Senator Hutchins:

We are in receipt of your letter requesting an opinion of the Attorney General interpreting Senate File 395 (1985 Session), which authorizes the private sale of wine. Specifically, you present the following questions:

1. May the holders of Class "B" wine permits sell wine for consumption off the premises between the hours of 10:00 a.m. and 12:00 midnight on Sunday?

2. If the answer [to question 1] is in the affirmative, should the Class "B" wine permittee be required to pay the additional 20% of the regular license for this fee?

A person holding a Class "B" wine permit may sell wine at retail for consumption off the premises only. Iowa Code § 123.178(1), as added by Senate File 395, § 69. Thus, our office has been asked to determine whether a Class "B" wine permittee may sell

wine on Sundays,[1] and if such authority exists, whether a fee may be assessed for that privilege.

Iowa Code Chapter 123 governs the sale of alcoholic liquor, wine and beer. The provisions of Chapter 123 are to be liberally construed for the protection of the public welfare, health, peace, morals and safety. Iowa Code § 123.1, as amended by S.F. 395, § 3.

I.

The provision governing Sunday sales of wine is found in S.F. 395, § 41. That section amends Iowa Code § 123.49(2) by adding new paragraph k. Paragraph k prohibits a holder of a liquor control license, wine permit or beer permit from selling or dispensing:

> . . . any wine on the premises covered by the permit or permit the consumption on the premises between the hours of two a.m. and six a.m. on a weekday, and between the hours of two a.m. on Sunday and six a.m. on the following Monday, <u>however, a holder of a wine permit authorized to sell wine on Sunday may sell or dispense wine between the hours of ten a.m. and twelve midnight on Sunday</u>. [Emphasis added]

Sunday wine sales are, therefore, prohibited except sales within specified times by a "holder of a wine permit authorized to sell wine on Sunday."[2]

The issue then becomes what holders of a wine permit are authorized to sell wine on Sunday. Sections 123.36(6) and 123.49(4) (S.F. 395, §§ 28, 42) addressing Sunday sales of wine by liquor licensees for on-premises consumption do not address wine permits, which authorize only sales for off-premises consumption.

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[1] Sunday sales of wine, for purposes of this opinion, do not include the hours between twelve midnight on Saturday and two a.m. on Sunday as such sales are permissible. Iowa Code § 123.49(2)(k), as added by S.F. 395, § 41.

[2] An additional exception is contained in Iowa Code § 123.36(6), as amended by S.F. 395, § 28, which permits liquor control licensees to sell liquor, wine and beer for on-premises consumption on Sunday if a special privilege is obtained.

Iowa Code § 123.49(2)(b) (1985) is similar to new § 123.49(2)(k). Subsection (b) governs the Sunday sale of "alcoholic beverages" and beer. (The term "alcoholic beverages" is now defined to exclude "wine" as defined in the Act. Iowa Code § 123.2(8), as amended by S.F. 395, § 4.) Subsection (b) permits the Sunday sales of liquor and beer by permit holders "granted the privilege of selling alcoholic liquor and beer . . . on Sunday." Subsection (k) permits the Sunday sale of wine by holders of a wine permit "authorized to sell wine on Sunday." This is the only semantic difference in the exception clauses of the two sub-sections. However, separate Code sections specify how the privilege of selling liquor and beer on Sunday is to be obtained.

Section 123.36(6), as amended by S.F. 395, § 28, governs the privilege for liquor licensees to sell on Sundays. It is limited to licensees who earn, from the licensed premises, half or more of their gross receipts from the sale of goods and services other than alcoholic liquor, wine or beer. Further, the licensee who sells on Sundays must pay a fee of twenty percent of the regular license fee for the privilege to be noted on the license.

Section 123.134(5) governs the privilege of selling beer on Sunday. Again, an increased fee of twenty percent is charged for the privilege. Class "B" beer permittees (who can sell beer for consumption on or off the premises) may obtain the privilege only if a majority of their gross receipts are from sales of other goods and services. Any Class "C" beer permittee (who can sell beer for off-premises consumption only) may obtain the Sunday sales privilege by paying the increased fee.

Subsection (k), in our view, does not itself authorize all holders of a wine permit to sell wine on Sunday. If the legislature had intended to do so, it would have simply stated that a holder of a wine permit may sell on Sunday. The modifying phrase "authorized to sell wine on Sunday" would be rendered superfluous. <u>See Hanover Insurance Co. v. Alamo Motel</u>, 264 N.W.2d 744, 778 (Iowa 1978). The quoted language is also a phrase modifying the previous phrase, "holder of a wine permit," and it, therefore, appears that the quoted language limits the class of holders of wine permits who may sell on Sunday. The similarity to the language used in subsection (b) for liquor and beer permittees also suggests that the quoted language was intended to be a qualifying phrase rather than a grant of that authority.

Iowa Code § 123.24(2), as amended by S.F. 395, § 24, permits fourteen-day liquor licenses, wine permits, and Class "B" beer permits. It further provides that the permit holder shall not sell on Sunday unless the permit holder qualifies for and obtains the privilege to sell on Sundays contained in §§ 123.36(6) and

123.134(5). Section 123.24(3), as amended by S.F. 395, § 24, further states, "The fee for the privilege to sell on the two Sundays in the fourteen-day period is twenty percent of the price of the fourteen-day liquor license, wine permit, or beer permit." Thus, the legislature has provided the requirements for authorization for Sunday sales by the holder of a fourteen-day wine permit. It has not, however, done so for the regular Class "B" wine permit.

As the legislature has not defined how this authorization is to be obtained, the Iowa Beer and Liquor Control Department must implement the provision through rulemaking. That agency is responsible for the administration and enforcement of the laws of this state concerning alcoholic liquor, wine and beer. Iowa Code § 123.4, as amended by S.F. 395, § 9. Pursuant to Iowa Code § 123.21(11) (1985), the director of that department, with approval of the Iowa Beer and Liquor Control Council, may adopt rules:

> Prescribing, subject to the provisions of this chapter, the conditions and qualifications necessary for the obtaining of licenses and permits and the books and records to be kept and the remittances to be made by those holding licenses and permits and providing for the inspection of the records of all such licensees and permittees.

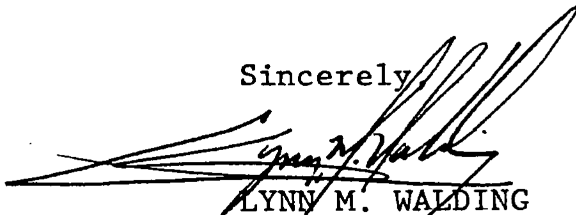
That provision would appear to grant the director of the liquor department authority to adopt rules necessary to implement the Sunday sale of wine. Thus, it is our view that the legislature left to the agency the determination of which wine permittees should be authorized to sell wine on Sunday.

II.

You further ask whether the Class "B" wine permittee can be required to pay an additional twenty percent of the regular license fee to sell wine on Sunday. The legislature has provided for an additional fee of twenty percent for the privilege of selling on Sunday for liquor licenses, § 123.36(6), beer permits, § 123.134(5), and for fourteen-day liquor licenses, Class "B" wine permits, and Class "B" beer permits. § 123.34(3), as amended. It has not done so for the authorization of Sunday sales by regular Class "B" wine permits. Section 123.79(2), added by S.F. 395, § 70, provides, "The annual permit fee for a Class "B" wine permit is five hundred dollars." As the statute states the fee for wine permits and otherwise comprehensively lists the fees to be charged for permits and licenses, we do not believe that the authority to charge an additional fee for the Sunday authorization can be implied from legislative silence.

In conclusion, it is our opinion that the General Assembly, in enacting S.F. 395, contemplated the Sunday sale of wine by Class "B" wine permittees if authorization is obtained. The Iowa Department of Beer and Liquor Control should implement this provision by rulemaking. The Department may not impose an additional twenty percent of the permit fee for this authorization.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW/cjc

ELECTIONS: Privilege of an Elector; Notification of legal determination of retardation or incompetency; Notification of criminal conviction. Iowa Const. art. II § 5; Ch. 47, § 47.7; Ch. 48, §§ 48.30, 48.31; Ch. 701, § 701.7; Ch. 907, § 907.3. The terms "idiot" and "insane person" in Article II § 5 of the Iowa Constitution are functionally limited to persons who have been determined to be retarded or incompetent in a statutory adjudicative proceeding. The term "infamous crime" means any crime punishable by imprisonment in the penitentiary. Under current statutes, infamous crimes include crimes punishable by confinement for a period of more than one year. The terms "privilege of an elector" mean voting and other activity for which the legislation imposes qualification or eligibility to vote as a prerequisite. The term "felony" in § 48.30 includes any public offense which the statute defining the crime declares to be a felony. Deferred sentences and deferred judgments are not convictions of which the clerk of court must notify the commissioner of elections pursuant to § 48.30. The state registrar has no authority to compare electronic voter registration files with other electronic files regarding criminal convictions and to provide the information to the county commissioners of elections for the purpose of cancelling the registration. (Pottorff to Whitcome, January Chair, Voter Registration Commission, 6/19/85) #85-6-7(L)

Louise Whitcome
January Chair
Iowa Voter Registration Commission
L O C A L

June 19, 1985

Dear Ms. Whitcome:

You have requested an opinion of the Attorney General concerning construction and application of statutes which implement a constitutional prohibition against extending the privilege of an elector to specific classes of persons. Article II § 5 of the Iowa Constitution states: "No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector." You point out that §§ 47.7, 48.30, 48.31(4) and 48.31(5) variously affect the implementation of this prohibition. With respect to these statutory provisions, you specifically pose the following six questions:

1. What exactly is meant by the constitutional phrases and terms "idiot," "insane person," "infamous crime," and "privilege of an elector?"

2. What exactly is meant by the statutory term "felony" as used in section 48.30?

3. May a county commissioner lawfully refuse to accept a registration from an individual whose name has been certified pursuant to section 48.30?

4. Should the state registrar of voters have an obligation under the Constitution and section 47.7(1) to identify registrations of persons the Constitution prohibits from voting, and to notify the county commissioner in order to cause the removal of those registrations? If so, should he be likewise obligated to cause notification in a similar manner to those individuals whose voting privilege has been restored by operation of law?

5. Assuming some affirmative action is, by implication, required, what, if any, is the effect of a deferred sentence or a deferred judgment following a conviction?

6. Is there a need for legislation to allow the registrar to access any relevant electronic records, or can this be resolved administratively?

For the purpose of clarity, these questions are separately considered.

Article II encompasses several constitutional provisions which address the right of sufferage. See Iowa Const. art. II §§ 1-7. Electors, are, in all cases except treason, felony, or breach of the peace, privileged from arrest on election day while going to, attending, or returning from the election. Iowa Const. art. II § 2. Electors are exempt from military duty on election day except in time of war or public danger. Iowa Const. art. II § 3. No "idiot," or "insane person," or "person convicted of any infamous crime," however, shall be entitled "to the privilege of an elector." Iowa Const. art. II § 5.

I.

With respect to the limitation on the privilege of an elector contained in section 5, you ask the definition of the following terms: "idiot," "insane person," "infamous crime," and "privilege of an elector." These terms are not expressly defined in the Iowa Constitution or by statute.

In defining the terms "idiot" and "insane person," principles of construction are of limited assistance. Generally, in

construing a constitution words are given meaning in their natural sense as commonly understood. Redmond v. Ray, 268 N.W.2d 849, 853 (Iowa 1978). The terms "idiot" and "insane person," however, are not commonly understood with sufficient precision to articulate reliable criteria. Application of these terms to deny a person the "privilege of an elector," moreover, is a quasi-adjudicative process. Neither the Iowa Constitution nor the statutes have created an adjudicative procedure for election officials, themselves, to make such individual determinations.

We point out that § 48.31 separately states as one ground for cancellation of a voter registration the following provision:

> The clerk of district court sends notification, of a legal determination that the elector is severely or profoundly mentally retarded, or has been found incompetent in a proceeding held pursuant to section 299.27, or is otherwise under conservatorship or guardianship by reason of incompetency. Certification by the clerk that any such person has been found no longer incompetent by a court, or the termination by the court of any such conservatorship or guardianship shall qualify any such ward to again be an elector, subject to the other provisions of this chapter.

Iowa Code § 48.31(5) (1985). Under this language, the county commissioner of elections is authorized to cancel a voter registration only when there has been a prior legal determination that the elector is mentally retarded or incompetent.

In our view, § 48.31(5) represents a reasonable approach to implementation of this constitutional limitation on exercise of the privilege of an elector. Any determination that an elector is an "idiot" or "insane person" must be made on an adjudicative basis. See, generally, Iowa Code § 4.1(6) (1985) ("A person who is hospitalized or detained for treatment of mental illness shall not be deemed or presumed to be incompetent in the absence of a finding of incompetence made pursuant to section 229.27.") Existing mental health statutes provide the only mechanisms for the adjudication of mental status. See, e.g., Iowa Code § 222.16-30 (1985) (proceedings for adjudication of retardation); Iowa Code § 229.27 (1985) (proceedings for finding incompetency); Iowa Code § 633.552-61 (proceedings for appointment of guardian due to mental incapacity). We, therefore, construe the terms "idiot" and "insane person" as functionally limited to persons who have been determined to be retarded or incompetent in a statutory adjudicative proceeding.

The term "infamous crime" has been defined by the Iowa Supreme Court. In State v. Haubrich, 248 Iowa 978, 83 N.W.2d 451, 452 (1957), the Court defined an infamous crime as "[a]ny crime punishable by imprisonment in the penitentiary." This rather terse definition posed by the Court in 1957 was a summary affirmation of earlier decisions. See Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916); Blodgett v. Clarke, 177 Iowa 575, 159 N.W. 243 (1916).

The term "infamous crime" has not been fully considered by the Court since the decision in Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916). In 1916, the Court considered whether two proceedings in which the defendant had been found guilty of contempt were convictions establishing the defendant as a persistent violator and subjecting the defendant to potential imprisonment in the state penitentiary. The Court noted that imprisonment in the state penitentiary is an infamous punishment which includes the unpleasant historical attributes of life in former-day penitentiaries.[1]

Application of this definition of an "infamous crime" under the present criminal code is problematic. Prior to revision of the criminal code in 1978, crimes in Iowa punishable by imprisonment in the penitentiary were felonies. See State v. Gabrielson, 192 N.W.2d 792, 794 (Iowa 1971). Under current statutes, however, all persons sentenced to confinement for a period of more than one year are committed to the custody of the director of the Iowa Department of Corrections to be confined in a place to be designated by the director. Iowa Code § 903.4 (1985). Persons sentenced to confinement for a period of more than one year may include persons convicted of aggravated misdemeanors. Iowa Code § 903.1(2) (1985). Although local facilities are preferred for confinement of misdemeanants under § 903.5, the director may designate the state penitentiary as the place of confinement for any person committed to his/her custody. Iowa Code § 902.5 (1985). Since it is the potential for imprisonment in the penitentiary, rather than the actual imprisonment in the penitentiary, that characterizes a crime as "infamous," see 1940 Op.Att'yGen. 368, 368-71, persons convicted of aggravated misdemeanors would be convicted of "infamous crimes." This office has noted this expansion of the class of infamous crimes from felonies to include aggravated misdemeanors in a 1976 opinion. 1976 Op.Att'yGen. 493, 493-95.

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[1] In previous opinions this office has determined that the term "infamous crime" is not limited to convictions in state court. See 1972 Op.Att'yGen. 694 (foreign courts); 1912 Op.Att'yGen. 823 (federal courts).

We question whether the present Iowa Supreme Court would reaffirm the definition of "infamous crime" set out in State v. Haubrich if the issue were presented today in light of contemporary statutes and prison conditions. Before the criminal code revision, "infamous crimes" had been felonies. The historical attributes of imprisonment in a penitentiary relied on by the Court, moreover, are dated. We believe the present Court would equate an infamous crime with a felony regardless of the site of confinement. Unless and until the Court articulates a new definition of "infamous crime," however, we are bound by existing case law. We must conclude, therefore, that an infamous crime is any crime punishable by imprisonment in a penitentiary. Under current statutes, infamous crimes include crimes punishable by confinement for a period of more than one year.

The foregoing definitions are significant in identifying the classes of persons who are denied the "privilege of an elector" under the Iowa Constitution. The Iowa Supreme Court has construed the "privilege of an elector" to encompass voting and holding office. State v. Haubrich, 248 Iowa 978, 83 N.W.2d 451, 452 (1957). See State v. Allison, 173 N.W.2d 533, 537 (Iowa 1970). See also 1936 Op.Att'yGen. 417, 417-18. Based on this precedent, we conclude that the "privilege of an elector" includes voting and holding office.

II.

With respect to the statutory implementation of this constitutional prohibition, you ask three questions concerning § 48.30. Section 48.30 requires the clerk of court to notify the county commissioner of elections of records which indicate a person should be denied the privilege of an elector under the Iowa Constitution. This section states:

> Notification of changes in registration.
> The clerk of the district court shall promptly notify the county commissioner of registration of changes of name and of convictions of infamous crimes or felonies, of legal declarations of incompetence made after a proceeding held pursuant to section 229.27, and of diagnosis of severe or profound mental retardation of persons of voting age. The clerk of the district court shall also notify the county commissioner of registration of the restoration of citizenship of a person who has been convicted of an infamous crime or felony and of the finding that a person is of good mental health. The notice will not restore voter registration. The county commissioner of registration

> shall notify the person whose citizenship has been restored or who has been declared to be in good mental health that the person's registration to vote was canceled and the person must register again to become a qualified elector.

Iowa Code § 48.30 (1985). You specifically inquire what the term "felony" means, what effect a deferred sentence or deferred judgment has on the obligation to report convictions, and whether a county commissioner can lawfully refuse the registration of someone whose name has been certified under this section.

The definition of the term felony and the effect of a deferred sentence or deferred judgment are set out in current statutes. Under § 701.7 a public offense is a felony when the statute defining the crime declares it to be a felony. Iowa Code § 701.7 (1985). Whether any particular crime constitutes a felony, therefore, must be ascertained by reference to the statute defining the crime itself. Deferred sentence and deferred judgment are disposition options available to the court under certain circumstances. Iowa Code § 907.3(1) (1985). In a deferred sentence, the judgment is entered but the sentence is deferred and the defendant is assigned to the judicial district department of correctional services. Id. In a deferred judgment, judgment is deferred and the defendant is placed on probation. Id. In either case, successful completion of the program or probation, respectively, will preclude a "conviction." Op.Att'yGen. #82-2-10(L). See State v. Ridout, 346 N.W.2d 837, 839 (Iowa 1984). Records of deferred sentences and deferred judgments, therefore, are not convictions of which the clerk of court must notify the county commissioner of elections.

We note that convictions of infamous crimes or felonies and legal declarations of incompetency or severe or profound mental retardation of which the clerk of court must notify the county commissioner of elections pursuant to § 48.30 also constitute grounds upon which a registration shall be canceled. Compare Iowa Code § 48.30 (1985) with Iowa Code § 48.31(4)-(5) (1985). In response to your inquiry, we see no need for the county commissioner of elections to accept voter registrations from persons about whom he/she has been notified pursuant to § 48.30 and then institute the cancellation process. Cancellation is not an evidentiary proceeding in which the registrant has confrontational rights. Rather, it is a summary process of eliminating registrations with notice to the registrant of the action taken. See, generally, Iowa Code § 48.31 (1985). Under these circumstances, the county commissioner of elections may reject a registration on the legal ground that the registration would be subject to cancellation pursuant to § 48.31 on the basis of information statutorily provided to the county commissioner.

III.

With respect to the implementation of this constitutional prohibition, you ask two questions concerning the role of the state registrar of voters. Chapter 47 creates the state registrar of voters and obligates him/her to prepare, preserve and maintain voter registration records. Iowa Code § 47.7(1) (1985). Counties may utilize the same data processing facilities to process their registration records. Iowa Code § 47.7(2) (1985). Alternatively, counties may utilize their own data processing facilities and provide the registrar with update registration lists. Iowa Code § 47.7(3) (1985). You specifically inquire whether the state registrar has an obligation to compare electronic files containing information regarding criminal convictions and to provide this information to the county commissioners and whether legislation is needed to authorize the state registrar to do so.

The legislature has established a specific mechanism for notification to a county commissioner by the clerk of court of convictions under § 48.30. No comparable statutory mechanism exists for notification to county commissioners by the state registrar of convictions under Chapter 47. In a previous opinion we concluded that when the state registrar has the capability for collecting and processing data, but the legislature has separately provided a specific statutory procedure for collecting and processing the data, the specific statutory procedure must be followed. Op.Att'yGen. #83-11-6(L) (state registrar not authorized to contract with private vendor to add residential telephone numbers to voter registration records in view of specific statutory procedure for addition of data). Adherence to existing statutory procedures is particularly important when the action will cancel a registration and, thereby, deny the right to vote which is construed to be a fundamental, constitutionally protected right. <u>See</u> 1982 Op.Att'yGen. 549, 552. In view of the existence of a specific statutory procedure for notifying a county commissioner of this information and the fundamental, constitutionally protected nature of the right to vote, we advise that the state registrar is not authorized to provide information concerning criminal convictions to county commissioners for the purpose of effecting cancellation of voter registrations in absence of express legislation.

In summary, we answer your questions in the following manner:

1. The terms "idiot" and "insane person" are functionally limited to persons who have been determined to be retarded or incompetent in a statutory adjudicative proceeding.

2. The term "infamous crime" means any crime punishable by imprisonment in the penitentiary. Under current statutes, infamous crimes include crims punishable by confinement for a period of more than one year.

3. The terms "privilege of an elector" mean voting and holding office.

4. The term "felony" includes any public offense which the statute defining the crime declares to be a felony.

5. Deferred sentences and deferred judgments are not convictions of which the clerk of court must notify the commissioner of elections pursuant to § 48.30.

6. The state registrar has no authority to compare electronic voter registration files with other electronic files regarding criminal convictions and to provide the information to the county commissioners of elections for the purpose of cancelling the registration.

Sincerely,

JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc

SCHOOLS: Laboratory Schools. Iowa Code §§ 265.1; 279.10; 299.1; S.F. 77 (1985 Iowa Legis. Serv. 9). The requirement in S.F. 77 enacted by the 1985 session of the General Assembly that requires school districts to commence school no sooner than the first day of September does not apply to the Malcolm Price Laboratory Schools operated by the University of Northern Iowa. (Fleming to Lind, State Senator, 6/19/85) #85-6-6(L)

June 19, 1985

The Honorable Thomas A. Lind
State Senator
111 Frederic Avenue
Waterloo, Iowa 50701

Dear Senator Lind:

You have asked for our opinion with respect to the operation of Senate File 77, adopted by the 1985 session of the Iowa General Assembly. Specifically, you ask whether S.F. 77, an act requiring that the first day of school not be sooner than September 1, applies to Malcolm Price Laboratory School. That school is an elementary and secondary laboratory school at the University of Northern Iowa, pursuant to Iowa Code Ch. 265 (1985); the Board of Regents is its governing body. The new legislation takes effect on July 1, 1986. See 1985 Iowa Legis. Serv. 9, S.F. 77, § 4.

Your inquiry presents difficult questions of statutory construction. We conclude that Senate File 77 does not apply to Malcolm Price Lab Schools. The Board of Regents could, however, limit the opening day of school for Malcolm Price as required for public school districts in the new legislation.

Some of the difficulty presented by your inquiry arises because S.F. 77 amends sections of two very different chapters of the Iowa Code. Sections 1 and 2 of the new law amend § 279.10, a part of Ch. 279 which pertains to the powers and duties of the boards of directors of Iowa school districts. On the other hand, section 3 of S.F. 77 amends § 299.1, the Iowa compulsory attendance law which applies to parents. As we noted above, Malcolm Price Lab School is operated by the Board of Regents pursuant to its authority under Iowa Code § 265.1 (1985). In considering the issue, we are guided by Iowa Code Ch. 4 (1985) on the construction of statutes, and various principles of statutory construction, as enunciated in decisions of the Supreme Court of Iowa, which will be cited when applicable. The starting point in interpreting a statute is the statute itself. U.S. v. Hepp, 497 F.Supp. 348, 349 (N.D. Iowa 1980) aff. 656 F.2d 350.

There is no question that S.F. 77 requires that the first day of school in Iowa school districts shall be "no sooner than the first day of September," 1985 Iowa Legis. Serv., 9, sec. 1, unless the State Board of Public Instruction has granted a request "made by a board of directors of a school district . . . to commence classes . . . before the first day of September." Id., sec. 2 (emphasis added). Where the language of a statute is clear and plain there is no room for construction. Hinders v. City of Ames, 329 N.W.2d 654, 655 (Iowa 1983).

Statutory construction is properly invoked, however, when ambiguities exist that create uncertainty. State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981). The mandate to commence school "no sooner than the first day of September" makes no reference to the elementary and secondary schools operated by the Board of Regents, including Malcolm Price Lab School. See Iowa Code § 262.7(3) (University of Northern Iowa which operates Malcolm Price); § 262.7(4) (the Iowa braille and sight saving school); § 262.7(5) (the state school for the deaf); § 262.7(7) (the state hospital school which is operated by the University of Iowa). Thus, we must apply principles of statutory construction to determine legislative intent, the polestar of statutory construction. Doe v. Ray, 251 N.W.2d 496, 500 (Iowa 1977). In other words, the new statute is plain and clear with respect to the starting date of schools in school districts, but we must use principles of statutory construction to determine whether S.F. 77 applies to Malcolm Price Lab Schools.

An important tool of statutory construction is the examination of statutory purpose. State v. Nelson, 329 N.W.2d 643, 646 (Iowa 1983). In this instance we must first determine whether the concept of pari materia comes into play. Spilman v. Board of Directors, 253 N.W.2d 593, 596 (Iowa 1977). The general

rule that meaning of a statute may be determined from its construction in connection with other statutes relating to the same subject matter or closely related subjects is not of universal application. Cochran v. Lovelace, 209 N.W.2d 130, 132 (Iowa 1973). The principle "requires that the statutes under consideration must relate to the same person or thing, to the same class of persons or things, or have identical purposes or objects." Ballstadt v. Iowa Dept. of Revenue, ___ N.W.2d ___, (Iowa 1985) 84-1089, Slip Op. filed May 22, 1985; page 6. Here, as in Ballstadt, the statutes which provide for the creation of Malcolm Price Lab Schools and statutes which provide for the operation of school districts, and S.F. 77 in particular, have very different purposes.

The people of Iowa in the Constitution have granted to the General Assembly the power to provide for the education of Iowa citizens. See Iowa Const., Art. IX, Sec. 15. The legislature authorized the Board of Regents "to establish and operate elementary and secondary laboratory schools at the institutions of higher education under its control." Iowa Code § 265.1 (1985). Such laboratory schools have three purposes:

> laboratory school shall mean a school operated by or educational institution for the purpose of instructing students, training teachers, and advancing teaching methods.

Id. (emphasis supplied).

In contrast to the purpose identified in § 265.1, the legislature has adopted the following:

> It is declared to be the policy of the state to encourage economical and efficient school districts which will ensure an equal educational opportunity to all children of the state.

Iowa Code § 275.1 (first sentence) (emphasis supplied). A school district is granted exclusive jurisdiction in all school matters within the geographic territory of the district, see Iowa Code § 274.1 (1985), and the board of directors is charged with the responsibility to operate the schools of the district. See Iowa Code Ch. 279 as amended by S.F. 77.[1]

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[1] Certain powers are granted to the electors of the district. See Iowa Code § 278.1 (1985). The State Board of Public

The Board of Regents exercises broad authority over the institutions it controls, including the University of Northern Iowa and Malcolm Price Lab Schools. See Iowa Code § 262.9 (1985). It is clear that S.F. 77 provides that schools start no sooner than September first in Iowa school districts in keeping with the policy of providing "equal educational opportunity" to the children of Iowa. But given the fact that the Lab schools are created for the purpose of "training teachers" and "advancing teaching methods" as well as "instructing students," in our view, the Board of Regents holds responsibility to determine details, such as school starting dates, in keeping with all three purposes. That is, the Regents may decide that the appropriate starting date for Malcolm Price is the same as that of the University of Northern Iowa, rather than that prescribed by S.F. 77 because of issues related to "training teachers" and "advancing teaching methods." For other discussion of Malcolm Price as a part of the teacher training program at the University of Northern Iowa see 1980 Op.Att'yGen. 378, #79-9-4(L).

One other principle of statutory construction adds support to our view that the Regents are not governed by S.F. 77. In construing statutes, we search for legislative intent as shown by what the legislature said, rather than what it might have said. See Iowa Rule of Appellate Procedure 14(f)(13); Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 359 (Iowa 1982). The legislature did not include a reference to the Regents in S.F. 77 and the legislature has demonstrated that if Regents' schools are governed by some aspect of the statutes pertaining to school districts, it provides specifically for that relationship. See Iowa Code § 265.6 (Regents receive state aid for pupils enrolled in laboratory schools pursuant to formula in Iowa Code Chs. 281 and 442).

We are aware that Iowa Code § 299.1 was amended by S.F. 77. See 1985 West's Legis. Serv., page 10. Because § 299.1 is a criminal statute which governs the conduct of parents, we cannot read into it a legislative intent to regulate the Board of

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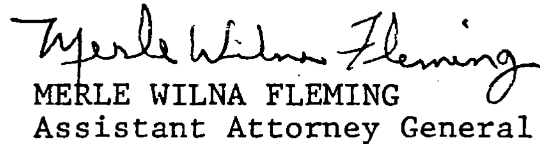
n.1 continued

Instruction exercises rulemaking authority in school matters. Iowa Code § 257.9 (1985). The State Superintendent and the Area Education Agencies also exercise certain defined powers but the actual operation of the elementary and secondary schools in Iowa school districts, which encompass all the area of the state, see Iowa Code § 275.1, is carried out by district boards of directors.

Regents' operation of the Malcolm Price Lab Schools,[2] under the principles of statutory construction that apply to criminal statutes.

We should not be understood to say that the Regents may not adopt the starting date of the school as provided in S.F. 77 for the Malcolm Price Lab School. It is our opinion that S.F. 77 does not apply to the Malcolm Price Laboratory Schools in Cedar Falls.

Sincerely,



MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

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[2] There is no question that Malcolm Price is a "public school" as distinguished from a "nonpublic school," in that it is supported by tax money. See Iowa Code § 280.2 (1985).

COUNTIES: Assessor. Iowa Code §§ 428.5, 441.17(3) (1985), 327G.77 (1981). If railroad company provides county asssessor with information showing that right-of-way abandoned in 1982 has reverted to successors in interest of original grantor, assessor should list right-of-way to owner(s) of adjoining land. If owner of adjoining land provides assessor with information showing break in chain of title to fee underlying right-of-way, assessor should list right-of-way to unknown owners. (Smith to Fulton, Decatur County Attorney, 6/19/85) #85-6-5(L)

June 19, 1985

Mr. Robert L. Fulton
Decatur County Attorney
203 N. Idaho
Leon, Iowa 50144

Dear Mr. Fulton:

You have requested our opinion whether the county assessor may list to adjoining owners railroad right-of-way abandoned in 1982, where the railroad's interest was a right-of-way easement originally acquired by deed from a willing seller. Your request notes that in some instances the railroad has quit claimed its interest in the right-of-way to owners of adjacent land, in some instances owners of adjacent land have filed affidavits pursuant to Iowa Code § 326G.77(2) (1985) claiming reversion of right-of-way, but that in other instances the chain of title to adjacent land excepts the right-of-way and the owners do not claim any interest in the abandoned right-of-way. We note that the various reported Iowa cases classifying real property interests conveyed to railroads are not easily harmonized. _See_ Martell, _Acquiring Abandoned Railroad Right of Way in Iowa_, _30_ Drake L.Rev. 545, _550-552 (1981)_. Determination whether a railroad right-of-way interest was an easement rather than a fee subject to possibility of reverter or shifting executory interest would be essential to determine the applicability of Iowa Code § 614.24 (1966). The Iowa Supreme Court recently held that § 614.24 cut off a possibility of shifting executory interest in railroad right-of-way. _McKinley v. Waterloo Railroad Company_ (May 22, 1985).

We assume for the purposes of this opinion that the railroad interest terminated by abandonment was properly classified as an easement rather than as a fee simple, a fee subject to possibility of reverter, or fee subject to shifting executory interest. We conclude that a railroad's possessory easement interest originally acquired by deed reverted to the successor in interest of the original grantor when the easement was terminated by abandonment in 1982, and that the reversion was not governed by

Iowa Code §§ 327G.76 and 327G.77. We further conclude that in certain circumstances a county assessor may presume that the successor in interest of the original grantor is the owner(s) of land adjoining the right-of-way.

In Op.Att'yGen. #82-11-3, we opined that Iowa Code § 327G.77 (1981) did not apply to an easement by conveyance. Sections 327G.76 and 327G.77 subsequently have been amended by 1983 Iowa Acts, ch. 121, which expanded the applicability of statutory reversion to include all railroad right-of-way easements rather than just easements acquired by condemnation. The 1983 amendment also established a process for an adjacent landowner to perfect title to reverted right-of-way by filing an affidavit of ownership with the county recorder.

The 1983 amendment was not expressly made retrospective. Therefore, pursuant to Iowa Code § 4.5 (1985), it must be presumed to be prospective in its operation, at least to the extent that it affects substantive rights. Cunha v. City of Algona, 334 N.W.2d 591, 597 (1983). A previous amendment that expanded the applicability of the reverter statute was construed by the Iowa Supreme Court to be prospective in operation. Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961).

Thus, the 1983 amendment of §§ 327G.76 and 327G.77 does not affect our conclusion in Op.Att'yGen. #82-11-3 that when a 1982 abandonment terminated a railroad easement originally acquired by voluntary conveyance, the right-of-way reverted to the original grantor's successor in interest as determined by the chain of title to the fee underlying the right-of-way easement. The original grantor's successor in interest will not necessarily be the person who, at the time of abandonment, owns the land abutting the right-of-way. In Smith v. Hall, 103 Iowa 95, 72 N.W. 427 (1897), the Supreme Court construed an ambiguous reverter statute to provide for reversion of abandoned railroad right-of-way to the person owning the adjoining land at the time of the reversion. Smith was a quiet title action in which the plaintiffs were grantees of the fee underlying a railroad easement. The grantor had previously conveyed lands on each side of the right-of-way to defendants after granting a right-of-way easement to a railroad company. In affirming the decree quieting title in the adjoining landowners the court stated the following:

> The legislature could not have intended that the title revert to the original owner, and it be traced down to his descendants or those of his grantees. Such a holding would result in much litigation, and the land, owing to its condition and situation, would be of

> little value to the person obtaining it; while the construction casting the reversion on the owners of the remaining portion of the tract from which taken renders those entitled to it certain and easily ascertained, and vests the land in those to whom it will be of some advantage.

And in Brugman v. Bloomer, 234 Iowa 813, 13 N.W.2d 313 (1944), title to an abandoned right-of-way was quieted as between the owners of adjoining tracts on opposite sides by holding that they had a reversion of the fee on their respective sides of the center line. The court did not discuss the reported facts that their deeds excepted the right-of-way.

However, in Spencer v. Wabash R. Co., 132 Iowa 129, 109 N.W. 453 (1906), and Hall v. Wabash R. Co., 133 Iowa 714, 110 N.W. 1039 (1907), a divided court held that deeds similar to the deeds in Smith excepted right-of-way from conveyances of adjoining land and, therefore, that adjoining landowners were not entitled to condemnation awards (when a second railroad company condemned abandoned right-of-way) because the fee underlying the right-of-way remained in the original grantor (or heirs).

In Jacobs v. Miller, supra, heirs of the original grantor brought an action to quiet title to abandoned right-of-way (including depot grounds) against the individuals who at the time of abandonment owned land adjoining the right-of-way. The parties apparently stipulated that the original grantor had reserved a possibility of reverter of the fee underlying the right-of-way when he conveyed adjoining lands. Therefore, the court did not need to analyze the language of reservation in the instruments by which adjoining land was conveyed. The court held that an inheritable possibility of reverter reserved by the original grantor passed to the grantor's heirs in whom title to the right-of-way was quieted.

Thus, the court has construed ambiguity in a previous reverter statute to achieve the practical result of reunifying abandoned right-of-way with adjoining land, but reached a different result in reversion conflicts not governed by a reverter statute.

Duties of the county assessor pertinent to your opinion request are set forth in Iowa Code § 441.17(3) (1985), which provides that the assessor shall:

> Have access to all public records of the county and, so far as practicable, make or cause to be made a careful examination of all

> such records and files in order to obtain all available information which may contribute to the accurate listing at its taxable value, and to the proper persons, of all property subject to assessment by the assessor.

Section 428.1 (1985) requires each inhabitant to list for the assessor all property subject to taxation in the state, and § 441.18 (1985) requires that persons assessed assist the assessor in entering upon the assessment rolls the several items of property required to be entered for assessment. Accordingly, after a right-of-way is abandoned, the railroad company has a duty to list that part of its abandoned right-of-way that is subject to local assessment. And the assessor would have discretion to require the railroad company to provide an explanation of its failure to list the abandoned right-of-way to which it has apparent record title. See Tiffany v. County Board of Review in and for Greene County, 188 N.W.2d 343, 349-350 (1971). If satisfactory evidence of reversion is presented by the railroad, but the assessor, after a careful examination of public records, is uncertain whether the right-of-way has been reunified with adjoining land by reversion, then the assessor may reasonably list the right-of-way to the owners of adjoining land and presume that the owners of adjoining land are the successors in interest of the grantors who conveyed an easement to the railroad. If the assessor concludes that the abandoned property is to be assessed in the name of a taxpayer other than the railroad company, the assessor should send an assessment roll to the taxpayer. If the owners of adjoining land provide the assessor with evidence showing that the fee underlying a right-of-way easement was excepted from conveyance of adjoining land, the assessor may reasonably list the right-of-way to unknown owners pursuant to § 428.5.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

TAXATION: Applicability of sales and use tax to alcohol sold, given away or dispensed by air common carriers. Iowa Code §§ 123.36(5)(c), 123.98, 422.43, 423.2 (1985). Section 123.36(5)(c) imposes a $7.00 per gallon tax on alcoholic beverages sold, given away or dispensed in or over Iowa. This tax is substituted for a sales or use tax imposed by §§ 422.43 and 423.2. (Nelson to Bair, Director, Iowa Department of Revenue, 6/19/85) #85-6-4(L)

June 19, 1985

Gerald D. Bair
Director, Iowa Department of Revenue
Hoover State Office Building
Des Moines, Iowa 50319

Dear Mr. Bair:

You have requested an Attorney General's opinion concerning the applicability of the sales and use tax imposed by Iowa Code chs. 422 and 423 (1985) to alcoholic beverages sold, given away or dispensed by air common carriers while the carrier is in or over the state. Specifically, you have posed the following question:

> Whether the payment of the seven dollar ($7.00) per gallon tax imposed by Iowa Code § 123.36(5)(c) and collected from air common carriers for each gallon of liquor sold, given away or dispensed in and over this state would prohibit the imposition of a sales or use tax for the sale or use of liquor or beer.

The answer to the question is yes.

The analysis begins with an examination of the language of Iowa Code § 123.36(5)(c) (1985). This section provides:

> 5. Class "D" liquor control licenses, the following sums:
>
> * * *
>
> c. For air common carriers, each company shall pay a base annual fee of five hundred dollars and, in addition, shall quarterly remit to the department [of Beer and Liquor Control] an amount equal to seven dollars for each gallon of alcoholic liquor sold, given away, or dispensed in or over this state during the preceding calendar quarter. The Class "D" license fee and tax for air common carriers shall be in lieu of any other fee or tax collected from such carriers in this state for the possession and sale of alcoholic liquor and beer.[1]

Iowa Code § 123.36(5)(c) (1985) finds its roots in Iowa Code § 1921-f28 (1935). This provision provided for the payment of one dollar for an individual permit to sell liquor or three dollars for a special permit to possess, sell or dispense liquor. The language of this provision remained unchanged until 1946 when the section was renumbered and more specificity was added to the definition of special permit. See Iowa Code §§ 123.27, 123.28 (1950). Previously, the legislature had not drawn a distinction between special permit holders who were common carriers and other classes of individuals who were eligible for a special permit.

In 1963, the General Assembly significantly changed the liquor control laws in Iowa. See 1963 Iowa Acts, ch. 114. The legislation added liquor by the drink and restructured the classification designations for licenseholders. The legislature added a license class for railroads, air common carriers and passenger boats and ships and added a definition for air common carriers. A Class D license permitted these entities to sell or furnish alcoholic beverages to passengers for consumption only on trains, the described watercraft or aircraft. The licenseholder was required to keep a record of all liquor sold or furnished in Iowa and file a monthly report with the Liquor Control Commission indicating the quantity of liquor sold or furnished. The report was to be accompanied by payment of all appropriate taxes owing. See 1963 Iowa Acts, ch. 114, § 10(6) a-d.

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[1]Section 123.36(5)(c) was amended by Senate File 395, §27 (1985 Session), but that amendment would not affect the results reached in this opinion.

The 1963 legislation also imposed a ten percent occupational tax on the gross receipts of any licensee from the sale of alcoholic beverages for consumption on the premises where sold. This was the only tax imposed by Iowa Code ch. 123 that contains any reference to payment of sales tax by a licensee.[2] The occupational tax on gross receipts from the sale of alcoholic beverages was in lieu of sales tax paid by the licensee. See 1963 Iowa Acts, ch. 114, § 31.

In 1971, the 64th General Assembly passed legislation which reorganized the Iowa Beer and Liquor Control Commission. The purpose of the legislation is set out in the preamble. See 1973 Iowa Acts, ch. 131. The Iowa Beer and Liquor Control Act was passed for the protection of the welfare, health, peace, morals and safety of the people of the state. Its provisions shall be liberally construed to accomplish this purpose. See Iowa Code § 123.1 (1985).

The legislation retained the definition of air common carriers first used in 1963. See Iowa Code § 123.28 (1973). The requirements for obtaining a liquor control license remained the same. The legislature was satisfied with the classifications established in 1963. The significant changes appear in the provisions which set the amount of license fees.

Iowa Code § 123.36 (1973) reflects the changes in the fees paid by the various license classes. The license fees were increased for each license class and a sliding scale of fees was adopted for Class B and Class C licenses based on population. Class D licenses were divided into individual transportation modes and a separate amount was charged for each subclassification.

Air common carriers were required to pay two separate amounts. Initially, a base fee of $500 was charged as the amount for the license. In addition, a $7.00 per gallon tax was collected for each gallon of alcoholic liquor sold, dispensed or given away in or over the state. The legislature also added the sentence in Iowa Code § 123.36(5)(c) that the Class D license fee and tax for air common carriers shall be in lieu of any other fee or tax collected from such

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[2]A barrel tax for beer has been included in the beer and liquor control statutes since 1935. See Iowa Code § 1921-f118 (1935). The tax was retained when the legislature passed the 1963 legislation. See Iowa Code § 124.25 (1971). The section number was changed in the 1971 reorganization act. See Iowa Code §123.136 (1973). The barrel tax is levied on all Class A permitholders for beer manufactured for sale or for beer sold at wholesale or for beer imported into this state and sold in 31-gallon barrels.

carriers in this state for the possession and sale of alcoholic liquor and beer.[3]

The legislature also expanded the provision within Iowa Code ch. 123 concerning the imposition of a tax on alcoholic beverages sold for consumption on premises. A tax of fifteen percent was required at the point of purchase for all alcoholic beverages intended or used for resale for consumption of alcoholic beverages on the premises of retail establishments. The tax was in lieu of any other sales tax applied at the state store.

No further changes took place in Iowa Code § 123.36. The legislative history indicates that the legislature had a specific taxing scheme in mind when it passed the liquor control statutes. By way of contrast, the sales and use tax provision of Iowa Code chs. 422 and 423 are more general in application. The imposition of the sales tax is governed by Iowa Code § 422.43 which provides:

> 1. There is imposed a tax of four percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of gas, electricity, water, heat and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, water, heat, and communication service to the public in its proprietary capacity, except as otherwise provided in this division, when sold at retail in the state to consumers or users; a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement, fairs, and athletic events except those of elementary and secondary educational institutions;

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[3]The "and tax" language did not appear in the original draft of the 1971 legislation. It was added in the second session of the 64th General Assembly. The purpose of H.F. 1133 was corrective in nature. The preamble to the bill explains that the words "and tax" were mistakenly omitted when the law was initially passed. <u>See</u> Explanation, H.F. 1133, House Files 451-744, 64th G.A., 1st Reg. Sess., Pt. 2 (1972).

> and a like rate of tax upon that part of private club membership fees or charges paid for the privilege of participating in any athletic sports provided club members.

The imposition of the use tax is based upon Iowa Code § 423.2 which provides:

> An excise tax is imposed on the use in this state of tangible personal property purchased for use in this state, at the rate of four percent of the purchase price of the property. The excise tax is imposed upon every person using the property within this state until the tax has been paid directly to the county treasurer or the state department of transportation, to a retailer, or to the department. An excise tax is imposed on the use in this state of services enumerated in section 422.43 at the rate of four percent. This tax is applicable where services are rendered, furnished, or performed in this state or where the product or result of the service is used in this state. This tax is imposed on every person using the services or the product of the services in this state until the user has paid the tax either to an Iowa use tax permit holder or to the department of revenue.

Both the sales and use tax provisions of the Iowa Code were amended in the same General Assembly that saw the passage of the 1971 Beer and Liquor Control Act. The additions to Iowa Code chs. 422 and 423 did not touch upon the taxation of liquor sold, given away or dispensed while an air common carrier was in or over the state.[4] Nor have any later sales or use tax amendments specifically addressed the question of whether these chapters apply to liquor sold, given away or dispensed by air common carriers.

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[4]The amendments to Iowa Code chs. 422 and 423 in 1971 involved the imposition of sales and use tax on motor vehicles, a sales tax penalty, the remittance of sales and use tax and the collection of sales and use tax. <u>See</u> 1971 Iowa Acts, chs. 210, 211, 212 and 213.

Against this backdrop of legislative history, the next step in this analysis must include an examination of the fundamental rules of statutory construction employed when tax statutes are in issue.

The Iowa Supreme Court has adopted a variety of rules it looks to when it interprets a statute. Primary among these is that, where a statute is clear and unambiguous on its face, a court need not and, in fact, cannot interpret the statute. American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140 (Iowa 1981); Cowman v. Hansen, 92 N.W.2d 682 (Iowa 1958); Dingman v. City of Council Bluffs, 90 N.W.2d 742 (Iowa 1958); 2A Sutherland, Statutory Construction § 45.02 at 4 (4th ed. 1984). If the words in the statute are unclear or the meaning is doubtful, then the Court may use various aids to interpret the statute. The Iowa Supreme Court has frequently applied the following rules of construction for this purpose.

1. In considering legislative enactments the Court should avoid strained, impractical or absurd results.

2. The usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal impact of the words used.

3. Where language is clear and plain, there is no room for construction.

4. The Court should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reading a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

5. All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion.

6. The Court gives weight to the administrative interpretation of the statute particularly when they are long standing. This review requires deference but not adherence. Sorg v. Iowa Dept. of Revenue, 269 N.W.2d 129, 131 (Iowa 1978).

7. In construing tax statutes, doubt should be resolved in favor of the taxpayer.

American Home Products 302 N.W.2d at 142-143.

Using either of the standards set out above, Iowa Code § 123.36(5)(c) (1985) precludes the imposition of the sales and use tax found at Iowa Code §§ 422.43 and 423.2 (1985) on air common carriers.[5]

The language of Iowa Code § 123.36(5)(c) is clear and unambiguous. An air common carrier makes two separate payments to the State. One payment is a $500 license fee. The other is a seven dollar ($7.00) per gallon tax on liquor sold, dispensed or given away in or over Iowa. The next sentence in the section establishes the exclusivity of the tax and fee. The legislature provided that if the above recited payments were made, the amounts would be in lieu of any other fee or tax collected from an air carrier for the possession and sale of alcoholic beverages or beer. The "in lieu of" language has been interpreted to mean "instead of." See Wolder v. Rahm, 249 N.W.2d 630, 633 (Iowa 1977). In Wolder, the Iowa Supreme Court found that where the legislature had employed the "in lieu of" language in connection with filing a claim in a decedent's estate, the phrase meant "instead of," "in place of," and "in substitution for." It does not mean "in addition to." Applying this definition to Iowa Code § 123.36(5)(c), the legislature intended to substitute the seven dollar per gallon tax for any other fee and tax collected from the air common carrier for the sale and possession of alcoholic beverages and beer in or over Iowa.

When the legislature chose to use the phrase "any other fee and tax collected from such carriers for the possession and sale of alcoholic beverages and beer" in conjunction with the "in lieu of" language, it excused air common carriers from paying the fifteen percent tax imposed by Iowa Code § 123.98 (1985) and from collecting or paying the four percent sales and use tax.

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[5]Iowa Code § 123.36(5)(c) is both a tax imposition statute and a tax exemption statute. If construction is necessary, two rules of construction are applicable. Tax imposition statutes are construed strictly against the taxing authority. Tax exemption statutes are construed strictly against the taxpayer. See Iowa Auto Dealers v. Iowa Department of Revenue, 301 N.W.2d 760 (Iowa 1981); Jones v. Iowa State Tax Commission, 247 Iowa 530, 534, 74 N.W.2d 563, 565 (1956).

Air common carriers are not subject to the fifteen percent tax imposed on Class A, B and C licensees because an airplane does not meet the definition of premises. See Iowa Code § 123.3(31). Consequently, when the legislature used the words "other fees and taxes," the reference was not to this section. The reference could only include the sales and use tax provisions.

This conclusion is buttressed by the use of the words "possession and sale" in Iowa Code § 123.36(5)(c) (1985). Both words have specific meanings in a sales or use tax context. Use of these particular words suggests that the legislature had the sales and use tax provisions in mind when it adopted the language for Iowa Code § 123.36(5)(c). "Possession" is included in the definition of "use" found at Iowa Code § 423.1 (1985). Possession of tangible personal property is the highest form of the exercise of any right or power over an item of tangible personal property. "Sale" is specifically defined in Iowa Code § 422.42(2) as any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for consideration. The conclusion is inescapable that the legislature intended to impose only one tax on the sale or use of alcoholic beverages by air common carriers in or over Iowa.

The choice of words and the purpose sought to be accomplished by all three of these tax statutes suggests that the legislature intended an in pari materia construction for Iowa Code §§ 123.36(5)(c), 422.42(2) and 423.1 (1985). Statutes are construed in pari materia when they relate to the same person or thing, to the same class of persons or things or have the same purpose or object. 2A Sutherland, Statutory Construction § 51.03 at 467 (4th ed. 1984). The most significant of these three items is the purpose or object of a statute rather than the subject matter with which the statute deals. Kemp v. Creston Transfer Co., 70 F. Supp. 521, 537 (N.D. Iowa 1947).

The purpose of the statutes is the same. Each seeks to impose a tax on the privilege of selling or using liquor in Iowa. The only difference is that a different agency makes the collection. The effect of both the sales and use tax and the tax imposed by Iowa Code § 123.36(5)(c) is the same. Receipts from all three taxes go into the general fund. See Iowa Code §§ 123.97, 422.23(8) and 423.24 (1985). The only difference is the administrative path the monies take to reach the general fund. Each chapter has its own exemption scheme as well.

If the rules of statutory construction are employed, the conclusion reached above remains unchanged. Iowa Code chs. 422 and 423 are tax imposition statutes. When the purpose of each of the provisions is examined and compared, it is apparent that the object to be accomplished is to prevent those who use and sell alcoholic beverages and beer in Iowa from avoiding their tax liability for that privilege. All three taxes accomplish this purpose.

Moreover, the conclusion that Iowa Code § 123.36(5)(c) precludes the imposition of the sales and use tax on the sale or use of alcoholic beverages by an air common carrier produces a logical and practical result and avoids a strained and absurd interpretation. If a sales or use tax is imposed on the sale or use of alcoholic beverages by an air carrier, the carrier is being taxed twice for the privilege of selling or using liquor. Further, the imposition of the sales and use tax on the airline for the sale or use of alcoholic beverages would render the last sentence of paragraph (c) of Iowa Code § 123.36(5)(c) meaningless. This construction would run afoul of the rules set forth in American Home Products, 309 N.W.2d at 142-143, and Iowa Code § 4.4(2) (1985). These strained and impractical results are avoided when the air carrier pays its gallonage tax instead of paying a sales or use tax.

The rules of statutory construction set out at Iowa Code § 4.7 (1985) also lend support to the interpretation that Iowa Code § 123.36(5)(c) precludes imposition of the sales and use tax on air common carriers for the sale and possession of liquor or beer. Iowa Code § 123.36(5)(c) is a specific statute. It deals with one subject, one type of common carrier within the transportation industry and one tax--a tax on alcoholic beverages sold or used by air common carriers. The sales and use tax provisions are general taxing provisions which cross industry lines. Iowa Code § 4.7 (1985) provides that where there is conflict between a general and specific provision, the specific provision prevails as an exception to the general statute. In this case, the specific provision contained in Iowa Code § 123.36(5)(c) is an exception to the sales and use tax provisions.

CONCLUSION

Based upon the legislative history and the language contained in Iowa Code § 123.36(5)(c), air common carriers are not subject to the imposition of sales and use tax provided for at Iowa Code §§ 422.43 and

423.2 respectively. If the rules of statutory construction are consulted, the result is the same.

Very truly yours,

Elizabeth A. Nelson
Assistant Attorney General

EAN:cmh

TAXATION: Soil Conservation Subdistricts. Iowa Code §§ 107.16, 110.3, 427.1, 441.17, 441.21, 455.50, 467A.20 (1985). Section 467A.20 does not authorize the levy of special annual soil conservation subdistrict tax on assessed value of property that is exempted from taxation by § 427.1(1). (Smith to Casper, Madison County Attorney, 6/7/85) #85-6-2(L)

June 7, 1985

Mr. John E. Casper
Madison County Attorney
223 East Court Avenue
Winterset, Iowa 50273

Dear Mr. Casper:

Your letter of April 18, 1985, notes that Iowa Code § 427.1(1) exempts state property from taxation, but requests an opinion on the question whether § 467A.20 creates an exception authorizing levy of a special annual soil conservation subdistrict tax on state property within the subdistrict.

In responding to your question, we would emphasize a different portion of the statutory language than that emphasized in your letter. Section 467A.20, in pertinent part, provides that the board(s) shall "make the necessary levy <u>on the assessed valuation</u> of all real estate within the boundaries of the subdistrict." (emphasis added). The levy authorized is on "the assessed valuation." Section 467A.20 does not establish an independent assessment process.

The assessed valuations subject to a § 467A.20 levy are those fixed by local assessing officials or by the Director of Revenue. <u>See, e.g.</u>: Iowa Code Chapters 428, 433, 434, 437, 438; Iowa Code §§ 427.1(31), 441.17(2) and 441.21. The latter two sections are particularly pertinent. Section 441.17(2) provides that the assessor shall:

> 2. Cause to be assessed, in accordance with section 441.21, all the property, personal and real, in the assessor's county or city as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law.

Section 467A.20 does not authorize the assessor to assess tax exempt state property. It only authorizes the board(s) to levy a tax on assessed valuations.

It might be argued that § 467A.20 authorizes the board(s) to levy on the value that is assessed pursuant to § 427.1(31) which requires local assessing officials to assess tax exempt property. However, § 467A.20 had its genesis in 1955 Iowa Acts, ch. 225, § 8, enacted seventeen years before 1972 Iowa Acts, ch. 1104, § 3, which added the requirement that assessors determine the value of exempt property. Therefore, the argument that § 467A.20 includes an implied reference to § 427.1(31) must fail.

The language of § 467A.20 quoted in your opinion request is distinctly dissimilar from the language of other legislative enactments that have established exceptions to the tax exemption for state property in § 427.1. An example is the limited exception to the exemption in § 427.1 established and continued by a series of acts appropriating funds to the Iowa Conservation Commission for payment of school taxes on land acquired by the Conservation Commission under the open spaces acquisition program. The first such appropriation was in 1979 Iowa Acts, ch. 12, § 7, which directed the county treasurer to certify to the Conservation Commission the school taxes due for the fiscal year beginning July 1, 1980, on land acquired with open spaces acquisition funds based on the assessed value determined by county assessors under § 427.1(31).

Other examples are Iowa Code §§ 107.16 and 110.3 which govern the use of revenues, respectively, from the income tax checkoff for the fish and game protection fund, and from the sale of wildlife habitat stamps. These two sections employ identical language to establish an exception from the general property tax exemption in § 427.1, as follows:

> Notwithstanding the exemption provided by section 427.1, any land acquired with the revenues and matched federal funds shall be subject to the full consolidated levy of property taxes which shall be paid from those revenues.

Sections 107.16 and 110.3 except state property acquired with certain revenues from tax-exempt status and thereby bring it within the class of property which local assessing officials are required to assess pursuant to § 441.17(2).

Section 467A.20 also contrasts with the drainage district code which sets forth an independent process by which drainage districts are authorized to assess property within the district

(§§ 455.45-455.56), including specific authorization to assess state property. (§ 455.50).

The exceptions to § 427.1(1) established by §§ 107.16, 110.3, and 455.50, and by a series of open spaces school tax appropriation acts all show that the General Assembly was capable of using unambiguous language explicitly identifying the process by which certain classes of otherwise tax-exempt land are subject to the assessment and levy of taxes. Such language is not present in § 467A.20. Additionally, an obvious purpose for the reference in § 467A.20 to "all real estate within the boundaries of the subdistrict" is to clarify that the tax is not to be selectively levied, i.e., that the board is prohibited from exempting property from the special tax if the property is within the boundaries of the subdistrict and is subject to assessment for the consolidated levy of property taxes.

We therefore conclude that § 467A.20 does not authorize the levy of a special annual soil conservation district tax on the assessed value of property that is exempted from taxation by § 427.1(1).

Sincerely,

Michael H. Smith

MICHAEL H. SMITH
Assistant Attorney General
Environmental Law Division
(515) 281-5351

MHS:rcp

TAXATION: Notice of Tax Sale; Compensation For Publication of Notice of Tax Sale. Iowa Code §§ 446.9, 446.10, and 446.12 (1985). Section 446.10 provides for compensation not to exceed one dollar for each description for each weekly newspaper publication of the notice of tax sale. (Griger to Metcalf, Black Hawk County Attorney, 6/7/85) #85-6-1(L)

June 7, 1985

James Metcalf
Black Hawk County Attorney
B-1 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Metcalf:

You have requested an opinion of the Attorney General concerning the interpretation of Iowa Code § 446.10 (1985). Specifically, you inquire whether the one dollar maximum compensation in Iowa Code § 446.10 for publication of each description of property to be offered at tax sale applies to each of the two published notices of the tax sale or to publication of both notices.

Iowa Code § 446.9 provides in relevant part:

> Notice of the time and place of the sale shall be given by the treasurer by publication in a newspaper in the county once each week for two consecutive weeks, the last of which is not more than two weeks before the day of sale. The notice shall contain a description of each separate tract to be sold as taken from the tax list, the amount of delinquent taxes for which it is liable for each year, the amount of penalty, interest, and costs accrued, and the name of the owner, if known, or the person, if any, to whom it is taxed. . . .

Section 446.10 provides:

> The compensation for such publication shall not exceed one dollar for each description,

> and shall be paid by the county. Headings and other matter shall be compensated for as provided in section 618.11. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury.

Iowa Code § 446.12 (1985) provides:

> The treasurer shall obtain a copy of the notice of sale, with a certificate of the publication thereof, from the printer or publisher, and file it in the office of the auditor, which certificate shall be substantially in the following form:
>
> I, A .... B ...., publisher (or printer) of the ...., a newspaper printed and published in the county of .... and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for two consecutive weeks, the last of which publications was made on the .... day of ...., A.D. ...., and that copies of each number of said paper in which said notice and list were published were delivered by carrier or transmitted by mail to each of the subscribers to said paper, according to the accustomed mode of business in this office.
>
> A .... B ....
>
> State of Iowa,)
>) ss.
> .... County.)
>
> The above certificate of publication was subscribed and sworn to before me by the above named A .... B ...., who is personally known to me to be the identical person described therein, on the .... day of ...., A.D. ....
>
> ....
> Auditor .... County, Iowa

Iowa Code § 618.11 (1985) provides:

> The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed twenty-six cents for one insertion, and seventeen cents for each subsequent insertion, for each line of eight-point type two inches in length, or the equivalent thereof. In case of controversy or doubt regarding measurements, style, manner or form, the controversy is referred to the executive council, and its decision is final.

The foregoing statutory provisions are in pari materia and should be considered, compared, and construed together. Northern Natural Gas Company v. Forst, 205 N.W.2d 692, 695 (Iowa 1973). In doing so, a reasonable interpretation should be given to the statute. Isaacson v. Iowa State Tax Commission, 183 N.W.2d 693, 695 (Iowa 1971).

Section 446.9 provides for publication of notice of tax sale. The "publication", contemplated by the language in the statute, is to be done twice, namely, "once each week for two consecutive weeks, the last of which is not more than two weeks before the day of sale." Section 446.9 contemplates two publications of notice of tax sale.

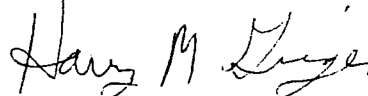
Compensation for such publication, pursuant to § 446.10, cannot exceed one dollar for each description. Compensation for "Headings and other matter" is made pursuant to § 618.11 which, as you point out, is for each insertion. If § 446.10 was construed to place a one dollar ceiling on both weekly publications of notice of tax sale for each description, then the one dollar would apply to both description "insertions" whereas "Headings and other matter", though compensated by different maximum amounts than for descriptions, would be compensated for each weekly publication.

Section 446.12 further provides that the treasurer is to obtain from the printer or publisher a certificate of the publication and file it with the county auditor. The certificate form is in § 446.12 and requires the publisher or printer to set forth the date of "the last of which publications."

In construing these statutes together, it is reasonable to conclude that § 446.10 limits the maximum one dollar compensation for a description to each newspaper publication of the tax sale notice rather than for both publications. Obviously, each time the notice of tax sale is published pursuant to § 446.9, there is a "publication." There are two publications of the notice of tax sale and each publication contains a description for which compensation not to exceed one dollar is provided in § 446.10. In addition, § 446.12, in the certificate form, recognizes that there are two publications of the notice of tax sale. And, as noted above, construing § 446.10 as providing for maximum one dollar compensation for each publication is consistent with the allowance for separate compensation for each publication of "Headings and other matter" pursuant to § 618.11.

Therefore, it is the opinion of the Attorney General that § 446.10 provides for compensation not to exceed one dollar for each description for each weekly newspaper publication of the notice of tax sale.

Very truly yours,



Harry M. Griger
Special Assistant Attorney General

HMG:cmh

TAXATION: Property Taxation; Race Track Property Owned by Private Nonprofit Corporation. Iowa Code §§ 99D.2, 427.1, 427.13 (1985). Race track property, as defined in § 99D.2, is not exempt from property taxation merely because it is owned by a private nonprofit corporation. (Mason to Gronstal, State Senator, 8/1/85) #85-7-9(L)

August 1, 1985

The Honorable Michael E. Gronstal
220 Bennett Ave.
Council Bluffs, Iowa 51501

Dear Senator Gronstal:

You have requested a response to the following questions:

1. Do the exemptions provided in Section 427.1 of the Code of Iowa 1985 apply to race tracks or race track enclosures as defined in Section 99D.2 (the Code) or the property on which the track, facilities, or concessions are located if this property is owned by a private nonprofit corporation?

2. Are there any other sections of the Code which may be legally interpreted to allow either a partial or complete exemption from property taxation either permanently or on a temporary basis?

3. What authority, if any, do local government officials have to leave this type of property off the tax rolls?

We are of the opinion that none of the exemptions provided in Iowa Code § 427.1 (1985) apply to race track property based solely on the fact that it is owned by a private nonprofit corporation. Further, no other sections of the Code appear to allow either a partial or complete exemption from property taxation.

Therefore, local government officials have no authority to leave this type of property off the tax rolls. Thus, your three questions are answered in the negative.

While Iowa Code § 99D.14 prohibits some types of excise taxes on race track licensees, it does not prohibit a property tax on the track grounds or enclosures. Therefore, the race track property is subject to property tax unless exempted by § 427.1.[1] See Iowa Code § 427.13 (1985). The only exemption in § 427.1 which appears remotely relevant to a race track owned by a private nonprofit corporation is that set out in Iowa Code § 427.1(9) (1985). Upon further examination of the requirements of § 427.1(9), however, it appears that the property is not exempt based solely on the fact that it is owned by a private nonprofit corporation.

Tax exemption statutes are strictly construed, with any doubts resolved in favor of taxation. Parshall Christian Order v. Board of Review, Marion County, 315 N.W.2d 798, 801, 28 A.L.R. 4th 333 (Iowa 1982). The party seeking the exemption has the burden of proving that the property falls within an exemption statute. Id.

Section 427.1(9) exempts the following from property tax:

> All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit.

Therefore, to fall within the exemption of § 427.1(9), the property must (1) be used by a literary, scientific, charitable, benevolent, agricultural, or religious institution or society, (2) be used solely for the appropriate objects of such an institution or society, and (3) not be used with a view to pecuniary profit.

---

[1] If the property is located in an area of the city designated by the city as a revitalization area pursuant to Iowa Code chapter 404 (1985), it may be eligible to receive a temporary exemption from taxation on a portion of the actual value added to the property by improvements made during the time the area was so designated. See Iowa Code § 404.3 (1985). This exemption does not apply to race track property per se, however. It would only apply if the conditions set forth in chapter 404 are satisfied. There is no information given in the opinion request from which it could be concluded that such exemption may be applicable.

A nonprofit corporation is not automatically an institution of the type required by § 427.1(9). Dow City Senior Citizens Housing Inc. v. Board of Review of Crawford County, 230 N.W.2d 497, 499 (Iowa 1975). If the owner of the track is also the licensee conducting the races, then it is required to be organized to promote certain enumerated purposes. Iowa Code § 99D.8 (1985). Among those purposes are those of "educational, civic, public, charitable, patriotic or religious uses in this state". Iowa Code §§ 99B.7(3)(b), 99D.8 (1985). Therefore, if the private nonprofit corporation which owns the track is also the racing licensee and is organized for the requisite purposes, it may be a literary, scientific, charitable, benevolent, agricultural, or religious institution as required by § 427.1(9). Even if there were sufficient facts given about the nonprofit corporation which owns the Council Bluffs race track from which it could be determined it was an exempt institution, however, the property does not necessarily satisfy the other two requirements.

The actual use of the property, rather than the identity of the owner, controls in determining whether a charitable organization's property is exempt. Iowa Methodist Hospital v. Board of Review, 252 N.W.2d 390, 392 (Iowa 1977).

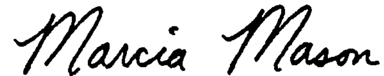
The exemption statutes are a legislative recognition of benefits received by society as a whole from properties devoted to appropriate objects of exempt institutions and the consequent lessening of the burden on the government. Dow City Senior Citizens Housing, Inc., 230 N.W.2d at 499.

We have considered whether a nonprofit corporation whose sole function will be to conduct horse racing can be an agricultural institution or society. It is our opinion that such a corporation would not be an agricultural institution or society since the primary purpose, under these circumstances, of the corporation and the use of the corporate property is to provide entertainment, and not to provide an agricultural function. As a consequence, the use of the corporate property as a race track is not for an appropriate object under § 427.1(9).

Property used for the entertainment of admission-paying persons is not used solely for an appropriate object under § 427.1(9). See Aerie 1287, Fraternal Order of Eagles v. Holland, 226 N.W.2d 22, 25 (Iowa 1975) (building used for relaxation and entertainment of dues-paying members not being used solely for appropriate objects, with no view to pecuniary profit).

Since a private nonprofit corporation which owns race track property is not automatically an exempt institution, and since, in any event, the operation of a race track as the sole function of the corporation is not an exempt use of the property, the § 427.1(9) exemption does not apply. As stated above, no other sections of the Code appear to exempt this property from property tax.

Sincerely,



Marcia Mason
Assistant Attorney General

WP2

SECRETARY OF STATE. Credit Union Administrator. §§ 496A.103, 496A.142, Iowa Code (1985). Credit Unions organized outside Iowa must comply with Chapter 533 of the Iowa Code (1985) and rules of Credit Union administrator before doing business in Iowa; they do not need a certificate of authority pursuant to § 496A.103 et seq. (Galenbeck to Odell, Secretary of State, 7/25/85) #85-7-8(L)

July 25, 1985

Mary Jane Odell
Secretary of State
L O C A L

Dear Ms. Odell:

You have requested an opinion whether a "certificate of authority" must be obtained by a credit union incorporated outside of Iowa but planning to do business in Iowa. Provisions relating to certificates of authority are found in §§ 496A.103 through 496A.109, Iowa Code (1985). Foreign credit unions doing business in Iowa are regulated by § 533.39 of the Iowa Code (1985).

General regulation of credit unions is the responsibility of the credit union review board and the credit union administrator as directed by Chapter 533, Iowa Code (1985). Following a 1984 amendment to the Code, credit unions chartered outside Iowa may do business in the state. Section 533.39 provides:

> "Subject to rules of the administrator, a credit union chartered in another state may do business in Iowa subject to the applicable provisions of this chapter. . . ."

In light of regulatory provisions contained in Chapter 533, requirements for a certificate of authority contained in Chapter 496A.103 et seq. are redundant. Recognizing this fact, the legislature has provided, in § 496A.142, that credit unions need not comply with Chapter 496A. Section 496A.142 states:

> "Except as provided in section 496A.2, in section 496A.103, subsection 2, and in this subsection, this chapter shall not apply to or affect corporations subject to the provisions of [chapter] . . . 533 . . . of the Code. . . ." (emphasis added)

The exceptions to the exclusionary language emphasized above do not affect resolution of your question -- whether foreign credit unions must obtain a certificate of authority. Section 496A.2 is strictly definitional. Section 496A.103(2), concerning corporate activities which do not constitute transacting business in the State, also fails to alter the exclusionary effect of § 496A.142. Finally, § 496A.142 itself regards, for the most part, domestic corporations organized under Code sections other than 496A, and foreign corporations holding a permit issued pursuant to Chapter 494 or 495. In sum, I find nothing in § 496A.2, § 496A.103(2) or § 496A.142 which requires credit unions to obtain a certificate of authority pursuant to § 496A.103(1).

Had the legislature intended foreign credit unions to obtain certificates of authority, the exclusionary language of § 496A.142 might have read: 'Except as provided in section 496A.2, in section 496A.103(1) and section 496A.103(2), etc.' (the addition to existing statutory language is underlined). However, no reference to the certificate of authority provisions found in § 496A.103(1) is contained in § 496A.142.

Because Chapter 533 of the Code provides a comprehensive scheme for regulation of credit unions organized outside Iowa, and because § 496A.142 specifically exempts credit unions from most provisions of Chapter 496A, it is unnecessary for non-domestic credit unions to obtain a § 496A.103(1) certificate of authority.

Sincerely,

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

MUNICIPALITIES: Public Utility Franchise Fees and Elections. Iowa Code §§ 364.2(4), 364.2(4)(f), 364.3(4), 476.1, 4.4(2), 4.4(3) (1985), and 368.2 (1973). A city may charge a franchise fee to public utilities as a condition of granting a franchise. Alternative proposals concerning the length of time that a franchise is to be granted may be submitted on the ballot at a franchise election. (DiDonato to Osterberg, State Representative, 7/24/85) #85-7-7(L)

July 24, 1985

The Honorable David Osterberg
State Representative
Mount Vernon, Iowa 52314

Dear Representative Osterberg:

You have requested an opinion of the Attorney General regarding municipal franchise agreements with privately owned public utilities. The questions that you have presented are:

1. Can a city charge a franchise fee to utilities pursuant to its Home Rule authority and Iowa Code section 364.2(4)(f) (1985)?

2. If a franchise fee can be charged, could the utility pass this cost on to customers? If so, would the fee be charged only to customers within the city or would the cost be charged to all customers of the utility?

3. May the ballot at a franchise election pose alternative questions, such as whether a franchise should be granted for 25 years or for 5 years?

I

We would note at the outset that this opinion concerns only whether a city is precluded by law from charging franchise fees to a public utility and whether alternative proposals may be submitted at a franchise election. The questions you raise concerning the rates charged by a public utility are properly presented in the first instance to the Iowa State Commerce Commission for determination. Iowa Code section 476.1 (1985) provides that the Iowa State Commerce Commission has the authority to regulate the rates of public utilities. Questions affecting public utility rates are to be submitted to and settled by the Commerce Commission. Iowa-Illinois Gas & Electric Co. v. Iowa City, 255 Iowa 1341, 124 N.W.2d 840, 845 (1963). The Iowa State Commerce Commission has ruled on questions similar to those you pose. The Iowa Supreme Court has affirmed a ruling of the

Iowa State Commerce Commission that a privately owned public utility may recover the cost of the franchise fee charged by the city to the utility by collecting a surcharge from city customers only rather than spreading the cost of the franchise fee over the utility customers generally in City of Des Moines, Iowa v. Iowa State Commerce Commission, 285 N.W.2d 12 (Iowa 1979).

II

A franchise is a grant whereby a city confers the right to a public service company to use the public streets and ways for the water pipes, gas pipes, conduits for wire, poles, etc., necessary to provide public utility service. 12 McQuillin, Municipal Corporations § 34.01 (3rd Ed. 1970). A franchise fee is charged as compensation for the use of streets and public ways by the public service company. City of St. Louis v. Western Telegraph Co., 149 U.S. 465, 470, 37 L. Ed. 810, 13 S. Ct. 990 (1893).

The authority of a city to grant a franchise to a public utility is delineated in Iowa Code section 364.2(4) (1985). Franchise fees are referred to in subsection (f) as follows:

> f. If a city franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer.

While there is no specific authorization for a city to charge a franchise fee in Iowa Code section 364.2(4) (1985), the power of a city to do so may be inferred from Iowa Code section 364.2(4)(f) (1985) and is within the Home Rule powers of a city, as the assessment of a fee is not limited by the Iowa Code.

The reference to the assessment of a city franchise fee in Iowa Code section 364.2(4)(f) was added by the Iowa legislature in 1983. 1983 Iowa Acts, ch. 127, § 5. It is our opinion that the reference to a city franchise fee strongly implies the legislative intent that a city has the power to impose such a fee. See Willis v. Consolidated Independent School District, 210 Iowa 391, 396, 227 N.W. 532, 535 (1929). To find otherwise would be to deny effect to 364.2(4)(f) and would therefore be unreasonable. Iowa Code § 4.4(2), (3) (1985).

Pursuant to its Home Rule powers, it is our opinion that a city has the authority to assess a franchise fee to a public utility in the absence of an express authorization pursuant to the Iowa Code. Any limitation on a city's home rule powers by state law must be expressly imposed. Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978). We have found no statutory restriction on the power of a city to impose a fee in consideration of the grant of a franchise to a utility. A

franchise fee may be distinguished from a tax. "A tax is a charge to pay the cost of government without regard to special benefits conferred." Newman v. City of Indianola, 232 N.W.2d 568, 573 (Iowa 1975), citing In re Trust of Shurtz, 242 Iowa 448, 454, 46 N.W.2d 559, 562 (1951). The essence of a franchise is the conferment of special benefits, not enjoyed by the general public, to the use of public property. The Iowa legislature appears to have recognized this distinction. Iowa Code section 364.3(4) (1985) restricts the power of a city to levy a tax by providing that: "A city may not levy a tax unless specifically authorized by a state law." This section was previously codified as Iowa Code section 368.2 (1973) as: "Cities and towns shall not have the power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute." (emphasis added) The section was amended in 1975 to delete the reference to fees and the other exactions. It can be inferred that the legislature, by dropping the reference to fees, has removed the previous limitation on a city's power to impose a fee.

It is our opinion that City of Des Moines v. Iowa Telephone Co., 181 Iowa 1282, 162 N.W. 323 (1917), is not controlling on this issue. City of Des Moines v. Iowa Telephone Co. held that a city cannot impose rental fees on the use of streets and public ways absent express statutory authority to do so. 162 N.W. at 331, 332. The court based its decision on two factors no longer relevant: the doctrine that a city has only that power delegated to it from the state and the fact that a statute gave public utilities the right to the unlimited use of city streets, the city having no voice in this grant of power. The basis of the court's decision has completely changed due to the adoption of the Home Rule Amendment and Iowa Code section 364.2(4) (1985), subsequent to the date of City of Des Moines v. Iowa Telephone Co.

Because of the deletion of "fees" from Iowa Code section 368.2 in 1975 and the addition of subsection (f) to Iowa Code section 364.2(4) in 1983, it is our opinion that two previous Iowa Attorney General Opinions, 1970 Op.Att'yGen. 421 (a municipal corporation has no authority to exact a franchise fee from a private utility as a condition precedent to the granting of a franchise), and 1972 Op.Att'yGen. 79 (city may not exact rental fee from telephone company for use of public streets for lines and poles) are no longer controlling.

III

Iowa Code section 364.2(4) (1985) empowers a city to grant a franchise for a term up to 25 years and does not limit the submittal to the voters at a franchise election of a proposal for

a single term of years for approval. Under the Home Rule authority of a city and Iowa Code section 364.2(4) (1985), a city would have the authority to submit alternative proposals for a term of 25 years or 5 years to a franchisee to voters at a franchise election.[1] Two prior Attorney General Opinions, 1978 Op.Att'yGen. 487 and 1978 Op.Att'yGen. 503, held that more than one proposal concerning the granting of a franchise to a public utility may be submitted on the ballot at an election.

In conclusion, a city has the authority pursuant to its Home Rule authority and Iowa Code section 364.2(4)(f) (1985) to charge a fee to a public utility granted a franchise by the city. Alternative proposals concerning the length of time that a franchise is to be granted may be submitted on the ballot at a franchise election. Questions concerning the rates charged by a public utility should be presented in the first instance to the Iowa State Commerce Commission.

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD/skb

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[1]Alternative proposals concerning the term of years that a franchise shall be granted should be submitted as separate questions on the ballot. See Lahn v. Incorporated Town of Primghar, 225 Iowa 686, 281 N.W. 214 (1938); Keokuk Water Works Co. v. City of Keokuk, 224 Iowa 718, 277 N.W. 291 (1938); 1938 Op.Att'yGen. 841.

MUNICIPALITIES: Member Contribution Refunds to Pension Accumulation Fund. Iowa Code Chapter 411 (1985); Iowa Code §§ 411.6, 411.6(1)(a), 411.6(1)(b), 411.6(2), 411.8(1), 411.8(1)(f), 411.11, 411.21(7) (1985); Iowa Code §§ 411.1(17), 411.6(2), 411.6(10), 411.8(1), 411.8(3) (1977). A member of an Iowa Code chapter 411 retirement system who terminates service except by disability or death prior to establishing eligibility for a service retirement benefit is not entitled to reimbursement of the amount of his or her accumulated contributions to the retirement system. Those members who contributed to the annuity savings fund prior to July 1, 1979, and who have served at least five years, may receive their accumulated contributions to that now abolished fund in accordance with the provisions of Iowa Code § 411.21(7) (1985). (DiDonato to Peterson, Muscatine County Attorney, 7/15/85) #85-7-5(L)

July 15, 1985

Mr. Stephen J. Peterson
Muscatine County Attorney
112 East Third Street
West Liberty, Iowa 52776

Dear Mr. Peterson:

You have requested an Attorney General's opinion concerning reimbursement of member contributions to the retirement systems for police officers and firefighters. The question presented is whether a member who terminates service before establishing eligibility for a service retirement benefit is able to receive a refund of the amount contributed by the member to the retirement system pursuant to Iowa Code Chapter 411 (1985). This question concerns only members of the chapter 411 retirement systems who have served less than 15 years and who do not terminate their service based upon death or disability.

Under a chapter 411 retirement system, a member is entitled to a service retirement allowance consisting of a pension equal to one-half of the member's average final compensation. Iowa Code § 411.6(2). The funding for the pension consists of contributions from a small percentage of the members' compensation with the necessary remaining funds provided by the city. Iowa Code §§ 411.8(1), 411.11. A member is eligible for a service retirement pension after attaining the age of fifty-five and serving twenty-two or more years. Iowa Code § 411.6(1)(a). A member who has served at least fifteen years is able to receive a prorated service retirement pension after attaining the age of fifty-five. Iowa Code § 411.6(1)(b). No provision is made under Iowa Code chapter 411 for a service retirement pension or a refund of member contributions to the pension accumulation fund for members

who terminate employment not for reason of death or disability before serving fifteen years.

Your request refers to the fact that chapter 411 previously contained a provision whereby a member could receive a refund of his or her accumulated contributions to the annuity savings fund if the member terminated employment before establishing eligibility for a service retirement benefit. Prior to July 1, 1979, chapter 411 retirement systems provided for a service retirement benefit that included both an annual pension and an annual annuity. Iowa Code § 411.6(2) (1977). The funding for these benefits was paid to a pension accumulation fund and an annuity savings fund, respectively. Iowa Code § 411.8(1)(3) (1977). The annuity was funded entirely from member contributions. Iowa Code §§ 411.1(17), 411.8(1) (1977). Iowa Code § 411.6(10) (1977) provided that a member resigning from service except by death or disability could upon demand receive his or her accumulated contributions to the annuity savings fund. No provision was made for refund of member contributions to the pension accumulation fund. The annual annuity benefit and the supporting annuity savings fund and annuity reserve fund were abolished when chapter 411 was revised effective July 1, 1979. 1978 Iowa Acts, ch. 1060, § 46, 56, 57. This revision resulted in the current system whereby a member's service retirement allowance consists of a pension only. The refund of members' contributions to the annuity savings fund pursuant to Iowa Code § 411.6(10) (1977) was also repealed. 1978 Iowa Acts, ch. 1060, § 50.

It should be noted that when the chapter 411 annuity benefit program was terminated, a new section was adopted to establish a schedule to reimburse member accumulated contributions to the annuity savings fund for those members with at least five years of service. 1978 Iowa Acts, ch. 1060, § 63; Iowa Code § 411.21(7) (1985).

The legislative intent not to provide for a refund of accumulated member contributions to the pension accumulation fund is clearly manifested by the continued provision for refund of member contributions to the annuity savings fund and absence of specific provision for a refund of member contributions to the pension accumulation fund. See State v. Flack, 251 Iowa 529, 101 N.W.2d 535, 538 (1960).

In conclusion, a police officer or firefighter under a chapter 411 retirement system who terminates service except by disability or death prior to establishing eligibility for a service retirement benefit is not entitled to reimbursement of the amount of his or her accumulated contributions to the retirement system. Those members who contributed to the annuity savings fund prior to July 1, 1979, and who have served at least

five years, may receive their accumulated contributions to that now abolished fund in accordance with the provisions of Iowa Code § 411.21(7) (1985).

Sincerely,

Ann DiDonato

ANN DiDONATO
Assistant Attorney General

AD:rcp

COUNTIES; INSURANCE; Voluntary contributions by counties to an insurance program. Iowa Code §§ 331.301; 331.424(1); 331.427(2); 507A.4-.5(1); 515.8; 515.10; 515.12; 515.69-.70; 521.1; 521.13 (1985). It is not a violation of state insurance laws for counties to make voluntary contributions to the Iowa State Association of Counties to support the insurance program offered to counties by that organization. Counties have home rule authority to make such contributions pursuant to their general authority to purchase liability and other insurance. (Haskins and Weeg to Doderer, State Representative, 7/15/85) #85-7-4

July 15, 1985

The Honorable Minnette Doderer
State Representative
2008 Dunlap Court
Iowa City, Iowa 52240

Dear Representative Doderer:

You have requested an opinion of the Attorney General on several questions relating to the insurance program offered to counties throughout the state by the Iowa State Association of Counties ("ISAC"). You state in your opinion request that ISAC has requested voluntary contributions from member counties across the state to support its insurance program. Your specific questions are as follows:

> 1. Can ISAC legally collect a volunteer assessment of tax dollars for this purpose or more accurately, can counties make a contribution from public funds to bail-out an unregulated or regulated foreign insurance company?
>
> 2. Were any insurance laws violated to create this shortage or are the laws inadequate to regulate insurance purchases by public bodies from companies not Iowa based?
>
> 3. Are the records of this insurance company available for inspection by Iowa officials?

I.

Your first two questions concern the legality under the insurance and other laws of Iowa of contributions requested by the Iowa State Association of Counties (ISAC) from its member counties to support its insurance program. The facts surrounding this program are as follows.

ISAC offers its members a general liability and property insurance program through an Iowa unauthorized insurance company. ISAC does not itself underwrite any risks in that program. The actual insurance is underwritten by Fremont Indemnity Company ("Fremont"), an insurance company domiciled in California but authorized to do business in Iowa. A portion of the risk undertaken by Fremont for the program is reinsured by Government Insurance Funds ("GIF"), an insurance company domiciled in Bermuda but admitted in neither Iowa nor California. (Fremont remains primarily liable, though, even as to this portion of the risk.)[1] GIF is owned and operated by ISAC. Iowa insurance law requires that an Iowa domestic or foreign[2] stock insurer have $1,000,000 in actual paid-up capital and $1,000,000 in surplus. See Iowa Code §§ 515.8, 515.10, 515.69 (1985). Bermuda law requires substantially less for its domestic insurers. (Under the Insurance Act, 1978, as amended in 1984, the Bermuda Minister of Insurance requires $400,000 as a reserve. See Insurance Company Asks Iowa's 99 Counties for $10,000 Donations, Des Moines Reg., Dec. 8, 1984, at 2A.) Fremont is presently liable for existing losses under ISAC's program. However, were GIF to be dissolved for failure to meet the financial requirements of Bermuda, it is likely that Fremont would discontinue underwriting ISAC's program in the future. ISAC is thus requesting a $10,000 contribution from each of its members in order to meet the requirements imposed by Bermuda. We are informed that ISAC has received sufficient contributions to maintain GIF's legal status.

The transfer and assumption of the risk of loss is the essence of "insurance." See Anderson, Couch: Cyclopedia of Insurance Law § 1:3, at 6-7 (1984); Huff v. St. Joseph's Mercy Hospital, 261 N.W.2d 695, 700 (Iowa 1978). With certain exceptions, the business of insurance in this state must be conducted by an authorized insurance company. See §§ 507A.5(1),

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[1] As to each loss occurrence, Fremont is responsible for the first $500,000 of a member's liability, having a right over and against GIF for the first $100,000 of that liability. Each ISAC member then assumes the risk over $1,000,000 on a given occurrence. Most ISAC members participating in the program purchase substantial "excess" insurance for this exposure.

[2] In the statutory terminology, a "domestic" insurance company is an insurer organized under the laws of Iowa, a "foreign" insurance company is an insurer organized under the laws of another state, and an "alien" insurer is an insurance company organized under the laws of another country. Compare Iowa Code § 515.69 (1985) with Iowa Code § 515.70 (1985). Thus, Fremont is a "foreign" insurer, while GIF is an "alien" insurer.

515.12 (1985). Since ISAC's insurance plan is directly underwritten only by Fremont, which is an authorized insurer, this requirement is satisfied. Because GIF merely underwrites Fremont's, and not ISAC's, risks, GIF is not considered to be doing business in Iowa. See Iowa Code § 507A.4 (1985) ("The [Unauthorized Insurers Act] shall not apply to: . . . 2. The unlawful transaction of reinsurance by insurers."). That is, GIF is nothing more than a reinsurer of Fremont's as to ISAC's risks.

This reinsurance arrangement is indeed permitted under Iowa law. Iowa domiciled insurance companies may only reinsure with those foreign insurance companies which are authorized to do business in Iowa (referred to as "admitted" insurers). See Iowa Code §§ 521.1, 521.13 (1985). However, there is no requirement in Iowa law that authorized foreign insurers reinsure only with other authorized companies, either domestic or foreign.[3] Thus, it is lawful under Iowa law for Fremont to reinsure with GIF, an insurer not admitted in Iowa.

In sum, then, in response to your second question, neither ISAC's insurance program nor the contributions requested of its members conflict with the insurance laws of Iowa. The latter are simply voluntary assessments made to fund a foreign reinsurer whose operations are lawful under Iowa insurance laws. Whether those laws are presently inadequate is a policy issue which is not for this office to address.

A remaining question exists as to whether it is lawful for the counties to make these contributions requested by ISAC. There are a number of statutory provisions governing the counties' authority with regard to liability insurance. First, Iowa Code ch. 613A (1985), the Municipal Tort Claims Act, expressly includes counties within the definition of municipality. See § 613A.1(1). Section 613A.7 authorizes a county to obtain liability insurance:

> The governing body of any municipality may purchase a policy of liability insurance insuring against all or any part of liability which might be incurred by such municipality

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[3] An administrative rule of the insurance department is sufficiently broad to be read to require that foreign insurers reinsure only with Iowa authorized companies. See 510 I.A.C. § 5.31. However, it has not been the insurance department's policy to require that of foreign insurers. See generally Dameron v. Neumann Bros., 339 N.W.2d 160, 162 (Iowa 1983) (administrative agency's construction of its own regulation is of "controlling weight" unless plainly erroneous).

> or its officers, employees and agents under the provisions of section 613A.2 and section 613A.8 and may similarly purchase insurance covering torts specified in section 613A.4. The premium costs of such insurance may be paid out of the general fund or any available funds or may be levied in excess of any tax limitation imposed by statute.

* * *

In addition, the supervisors are authorized by § 331.427(2) to appropriate money from the general fund for general county services, which include:

> 1. Services listed in section 331.424, subsection 1 . . .

Section 331.424(1) provides that in the event a county's basic levies are insufficient, the county may certify a supplemental levy for, <u>inter alia</u>:

* * *

> 1. Tort liability insurance to cover the liability of the county or its officers as provided in chapter 613A.

* * *

In the event the liability of a county officer or employee is not fully indemnified by insurance, § 331.324(4) requires the board to pay the amount of the loss beyond the amount of insurance. Finally, § 331.404 establishes the county indemnification fund, which is to be used:

> . . . to indemnify and pay on behalf of a county officer, . . . deputy, assistant, or employee of the county . . . , all sums that the person is legally obligated to pay because of an error or omission in the performance of official duties, . . .

§ 331.404(1). This fund "does not relieve an insurer issuing insurance under § 613A.7 from paying a loss incurred." § 331.404(2). <u>See</u> Op.Att'yGen. #83-11-1(L).

These provisions thus generally authorize counties to obtain liability insurance and provide a method of payment for claims which exceed the amount of insurance. There are no specific

statutory guidelines which would either authorize or prohibit the type of voluntary insurance payments being requested by ISAC in the present case.

In the absence of statutory authority on this particular question, we believe the county's home rule power may be invoked. See Iowa Const., Art. III, § 39A. Section 331.301(1) provides in part:

> 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. . . .

Subsection (3) subsequently provides that:

> . . . A county may exercise its general powers subject only to limitations expressly imposed by state law.

Thus, while the counties have been generally authorized by statute to purchase liability insurance, we believe their home rule powers authorize them to exercise their discretion in making specific decisions regarding the purchase of that insurance.

Therefore, because the county is authorized to purchase liability insurance, and because the voluntary payments here under discussion are not expressly prohibited by law, we conclude that it is within the discretion of each county board of supervisors, acting pursuant to their home rule authority, to decide whether these payments are an appropriate expenditure of county funds. As elected public officials, the supervisors are accountable to the electorate of the county for their decision to make these contributions.

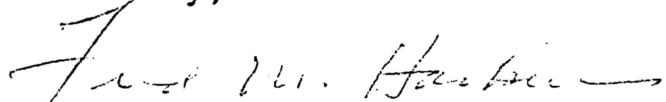
While this portion of our opinion has dealt with the question of liability insurance, we noted earlier that the insurance program offered to member counties by ISAC includes liability and property insurance. While there are no express statutory provisions authorizing counties to purchase property insurance, it is our opinion the counties may purchase such insurance pursuant to its home rule authority. The question of whether the counties may make the payments requested by ISAC in the present case with

regard to the property insurance program may be answered as was the question relating to the liability insurance program.

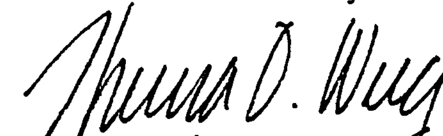
In concluding, we do note that there is a resource available to counties and other municipalities in Iowa to assist them in making decisions regarding the purchase of insurance. Sections 18.160-18.169 establish a risk management division within the Iowa Department of General Services. Section 18.165(2) gives the division the optional authority to develop risk management programs for governmental subdivisions, participation in which is to be on a voluntary basis only. Optional authority to acquire insurance coverage on behalf of governmental subdivisions is provided in § 18.166(4).

Your final question asks whether the records of this insurance company are available for inspection by Iowa officials. As indicated above, GIF is a Bermuda insurer, not an Iowa insurer, nor even a foreign insurer admitted here. Thus, the insurance department does not possess the records on it which that department would possess for even a foreign admitted insurer. Nevertheless, those records which the department does possess on ISAC's program are available for public inspection by virtue of Iowa Code § 22.2 (1985), the Public Records Law.

Sincerely,



FRED M. HASKINS
Assistant Attorney General



THERESA O'CONNELL WEEG
Assistant Attorney General

FMH:TOW:rcp

TAXATION: Propriety of Assessing Property Taxes Against Right to Extract or Mine Coal. Iowa Code § 84.18 (1985). The right to extract or mine coal (whether it be in the form of a lease agreement or easement) must be assessed and taxed separately to the owner of such a right. (Kuehn to Scieszinski, Monroe County Attorney, 7/9/85) #85-7-3(L)

July 9, 1985

Annette J. Scieszinski
Monroe County Attorney
One Benton Avenue East
P. O. Box 576
Albia, Iowa 52531

Dear Ms. Scieszinski:

You have requested an opinion of the Attorney General concerning whether property taxes can be assessed and taxed separately to the owner of a right to extract or mine coal from land and, further, whether it makes a difference if the conveyance of such a right is in the form of a lease agreement or an easement. Your question is answered by Iowa Code § 84.18 (1985) and 1982 Op.Att'yGen. 511 [82-8-16(L)].

Section 84.18 states:

> All rights and interests in or to oil, gas or other minerals underlying land, whether created by or arising under deed, lease, reservation of rights, or otherwise, which rights or interests are owned by any person other than the owner of the land, shall be assessed and taxed separately to the owner of such rights or interests in the same manner as other real estate. The taxes on such rights or interests which are not owned by the owner of the land shall not be a lien on the land. (Emphasis added)

The 1982 opinion of the Attorney General stated that, under § 84.18, coal leases should be assessed and taxed separately to the owner of such leases.

Annette J. Scieszinski
Page 2

It does not matter whether an easement or a lease agreement is used to convey the right to extract or mine coal from land. Any right to extract or mine coal comes within § 84.18 regardless what that right is called because § 84.18 encompasses "all rights and interests in ... minerals underlying land, whether created by or arising under ... lease ..., or otherwise ...." Based upon § 84.18, it is the opinion of the Attorney General that a conveyance of any right to extract or mine coal (whether it be in the form of a lease agreement or easement) should be assessed and taxed separately to the owner of such a right.

Very truly yours,

Gerald A. Kuehn
Assistant Attorney General

GAK:cmh

SANITARY DISTRICTS. Iowa Code § 358.9 (1985). The Iowa Conservation Commission has a duty to appoint two additional trustees to a sanitary district only if the state owns at least four hundred acres of land that is within district boundaries and contiguous to lakes within district boundaries. (Smith to Hart, Palo Alto County Attorney, 7/2/85) #85-7-2(L)

July 2, 1985

Mr. Peter Hart
Palo Alto County Attorney
P.O. Box 71
Emmetsburg, Iowa 50536

Dear Mr. Hart:

Your letter of April 15, 1985, requested an opinion of the Attorney General on the question whether the failure of the Iowa Conservation Commission to appoint two additional trustees to the Board of Trustees of the Lost Island Sanitary District has invalidated actions of the three-member Board of Trustees. Your request states that there are more than 400 acres of State-owned land contiguous to the lakes within the sanitary district, and assumes that Iowa Code § 358.9 (1985) requires that two additional trustees be appointed by the Iowa Conservation Commission. On the basis of additional information provided to us, we understand that there are more than 400 acres of State-owned land contiguous to Lost Island Lake but less than 400 acres of State-owned land within the Lost Island Sanitary District.

Iowa Code § 358.9, fourth unnumbered paragraph (1985), states the following:

> In cases where the state of Iowa owns <u>at least four hundred acres of land contiguous to lakes within the district</u>, the state conservation commission shall appoint two members of the board of trustees in addition to the three members provided in this section. The additional two members shall be United States citizens, not less than eighteen years of age, and property owners within the district. The two additional appointive members shall have equal vote and authority with other members of trustees and shall hold office at the pleasure of the state conservation commission.

(emphasis added). The language emphasized is facially ambiguous because it is not obvious whether the phrase "within the

district" qualifies the preceding phrase "at least four hundred acres of land contiguous to lakes" or only the word "lakes." If four hundred acres of State-owned land contiguous to lakes must be within the district boundaries, the duty to appoint two additional trustees would not be applicable to the Lost Island Sanitary District.

Facial ambiguity concerning the object of a qualifying phrase is sometimes resolved by application of the doctrine of the last antecedent. This rule of construction resolves ambiguities in sentence structure by requiring that a qualifying word or phrase be interpreted to apply to the last antecedent where no contrary intention appears. The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. Sutherland Statutory Construction § 47.33 (4th ed., 1984 Revision). Thus, the doctrine of the last antecedent can be applied only where the meaning of the sentence is clear. Also, it is usually applied where a qualifying phrase follows a series of terms, e.g., as in State v. Lohr, 266 N.W.2d 1, 3 (Iowa 1978).

To decide whether the meaning of an ambiguous sentence is impaired by application of a rule of construction, the legislative intent of the statute must be determined. Iowa Code § 4.6 (1985). The subject matter, effect, consequence, and the reason and spirit of the statute must be considered, as well as the words, in interpreting and construing it. Northern Natural Gas Company v. Forst, 205 N.W.2d 692, 695 (Iowa 1973). The legislative delegation of the duty to appoint two additional trustees had its genesis in 1955 Iowa Acts, ch. 179 (H.F. 476), which amended Iowa Code § 358.9 (1954). The 1955 amendment delegated to the Iowa Natural Resources Council the duty of appointing the two additional trustees. There was not any correlative amendment of chapter 455A (1954), which generally set forth the powers and duties of the Iowa Natural Resources Council. The principal duties of the Iowa Natural Resources Council set forth in chapter 455A (1954) involved water resources planning (§§ 455A.2 and 455A.17). The Council was not a pollution-control agency, although the scope of its duty to make surveys and investigations of the water resources of the state included "the problems of agriculture, industry, conservation, health, stream pollution and allied matters as they relate to flood control and water resources . . ." § 455A.18 (1954). The powers of a sanitary sewer district, as set forth in § 358.16 (1954), were to collect, treat and dispose of sewage. When chapters 358 and 455A (1954) are read in pari materia with the 1955 amendment of § 358.9, the legislative intent underlying delegation of the duty to appoint additional trustees is subject to conjecture.

To identify the intent of an ambiguous legislative enactment, the Iowa Supreme Court sometimes has examined the explanation appended to the act in bill form, e.g., as in Good Development Co. v. Horner, 260 N.W.2d 524 (Iowa 1977), and American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140 (Iowa 1981). Explanations appended to bills are not necessarily reliable indicia of legislative intent because bill explanations are not amended to reflect the effects of text amendments. However the explanation appended to H.F. 476, subsequently enacted as 1955 Iowa Acts, ch. 179, includes a reference to the 400-acre threshold that is in the act. The explanation states the following:

> This is to give representation on a board of trustees in a sanitary district, to the state, where their holdings amount to at least 400 acres, and a large number of property owners who are not legal residents.

This explanation is not a model of clarity. However, an intent expressed in the explanation is to give representation to the state as a landowner in the district, and to thereby dilute the power of the trustees whose election was controlled by residents of the district pursuant to § 358.7 (1954).

Given an intent to provide representation for the state as a landowner, the relevance of state land outside the district boundaries is not apparent. State holdings of 400 acres within district boundaries might give the state a substantial interest in the type of facilities established by the district and the methods of financing them. This would be especially likely where the state holdings included park camping and cabin development on a lakeshore. Conversely, if the state owned only one small parcel within a district for a boat ramp access which happened also to be contiguous to a large tract outside district boundaries, the interest of the state as a landowner would be minimal.

A statute should be given a sensible, practical, workable and logical construction. Northern Natural Gas Company v. Forst, at 695. Although it is a close question on which reasonable minds could differ, we conclude that the most logical construction of the ambiguous sentence in the 1955 enactment is that the legislature intended the state to have the duty to appoint additional trustees only when the 400 acres of state land are in the district.

Section 358.9 (1981) was amended by 1982 Iowa Acts, ch. 1199, § 66, which substituted the Iowa Conservation Commission for the Iowa Natural Resources Council upon the merger of the Council into the new Department of Water, Air and Waste

Management. This transfer of jurisdiction did not expressly or impliedly change the purpose of the delegated power to appoint additional trustees. It is consistent with the legislative intent expressed in the explanation appended to the bill enacted in 1955, i.e., to protect the interest of the state as a district landowner.

We conclude that the Iowa Conservation Commission has a duty under § 358.9 (1985) to appoint two additional trustees to a sanitary district whose boundaries include at least four hundred acres of State-owned land contiguous to lakes within the district. Since there are less than four hundred acres of State-owned land within the Lost Island Sanitary District, the Iowa Conservation Commission does not have a duty to appoint additional trustees. We therefore decline to answer your questions concerning the ramifications of a failure to appoint additional trustees to that district's board.

Sincerely,

Michael H Smith
MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

SUBSTANCE ABUSE; Mental Illness; Court Costs: Iowa Code Chapter 125, §§ 230.10, 625.1 (1985). Costs incurred in unsuccessful commitment proceedings under chapter 230 may not be taxed to the individual or their family. Chapter 125 does not provide for taxing applicants in unsuccessful proceedings and absent a court order assessing costs against an applicant as a "losing party," applicants should not be assessed costs pursuant to § 625.1. (McGuire to Norland, Worth County Attorney, 8/27/85) #85-8-11(L)

August 27, 1985

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

Dear Mr. Norland:

You requested an opinion from this office whether court costs can be taxed to the applicant, patient or family, in unsuccessful commitment proceedings. Specifically you ask whether the provisions of chapters 125 and 230 of the Iowa Code provide any basis for recovering costs and expenses incurred in an unsuccessful attempt to commit a person for treatment for mental illness or chemical dependency by an applicant.

Court costs are taxable only if provided by statute and only to the extent allowed by the statute. See e.g., Dole v. Harstad, 278 N.W.2d 907, 909 (Iowa 1979); City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (Iowa 1978). There must thus be statutory authority to tax costs to any one.

The courts have the authority to determine whether in specific cases costs may be taxed under statutes providing for court costs. Your question addresses the assessment of costs in the absence of court order.

A prior opinion of this office addressed the question of costs in unsuccessful commitment proceedings pursuant to Iowa Code Chapter 230. See 1966 Op.Att'yGen. 104. That opinion determined that § 230.10, providing for preliminary payment of costs in commitment hearings for mental illness, is also applicable when the individual is not committed.

Section 230.10 provides for the costs and expenses incurred in seeking the commitment of an individual to be paid by the county of commitment with reimbursement by the county of legal settlement. The 1966 opinion determined that this provision applies even when the commitment proceeding is unsuccessful and

as such, the costs are borne by the appropriate county and cannot be taxed to the individual or their family.[1] That opinion answers your question regarding Ch. 230.

Chapter 125, which authorizes commitment for substance abusers, is silent with respect to the costs related to the commitment. Therefore, as noted above, there must be some other statutory authority in order to tax costs in an unsuccessful commitment procedure.

Iowa Code § 625.1 provides that costs can be "recovered by the successful against the losing party." This is a general statute applicable to all types of actions. City of Ottumwa v. Taylor, 102 N.W.2d 376, 379 (Iowa 1960). This statute would thus authorize the taxing of costs to an applicant in an unsuccessful substance abuse commitment proceeding if the applicant is a "losing party." We do not construe the applicant in a substance abuse commitment proceeding to be a losing party for purposes of § 625.1.

Involuntary commitment procedures for substance abusers are a public proceeding. It is the state's interest, not a particular applicant's, that is the basis for commitment proceedings and which justifies imposing treatment and possible restraint of freedom of a substance abuser. See Addington v. Texas, 441 U.S. 418, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979) (state's interest in providing care and its police powers justify involuntary commitment for mental illness).

The procedures in chapter 125 primarily protect the public interest and the interests of the respondent. The proceeding can be initiated by a public official, the county attorney or an interested person as applicant. § 125.75.[2] The court has discretion in determining whether an individual is an interested person for initiating the proceedings. See § 125.2(15) (defines interested person as "person who, in the discretion of the court, is legitimately concerned that a respondent receive substance abuse treatment services").

Public interest is, in part, demonstrated by the fact that the county attorney may choose to present evidence on behalf of

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[1] See Op.Att'yGen. #85-3-1 which addresses the liability of the county of legal settlement and county of commitment under chapter 230.

[2] See Op.Att'yGen. #83-3-7(L) which addresses the county attorney's function in substance abuse commitment proceedings.

the applicant who initiates the proceeding. § 125.82(1). See Op.Att'yGen. #83-3-7(L).

Similarly, chapter 125 provides for the appointment of an attorney at public cost to represent the respondent and to assist the applicant in presenting evidence, if they cannot afford to hire attorneys. Once the proceeding is initiated, certain procedures are required to be followed which focus on the respondent, not the applicant. For example, § 125.82(4) provides that discovery pursuant to rules of civil procedure is available to the respondent. Section 125.80 requires the respondent to have a physician's exam, at public expense if necessary. According to § 125.82(4) the welfare of the respondent is paramount.

The applicant who initiates the proceeding is acting more in the role of a complainant than a party. See State v. Hess, 170 Iowa 397, 400-401, 150 N.W.2d 609, 611 (1915) (child's mother as complainant who initiated an unsuccessful paternity proceeding was not a losing party for purposes of taxing costs).

Even when the applicant has the burden of presenting the evidence, their role is not like that of a party in the proceeding. No rights, duties or privileges of the applicant are at issue.

It would thus appear that the chapter 125 commitment proceeding is a special public procedure. Although the procedure may be initiated by a private applicant, we are not convinced that the applicant is a "losing party" whenever the court determines not to commit the respondent.

In summary, costs incurred in unsuccessful commitment proceedings under chapter 230 may not be taxed to the individual or their family. Chapter 125 does not provide for taxing applicants in unsuccessful proceedings. Absent a court order assessing costs against an applicant as a "losing party," applicants should not be assessed costs pursuant to Iowa Code § 625.1.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

LAW ENFORCEMENT, PUBLIC SAFETY, DEPARTMENT OF: Iowa Code §§ 692.17-692.18 (1985). The provisions of Iowa Code § 692.17 (1985) are applicable only to the Iowa Department of Public Safety, and the provisions of the Iowa Code § 692.18 (1985) are applicable only to information received from that department and not to information generated by local law enforcement agencies. (Hayward to Metcalf, 8/26/85) #85-8-10(L)

August 26, 1985

Mr. James M. Metcalf
Black Hawk County Attorney
B-1 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Metcalf:

You have asked this office to give its opinion on the applicability and effect of Iowa Code §§ 692.16 and 692.17 (1985) on the maintenance of criminal identification information in a computer by county and municipal law enforcement agencies. Specifically you have asked (1) whether § 692.16 requires such local agencies to remove any such information concerning arrests from a computer after five years in the absence of corresponding dispositional data, and (2) whether § 692.17 requires the removal of all such information concerning an individual's involvement in an incident from a computer if the charges against that individual are dismissed or the individual is tried and acquitted. It is our opinion that § 692.16 is only applicable to the Iowa Department of Public Safety and its divisions and that § 691.17 is only applicable to information received from that department and not to information generated by the activities of individual local agencies.

The purpose of any exercise of statutory construction is to ascertain the intent of the legislature behind a particular enactment and, where possible, to give full effect to that intent. This is accomplished by determining the object to be accomplished or mischiefs to be remedied and by analyzing the language used by the legislature in the context of the entire statute and related statutes. See, Welp v. Iowa Department of Revenue, 333 N.W.2d 481, 483-484 (Iowa 1983).

The legislature in the enactment of Chapter 692 appeared concerned about two things in reference to criminal identification and criminal history information. First, it was concerned about public access to, or other misuse of, the compilation of information on a person by the Iowa Department of

Public Safety. Recognizing that such compilations were necessary to effective law enforcement, the legislature nonetheless was fearful of the harm such information could do to its subject. However, the information subjected to control by Chapter 692 in this area is generally public information at its source. Arrest records are public pursuant to Iowa Code § 22.7(a) (1985). Conviction and disposition data, except for information concerning cases resulting in deferred judgment, are public information at every courthouse. _See_, Iowa Code §§ 22.2 and 907.9 (1985). However, when all this information is compiled on an individual by the Iowa Department of Public Safety, it becomes "criminal history data" and is subject to the controls and penalties provided in Chapter 692. Iowa Code § 692.1(3) (1985). The second concern is related to the first. The legislature was also concerned about the potential for abuse and misuse of such information in computer storage systems, especially if they are interconnected.

With this in mind we turn to Iowa Code § 692.16 (1985) which states:

> At least every year the bureau shall review and determine current status of all Iowa arrests reported, which are at least one year old with no disposition data. Any Iowa arrest recorded within a computer data storage system which has no disposition data after five years shall be removed unless there is an outstanding arrest warrant or detainer on such charge.

It is clear that the first sentence refers only to information about arrests maintained by the Iowa Department of Public Safety, Division of Criminal Investigation, Bureau of Identification. The word "bureau" is so defined in Iowa Code § 692.1(2) (1985). The words "[a]ny Iowa arrest" in § 692.16 would seem to be broader in scope than "criminal history data". At first blush it would not seem to be limited to such information maintained by the "bureau" and there does not seem to be any language specifically expanding its scope. Also, it would seem incongruous for the legislature to mandate that arrest records be kept open to public inspection by every agency and then to prohibit the agencies from placing them into a modern up-to-date storage system so that they can be conveniently used. We will not assume that the legislature intended that law enforcement officials maintain records in the same manner as did their

grandfathers. Thus it is our opinion that § 692.16 is only applicable to the "bureau" and that the legislature did not intend that it apply to information subject to public inspection under Iowa Code Ch.22 (1985) or other provision of law.

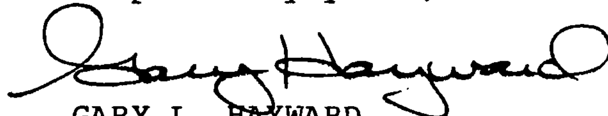
Iowa Code § 692.17 states:

> Criminal history data in a computer data storage system shall not include arrest or disposition data after the person has been acquitted or the charges dismissed.

As is noted above, the phrase "criminal history data" only applies to the information compiled by the Iowa Department of Public Safety. Thus, it does not have any application or effect on information generated by another agency for its own purposes.

For the foregoing reasons, it is our opinion that Iowa Code § 692.16 (1985) is only applicable to the Iowa Department of Public Safety and that Iowa Code § 692.17 (1985) is only applicable to information received from that department and not to information generated by other law enforcement agencies.

Respectfully yours,



GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

COUNTIES; County Attorney; Conflict of interest with civil litigation: Iowa Code § 331.755(2) (1985); Iowa Code of Professional Responsibility, Canon 7 and Canon 9. A county attorney has a conflict of interest in representing an individual in civil litigation in his or her county which has resulted in criminal charges being filed for violation of a state law, including traffic offenses; this is true even if a special prosecutor is appointed to represent the State of Iowa in the criminal case. (Blink to Belson, Ida County Attorney, 8/13/85) #85-8-9(L)

August 13, 1985

Robert J. Belson
Ida County Attorney
Ida County Courthouse
Ida Grove, Iowa 51445

Dear Mr. Belson:

In yours of April 1, 1985, you requested an opinion on the following:

> "A" is the operator of an auto which is struck by an auto driven by "B." "A" contacts the part-time County Attorney, who has previously done private legal work for "A", to retain him to represent "A" in his civil action against "B" for the personal injuries arising out of the accident. After "A" has contacted the part-time County Attorney, the part-time County Attorney learns that the investigating officer filed a simple misdemeanor traffic charge, relating to the traffic accident, against "B" in Magistrate Court and that "B" entered a plea of not guilty thereto. Since "A" had previously contacted the parttime County Attorney in his capacity as a private attorney, the part-time County Attorney makes application to the Magistrate to have a County Attorney from an adjoining county appointed as a special prosecutor; said special prosecutor thereafter represents the State of Iowa in the prosecution of the simple misdemeanor traffic offense.
>
> Based upon the above-recited facts, does Iowa Code section 331.755(2) prohibit the County Attorney from representing "A" in the civil action? If so, then doesn't such prohibition create a situation wherein the investigating officer has, in effect, denied "A" from using his

> regular, personal attorney. Finally, if the part-time County Attorney is in fact disqualified by Iowa Code section 331.755(2) in the above stated factual situation, then would said County Attorney also be disqualified if the above-described accident had occurred in another county, by analogy to the rationale for the prohibition against doing criminal defense work in other counties.

A prior opinion, 1962 Op.Att'yGen. 106, concluded that a county attorney is barred from representing a client in a civil suit based on the same set of facts giving rise to a criminal prosecution in the county where that county attorney holds office, regardless of whether the county attorney actively prosecuted the criminal case. Your letter asks us in effect to review that opinion. You state that your situation is factually distinguishable and further that the concerns addressed in 1962 Op.Att'yGen. 106 must be weighed against the client's right to retain his regular attorney in the civil suit.

As set forth below, we believe that the prior opinion is correct and applies to the situation described in your letter.

This office's former opinion dealt with a part-time county attorney's query of whether to represent the State in a criminal prosecution, or a litigant in a civil cause, when both actions stem from a single incident which arose in the county where he holds office. In stating that § 336.5 barred the part-time prosecutor from accepting the civil suit the opinion addressed the public policy supporting the statute. "The legislative intent clearly appears to completely separate the official duties of the county attorney from any private gain." 1962 Op.Att'yGen. 106, 107.

Section 331.755(2), formerly § 336.5, has been discussed by the Iowa Supreme Court on several occasions since 1962 Op.Att'yGen. 106. Section 331.755(2) reads: A county attorney shall not:

> [e]ngage directly or indirectly as an attorney or an agent for a party other than the state or the county in an action or proceeding arising in the county which is based upon substantially the same facts as a prosecution or proceeding which has been commenced or prosecuted by the county attorney in the name of the state or the county. This prohibition also applies to the members of a law firm with which the county attorney is associated.

A civil suit claiming malicious prosecution was filed by one Blanton. A part-time county attorney, representing Blanton's wife, caused Blanton to be charged with and arrested for child stealing. The county attorney thereafter withdrew as prosecutor, and a special prosecutor was appointed, but the grand jury refused to indict. Blanton alleged that the shield of prosecutorial immunity was pierced by violation of § 336.5. Holding that a prosecutor is amenable for unethical conduct, the Court found that a breach of § 336.5 does not abrogate the immunity. Blanton v. Barrick, 258 N.W.2d 306, 311 (Iowa 1977).

Following an incident of violence at the site of a labor strike, Weiland sued the company whose insurance carrier retained a member of the county attorney's law firm. A criminal prosecution against Weiland arose from the same altercation. Prior to commencement of the criminal case, the county attorney's partner withdrew from the civil case. Notwithstanding Weiland's claim that a conflict of interest generated by § 336.5 required reversal of his conviction, the Iowa Supreme Court held that the withdrawal answered defendant's charge. State v. Weiland, 202 N.W.2d 67 (Iowa 1972).

The questions posed are the direct and inevitable result of the dichotomous roles of the part-time county attorney. Factual situations pitting public duty against private gain are fraught with ethical concerns. As the Iowa Supreme Court commented:

> We note there are potential problems inherent in our state system which provides for part-time prosecutors. This is why the American Bar Association Standards, the Prosecution Function, section 2.3, so strongly advocate establishment of full-time prosecutors. Blanton at 311.

So sensitive an area is this that the aforementioned ABA Standards state the principle as follows:

> 1.2 Conflicts of Interest
> (a) A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. (Emphasis added.) Blanton at 311.

Special responsibilities beyond those of the general practitioner are expected of public prosecutors:

> Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to

> make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties. E.C. 8-8, Iowa Code of Professional Responsibility for Laywers.

From this directive, it is clear that the public service must be paramount to private practice. See also E.C. 7-11 which states:

> The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of particular proceeding. Examples include the representation of an illiterate or incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies. (Emphasis added.)

And finally, there is the admonition of Ethical Consideration 9.6 that all lawyers should "strive to avoid not only professional impropriety but also the appearance of impropriety."

Consequently, the guiding principle in applying § 331.755(2) must be the question of public trust: the appearance of impropriety by public prosecutors. If a part-time prosecutor can secure the lucrative representation of a client in a civil action by having another appointed as special prosecutor in the criminal case arising from the same facts, there is a potential for the public to view this as improper.

The clear legislative intent of § 331.755(2) and the public policy which supports it are lucidly set forth in this office's opinion of two decades ago. The wisdom of that opinion is borne out by the concerns expressed by the Iowa Supreme Court in addressing this code section. Among the sacrifices made when taking the oath of county attorney is placing public service before private gain. It is not unreasonable for the public to perceive as improper a part-time county attorney's withdrawal from a criminal prosecution to accept the purse of private employment. The expedient use of a "substitute County Attorney" to preserve private interests runs against the spirit, if not the letter, of § 331.755(2), as well as the American Bar Association Standards and the Iowa Code of Professional Responsibility for Lawyers.

In summary, the county attorney in question is barred from accepting the civil suit regardless of whether a special prosecutor could be appointed.

In response to your second question, a police officer does not "deny" a citizen the use of his regular attorney, who is also a part-time prosecutor, by the filing of a complaint in an automobile accident involving that client. The policeman has done no more than his statutory and sworn duty. The prohibition against representation is dictated rather by statute and the Canons of Ethics and the nature of part-time prosecution. This too is one of the "potential problems inherent in our state system which provides for part-time prosecutors."

In response to your third inquiry, a part-time prosecutor would not be precluded from serving as counsel in a civil suit arising in a county, other than the one in which he holds office, even if a criminal action has been commenced in such other county based on the same facts. Under such circumstances, the part-time county attorney would have the status of a private practitioner: having no "public duty" in such other county, no conflict is inherent.

This situation is not analogous to the prohibition against criminal defense practice by county attorneys. See Disciplinary Rule 8-101(b) Iowa Code of Professional Responsibility for Lawyers. In a civil case outside his elected county, a part-time county attorney is not advocating against his own client. In any criminal cause, where a county attorney represented an accused, he would be advocating against a client he has a sworn duty to serve: the State of Iowa.

Respectfully submitted,

ROBERT J. BLINK
Assistant Attorney General
Area Prosecutions Division

bjr

TOWNSHIPS AND TOWNSHIP TRUSTEES; Fire Protection and Ambulance Services. Iowa Code § 359.42 (1985). The township trustees have implied authority to define what fire protection and ambulance services will be provided in their township. The trustees have no authority to provide supplemental ambulance services when the county has already provided for ambulance services. (Weeg to Goeke, Bremer County Attorney, 8/12/85) #85-8-8(L)

August 12, 1985

Mr. Dale E. Goeke
Bremer County Attorney
100 East Bremer Avenue
Century Building
P.O. Box 89
Waverly, Iowa 50677

Dear Mr. Goeke:

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

> Can Township Trustees under Section 359.42 contribute to a volunteer group of "First Responders" for supplemental fire protection and ambulance services when the County already contracts with various ambulance services to provide direct ambulance service. The purpose of such a group of First Responders is to provide emergency medical and other assistance before the arrival of the ambulance service or fire protection service.

We first refer to the general rule that townships may exercise only those powers expressly or impliedly granted to them by statute. _See_ 1942 Op.Att'yGen. 197. _See also_ _Mandicino v. Kelly_, 158 N.W.2d 754, 758 (Iowa 1968). While counties and cities have been granted home rule authority by constitutional amendment, _see_ Iowa Const., Art. III, §§ 38A and 39A, this authority does not extend to townships.

Iowa Code § 359.42 (1985) provides in relevant part as follows:

> The trustees of each township shall provide fire protection service for the township, exclusive of any part of the

> township within a benefited fire district and, in counties not providing ambulance services, may provide ambulance service. The trustees may purchase, own, rent or maintain fire protection service or ambulance service apparatus or equipment or both kinds of apparatus or equipment and provide housing for the equipment. The trustees of a township which has a common boundary with a city having a population of one hundred eighty thousand or more may also establish and maintain an emergency warning system within the township. The trustees may contract with any public or private agency under chapter 28E for the purpose of providing any service or system required or authorized under this section.

Section 359.43 authorizes a tax levy to fund these services. Thus, a township is authorized by statute to provide fire protection service for the township, and to provide ambulance services when those services are not provided by the county. The statute does not define the terms "fire protection service" and "ambulance services." However, because the legislature has expressly authorized the township trustees to provide these services, it is our opinion the trustees have been granted the implied authority to exercise their discretion in defining what these services will consist of. The township trustees may reasonably conclude the First Responders' services are a vital element of the fire protection and ambulance services to be provided to residents of the township. We believe such a conclusion is within the authority of the township trustees.

However, in the event the county is providing ambulance services, a different conclusion is required. The express language of § 359.43 authorizes a township to provide ambulance services only "in counties not providing ambulance service." Thus, if the county has already provided for ambulance service in the county, the trustees would be precluded from providing supplemental ambulance services.

This opinion should not be read as precluding an agreement pursuant to Ch. 28E between a township, county, and other agencies for the provision of ambulance services as provided for in the last sentence of § 359.43.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES: Auditors and Boards of Supervisors. Incorporation of rural water districts. Iowa Code ch. 357A (1985). Proposed rural water district area may include existing benefitted districts, and rural service areas of other water systems not organized under ch. 357A; a petition for organization of a district would not be void under § 357A.2 where it described the area as "all unincorporated land in the county" rather than by sections. (Smith to Hughes, Ringgold County Attorney, 8/8/85) #85-8-7 (L)

August 8, 1985

Mr. Arlen F. Hughes
Ringgold County Attorney
Ringgold County Courthouse
Mount Ayr, Iowa 50854

Dear Mr. Hughes:

Your two letters of June 4, 1985, requested an opinion on several questions concerning requirements of Iowa Code ch. 357A (1985) for establishment of a rural water district. From information you provided for the purpose of addressing your questions, the following facts are assumed:

> The officers of an existing rural water system incorporated under Iowa Code ch. 504A, desiring to reorganize into a rural water district with an expanded service area, filed petitions with the auditors of several adjacent counties. The petition filed in Ringgold County described the proposed district as including all unincorporated land in Ringgold County and one named city. Notice was published in Ringgold County in accordance with the description in the petition. After hearing without objection, the Ringgold County Board of Supervisors ordered a district established as requested in the petition. At the time of filing the petition, portions of the unincorporated lands in Ringgold County were served by municipal (city) water systems, and other portions were served by benefitted water districts incorporated under Iowa Code ch. 357 or rural water systems (other than petitioner) incorporated under ch. 504A.

We paraphrase your questions and address them as follows:

> 1) Whether a petition for incorporation of a rural water district violates Iowa Code § 357A.2 (1985) by including in proposed district boundaries: (a) unincorporated lands served by city water mains; (b) the area included in an existing benefitted water district; or (c) the area served by an existing rural water system (other than petitioner) organized under Iowa Code ch. 504A?

We conclude that inclusion of the above-mentioned areas does not violate § 357A.2 for the following reasons. Section 357A.2 authorizes filing of a petition "requesting the supervisors to incorporate and organize a district encompassing an area, not then included in any other district. . . ." "District" is defined in § 357A.1(1) as a rural water district incorporated and organized pursuant to the provisions of ch. 357A. The "area included in any other district" as stated in § 357A.2 therefore does not refer to an area included in a benefitted water district organized under ch. 357 or an area served by a rural water system incorporated under ch. 504A.

Nor does § 357A.2 require that a proposed district exclude unincorporated areas served by city water mains. Subsection 357A.14(2) requires that the consent of the governing body of a city be obtained in order to include all or part of the city within the boundaries of an existing or proposed district. Section 357A.2 limits the purpose for establishing a district to "providing an adequate supply of water for domestic purposes to residents of the area who are not served by the water mains of any city water system and who cannot feasibly obtain adequate supplies of water from wells on their own premises." The existence of city water mains in an unincorporated area included in a rural water district would clearly be relevant to the issue of where district mains are needed. However, because subsection 357A.14(2) expressly prohibits inclusion of a city absent consent of its governing body, prohibition of including a city water system's rural service area cannot be inferred from § 357A.2. Expression of one thing is exclusion of another.

> 2) Whether a petition and notice violate § 357A.2 by describing the area to be included within the boundaries of a proposed rural water district as all unincorporated land in the county and a named city rather

than by listing each section, or fraction thereof, township, and range?

In cases involving challenges to special assessments the Iowa Supreme Court has referred to both "strict compliance" and "substantial compliance" as standards for determining whether notices conform to statutory specifications. Regardless of which standard was mentioned, the court has examined challenges to the legal descriptions in notices to determine whether the descriptions enabled property owners to determine whether their property would be affected. Collateral attacks on special assessments have been sustained where the notice of intent to construct improvements either totally failed to identify affected property, or failed to identify boundaries in terms understandable to a lay person. Davenport Locomotive Works v. City of Davenport, 185 Iowa 151, 169 N.W. 106 (1918) (description vague and overinclusive); Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921) (description underinclusive).

A notice of hearing on a petition to include within a proposed rural water district all unincorporated land in a county and a named city has one significant difference from a notice listing each section, or fraction thereof, township, and range, i.e., the shorthand description is equally accurate but more readily intelligible to readers of the notice. To know whether their property is included, readers need only know what is meant by "unincorporated land" and whether their property is in city limits. The statutory requirement that the petition describe included land by section, or fraction thereof, township and range has a logically imputed legislative purpose of assuring that the proposed district boundaries are accurately described. That purpose is not frustrated by an equally accurate description which includes the entire county and excepts only incorporated cities except one named.

This opinion is limited to the questions stated herein and should not be interpreted as an opinion concerning the legality of a particular incorporation proceeding.

Sincerely,

Michael H. Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

TAXATION: Bankrupt Railroads. Iowa Code §444.3(1985). Property taxes collected upon valuations excluded from use in computing the levy under section 444.3 shall be distributed to the various taxing districts if collected within 60 days of delinquency. Property of railroads that are not bankrupt or in bankruptcy proceedings at the time of levy shall be included in computing the levy. (Hunacek to Johnson, Auditor of State, 8/6/85) #85-8-6(L)

August 6, 1985

Richard C. Johnson, CPA
Office of Auditor of State
State Capitol Building
Des Moines, IA 50319

Dear Mr. Johnson:

We are in receipt of your request for an Attorney General Opinion regarding application of Iowa Code §444.3 (1985) to several railroads which were in bankruptcy proceedings in August 1983. Your specific questions are:

> 1. What is the proper disposition of property taxes collection upon valuations excluded from use in computing the levy under Section 444.3 of the Code of Iowa, when those taxes are collected within 60 days after they have become delinquent, thereby avoiding the complications of Section 307.29 of the Code of Iowa?
>
> 2. For what fiscal year can evaluations of the two railroads again be included in computing the levy under Section 444.3 of the Code of Iowa?

Your questions will be answered in the order presented. First, however, it is helpful to review some background information. Chapter 444 of the Iowa Code sets out the general procedure for the levying of taxes in the various taxing districts of the state. The property in each taxing district is assessed and valued as provided for in Iowa Code Chapter 441. When this has been accomplished, the County Auditor shall apply a percentage rate of taxation "as will raise the amount required for each taxing district, and no larger amount." Iowa Code §444.3 (1985). This section also contains the following provision:

> For purposes of computing the rate under this section, the adjusted taxable valuation of the property of the taxing district does not include the valuation of property of a railway corporation or its trustee which corporation has been declared bankrupt or is in bankruptcy proceedings. Nothing in the preceding sentence exempts the property of such railway corporation or its trustee from taxation and the rate computed under this section shall be levied on the taxable property of such railway corporation or its trustee.

This language was added to Iowa Code §444.3 by Chapter 1207, section 5, Acts of the Sixty-Ninth General Assembly, 1982 Regular Session. Section 6 of Chapter 1207 makes section 5 applicable to all fiscal years beginning after July 1, 1983.

The potential problem noted in your opinion request is that because the property of such railroads will not be included in the valuation assessment, but are nonetheless quite explicitly stated by the statute to be subject to taxation, an amount may be raised which exceeds the amount needed by the local taxing districts. This creates a potential conflict with the other section of Iowa Code §444.3, quoted earlier, providing that the rate applied by the County Auditor shall not raise to an amount exceeding that required for the taxing district.

Two railroads -- the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Chicago, Rock Island and Pacific Railroad Company -- were still in bankruptcy proceedings in the federal district court for the Eastern District of Illinois in August, 1983. Title to the assets of the latter railroad passed to the Sioux Line Railroad Company on February 21, 1985. The Chicago, Rock Island and Pacific Railroad was no longer in bankruptcy proceedings as of March, 1984.

With this background in mind, we turn to your specific questions.

1. Your first question is one of statutory construction. Several codified principles of statutory construction are relevant here. One is that if a general provision of a statute conflicts with a special or local provision, both provisions shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision. Iowa Code §4.7 (1985). Another is that if two statutes are irreconcilable, the statute latest in date of enactment prevails. Iowa Code §4.8 (1985).

Application of these principles of statutory construction suggests that the provisions of the 1982 amendment constitute an exception to the general rule that an amount may not be raised in excess of the amount required for such taxing district. This is because the 1982 amendment deals with a specific circumstance, and was promulgated subsequent to the remainder of section 444.3.

This conclusion is consistent also with what we believe to be the legislative intent behind the 1982 amendment. Recognizing the uncertainties involved in collecting taxes from a bankrupt railroad, the legislature undoubtedly intended to insure that the counties did not rely on such entities when computing the tax rate. On the other hand, the statute clearly does not immunize these entities from tax-paying responsibilities. This statute thus seems to be directed at insuring an adequate source of revenue for the counties. If a surplus should develop (and the existence of such a surplus is by no means guaranteed, since other tax sources may prove delinquent), it would seem that the legislature intended this surplus, along with all other tax revenues generated, to be distributed as usual.

The possible effects of Iowa Code §444.7 should be mentioned. This statute makes it a simple misdemeanor for the Board of Supervisors to authorize, or the County Auditor to carry upon the tax lists for any year, an amount of tax for any public purpose in excess of the amount certified or authorized as provided by law. The statute goes on to say that in the case of an excessive levy, "it shall be the duty of the County Auditor to reduce it to the maximum amount authorized by law". We do not believe this statute has any effect in the present case. In the first place, the potential surplus to which you refer arises by operation of section 444.3 and is therefore "authorized by law". Thus, this surplus constitutes an exception to the prohibition imposed by section 444.7. Second, we believe that this statute refers to the situation where the Auditor determines before tax payment that too much revenue will be raised. Because delinquent railroad taxes may or may not go to the county, Iowa Code §307.29, it may not even be possible to determine whether a surplus exists until months after other taxpayers have paid their taxes. The state authorizes a reduction in levy, but does not authorize a refund of taxes already paid. Therefore, we do not believe that section 444.7 requires that surplus tax raised by operation of the 1982 amendment to §444.3 be reduced.

For the preceding reasons, we believe that the answer to your first question is: all sums generated by operation of section 444.3 should be distributed to the various taxing districts.

2. We believe that the valuations of the two railroads mentioned can be included in computing the tax levy for any fiscal year which, at the time the levy is computed, the railroads are not in bankruptcy proceedings or declared bankrupt. This conclusion follows from our interpretation of the legislative intent behind the 1982 amendments to section 444.3. We have interpreted this provision as being designed to insure that taxing districts do not rely on bankrupt railroads as a source of revenue. It is, essentially, a planning provision. These planning decisions are made at the time of the tax levy. It is at this time that the county must determine whether certain property will or will not be considered in making the valuation.

Sincerely,

Mark Hunacek

MARK HUNACEK
Assistant Attorney General

MH:sa

MUNICIPALITIES: Amendment to Veteran's Preference under Civil Service. Iowa Code §§ 4.5, 19A.9(21), 400.10, 400.11 (1985). Senate File 266, which amends the veterans preference provisions of the civil service, applies only to certified eligible lists certified after the amendment's effective date of July 1, 1985. The additional points to be added to a veteran's grade or score are added to the grade or score of veterans qualifying for passage of the examination for appointment to a position. (DiDonato to O'Kane, State Representative, 8/6/85) #85-8-5(L)

August 6, 1985

The Honorable Jim O'Kane
State Representative
1815 Rebecca Street
Sioux City, Iowa 51103

Dear Representative O'Kane:

You have requested an opinion of the Attorney General regarding the application of that portion of Senate File 266 which amended the veteran's preference provision of Iowa Code § 400.10 (1985), effective July 1, 1985. The questions you have presented are:

> 1. Does Section 2 of Senate File 266, which amends Section 400.10 of the Code, apply to certified civil service lists in existence on the effective date of Senate File 266, or only to those civil service lists which are certified after July 1, 1985?
>
> 2. When should the five points be added to "the veteran's grade or score attained in qualifying examinations for appointment?" Should these points be added after all examinations are completed (i.e. oral, written, agility, etc.) and after the scores have been averaged, or to the score for each individual examination, or to the aggregate total of all examination scores prior to computing an average final score for ranking purposes?

I.

Pursuant to section two of Senate File 266, the first paragraph of Iowa Code § 400.10 is amended to read as follows:

> In all examinations and appointments under this chapter, other than promotions and appointments of chief of the police depart-

> ment and chief of the fire department, honorably discharged veterans from the military or naval forces of the United States in any war in which the United States has been engaged, including 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 May 7, 1975, both dates inclusive, and who are citizens and residents of this state, shall have five points added to the veteran's grade or score attained in qualifying examinations for appointment to positions and five additional points added to the grade or score if the veteran has a service-connected disability or is receiving compensation, disability benefits or pension under laws administered by the veterans administration. An honorably discharged veteran who has been awarded the Purple Heart for disabilities incurred in action shall be considered to have a service-connected disability. However, the points shall be given only upon passing the exam and shall not be the determining factor in passing.

Prior to the enactment of Senate File 266, Iowa Code § 400.10 (1985) provided that honorably discharged veterans who were qualified to be on the certified eligible list were entitled to appointment to a civil service position over other persons on the certified eligible list. Zanfes v. Olson, 232 Iowa 1169, 1174, 7 N.W.2d 901, 903 (1943). The certified eligible list is the list of the names certified by the Civil Service Commission to the city council of the ten persons who qualify with the highest standing as a result of examinations for the position to be filled. Iowa Code § 400.11 (1985). Senate File 266 changes the preference to be given to veterans seeking municipal employment under civil service from that of an absolute preference when on the certified eligible list to that of an additional five or ten points added to the veteran's passing score. Under the terms of the amendment, all veterans who receive a passing score are entitled to have an additional five points added to the score. If the veteran has a service-connected disability or is receiving compensation, disability benefits or pension under the laws the veterans administration administers, the veteran is entitled to another five points added to his or her passing score.[1]

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[1] Section two of Senate File 266 also makes the changes in the preference afforded to veterans applicable to jobs filled through a point-rated qualifying examination in all political subdivisions of the state. Section 1.4, Senate File 266.

The additional five points added to a veteran's score should be applied only to certified eligible lists certified after July 1, 1985. Statutes are presumed to be prospective in operation unless expressly made retroactive. Iowa Code § 4.5 (1985). There is no language in the amendment suggesting that the change in the manner of applying veteran's preference is to effect existing certified eligible lists. The prospective only application of Senate File 266 is in accord with the general prohibition against changing a civil service list of eligible persons or regrading on a different basis, thereby changing the relative standing of the eligibles, after the list has been published and the identity of the applicants made known. 3 McQuillin, Municipal Corporations § 12.79 (1982).

II.

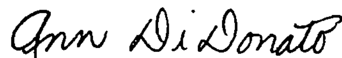
It is the opinion of this office that the additional points which a veteran is entitled to pursuant to Senate File 266 are to be added to the grade or score which is used to determine whether the applicant has achieved a grade or score qualifying for passage of the examination. The additional points are not added to a veteran's grade or score received in qualifying examinations before the score has been sufficiently computed to be used to determine whether it is a passing grade or score. The goal in construing a statute is to ascertain the legislative intent. The language used, the objects sought to be accomplished and the evils and mischiefs sought to be remedied may be considered. The statute will be given a reasonable construction which will best effect its purpose rather than one which will defeat it. Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980). The points to be added to a veteran's grade or score are added to the "grade or score attained in qualifying examinations for appointment" and "shall be given only upon passing the exam and shall not be the determining factor in passing." This language indicates that the points are added to a veteran's final grade or score achieved after taking all qualifying examinations and only if that score is a passing score. To apply the additional points to an aggregate score, which is not the final grade or score, with the effect of increasing the final score by less than five or ten points, would frustrate the intent of the legislature to give each veteran the advantage of at least five additional points. Further evidence as to the legislative intent in enacting Senate File 266 may be gleaned from a purview of similar language concerning the application of veteran's preference under the state merit system. It appears that the legislative intent in changing the manner in which veteran's preference is applied under civil service is to make that practice comparable to veteran's preference under the state merit system. Iowa Code § 19A.9(21) (1985) provides that:

> For veterans preference . . . [veterans] shall have five points added to the grade or score attained in qualifying examinations for appointment to jobs.
>
> Veterans who have a service-connected disability or are receiving compensation, disability benefits or pension under laws administered by the veterans administration shall have ten points added to the grades attained in qualifying examinations. . . .

The language of Senate File 266 that "[veterans] have five points added to the veteran's grade or score attained in qualifying examinations for appointment" is nearly identical to the applicable language in § 19A.9(21). Under the merit system, the additional veterans preference points are added onto the final score achieved by the veteran. If a qualifying examination consists of more than one part, the additional points are added to the final score determined from the scores on each part. 570 I.A.C. § 5.9(2)(4). A legislature is presumed to know the construction of a statute by the executive department. John Hancock Mutual Life Insurance Co. v. Lookingbill, 218 Iowa 373, 387, 253 N.W. 604, 611 (1934). This administrative interpretation of the language of § 19A.9(21) furthers the view that it is the legislative intent that the comparable language of Senate File 266 would also require that the additional points be added onto a veteran's grade or score used to determine whether the examination is passed. See Shinrone Farms, Inc. v. Gosch, 319 N.W.2d 298, 305 (Iowa 1982).

In conclusion, the portion of Senate File 266 amending the veterans preference provisions of the civil service applies only to certified eligible lists certified after the amendment's effective date of July 1, 1985. The additional points to be added to a veteran's grade or score are added to the grade or score of veterans qualifying for passage of the examination for appointment to a position.

Sincerely,



ANN DiDONATO
Assistant Attorney General

AD:rcp

CRIMINAL LAW: Obscene Materials. Iowa Code §§ 728.1(1), 728.1(2), 728.3, 728.4 (1985). An opinion will not be rendered on an issue which is presently the subject of litigation. In order for a seller of magazines containing advertisements for hard core pornography to be convicted of aiding and abetting the sale of hard core pornography as proscribed in § 728.4, proof that the seller had prior knowledge that hard core pornography was being offered would be required. (Dorff to Van Maanen, State Representative, 8/6/85) #85-8-4(L)

August 6, 1985

The Honorable Harold Van Maanen
State Representative, District 64
Rural Route 5
Oskaloosa, Iowa 52577

Dear Representative Van Maanen:

You have requested an opinion of the Attorney General concerning the effect of Iowa's obscenity law on the display and sale of magazines. The following questions are posed for our consideration:

1. Could a violation of Iowa Code sections 728.2 and 728.3 be found where the cover of a magazine constituting "obscene material" is visible to minors although the magazine contents are not accessible to minors and the cover itself is not "obscene"?

2. Could the sale of magazines that contain advertisements for "hard core pornography" be found to constitute a violation of Iowa Code section 728.4?

Section 728.2 provides as follows:

> Any person, other than the parent or guardian or the minor, who knowingly disseminates or exhibits obscene material to a minor, including the exhibition of obscene material so that it can be observed by a minor on or off the premises where it is displayed, is guilty of a public offense and shall upon conviction be guilty of a serious misdemeanor.

Section 728.3 prohibits knowingly admitting a minor to premises where obscene materials are exhibited, and provides:

> 1. A person who knowingly sells, gives, delivers, or provides a minor who is not a child with a pass or admits the minor to premises where obscene material is exhibited is guilty of a public offense and upon conviction is guilty of a serious misdemeanor.
>
> 2. A person who knowingly sells, gives, delivers, or provides a child with a pass or admits a child to a premise where obscene material is exhibited is guilty of a public offense and upon conviction is guilty of an aggravated misdemeanor.

The term "obscene material" is defined in § 728.1(1) as follows:

> 1. "Obscene material" is any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

The word "material" is defined in § 728.1(2):

> 2. "Material" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation of any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

Your first question is whether a magazine constituting "obscene material" is "exhibited" to a minor when only a non-obscene cover can be seen.

In Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), the United States Supreme Court first set forth the standard presently adhered to, that materials must be

judged "as a whole" in determining whether they constitute obscenity. The defendant in Roth was a New York business operator who published and sold books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted on a charge of mailing obscene circulars and advertising, as well as an obscene book, in violation of a federal obscenity statute. In upholding his conviction, the Supreme Court stated,

> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion." Id., 354 U.S. at 490, 77 S. Ct. at 1312, 1 L. Ed. 2d at 1510.

A decade later, the United States Supreme Court addressed the issue whether a state may prohibit the sale of literary materials deemed harmful to minors, despite the fact that sale of such materials to adults was lawful. In Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), the Court recognized that the welfare of children is a subject within a state's power to regulate. This power extends to the regulation and restriction on availability of material condemned by the statute as harmful to minors. Id., 390 U.S. at 639, 88 S. Ct. at 1280, 20 L. Ed. 2d at 203. Two reasons are cited by the Court in Ginsberg as justification for placing limitations upon the availability of sex materials to minors. First, parents are entitled to the support of laws designed to aid the discharge of their responsibilities for their children's well-being. Id., 390 U.S. at 639, 88 S. Ct. at 1280, 20 L. Ed. 2d at 203-04. Second, the state itself has an independent interest in the well-being of its youth. Id., 390 U.S. at 640, 88 S. Ct. at 1281, 20 L. Ed. 2d at 204. Thus, in order to sustain state power to exclude material defined as obscene by a particular statute, it must merely be shown that it was not irrational for the legislature to find that exposure to such materials is harmful to minors. Id., 390 U.S. at 641, 88 S. Ct. at 1281, 20 L. Ed. 2d at 205.

Applying the foregoing legal principles, a federal district court recently upheld a Minnesota obscenity statute containing similar language to the statute scrutinized in Ginsberg. In Upper Midwest Bookseller's v. City of Minneapolis, 602 F. Supp.

1361 (D.C. Minn. 1985), a Minneapolis bookseller brought suit challenging a statute requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and that covers of certain materials be blocked with opaque covers. The bookseller argued that Ginsberg requires that a particular work be considered "as a whole" in determining whether it falls within the category of obscenity. Following this argument, a piece of work containing a sexually explicit cover which would be "obscene" if standing alone, is not "obscene" when considered as a whole, providing the cover bears a rational relationship to the rest of the work. The court rejected the bookseller's argument, however, stating:

> "The 'as a whole' standard has been developed by the Supreme Court in the context of legislation which banned outright the distribution or possession of certain materials deemed obscene to either minors or adults. In such a context, it makes sense to treat the work as a whole, since the issue is whether it is appropriate for individuals to purchase and read or view the entire work. In the instant case, by contrast, the primary concern which prompted the legislation was the display of materials which are harmful to minors. A child who walks into a store which openly displays material with sexually explicit covers may be harmed simply by viewing those covers. In effect, to a child who may never acquire and read or view the entire work, the cover of the book or magazine is the 'work as a whole'". Id. at 1369. (emphasis in original).

The Eighth Circuit Court of Appeals, which is the federal appellate court with jurisdiction over Iowa, will hear arguments in September on that case. This may resolve constitutional questions regarding the display or exhibition of obscene materials to minors. That case may decide the issue whether covers may be, or must be, judged separately from the work as a whole if minors do not have access to the work as a whole. Because we would construe a statute to avoid an unconstitutional result (see Hines v. Illinois Central Gulf R.R., 330 N.W.2d 284, 290 (Iowa 1983)), we would defer ruling on this question until after the decision of that case. It has been the policy of this Office to deny opinions where issues are pending in litigation. 120 I.A.C. 1.5(3)(a); 1972 Op.Att'yGen. 686.

We would therefore at this time respectfully deny your request for an opinion on the first question.

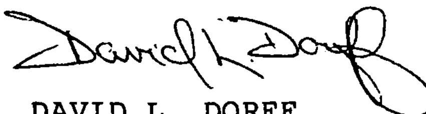
In answer to your second question, it is unlikely that the sale of magazines containing advertisements for "hard core pornography" would itself be found to constitute a violation of Iowa Code section 724.4. Section 728.4 in its present form appears to be aimed at those who directly sell or offer for sale hard core pornographic material, rather than those who sell or offer for sale materials containing advertisements for such materials. Under Iowa law, "[t]he offer for sale means no more than to put on the market." Wolf v. Lodge, 140 N.W.2d 429, 159 Iowa 162, 167 (1913). This opinion is also based upon the plain language of the statute itself which proscribes the sale or offer for sale of material "depicting" specified sex acts. If the advertisement does not "depict" the sex acts proscribed therein, a conviction under the present statute would not be possible.

By putting material containing advertisements for hard core pornography on the shelves, however, under proper facts convictions for aiding and abetting the sale of hard core pornography could conceivably occur. Chapter 703 of the Iowa Code would appear to provide a basis for prosecuting defendants under this theory. In such cases, evidence that the defendant "willfully associated himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about" would be necessary for a conviction to be upheld. See United States v. Wilford, 710 F.2d 439, 448 (8th Cir. 1983); see also State v. Galvan, 297 N.W.2d 344, 349 (Iowa 1980). The requirement under section 728.4 that the defendant "knowingly" sell or offer the material for sale requires that the seller must be "aware of the character of the matter." Iowa Code section 728.1(4). Thus, proof that a seller of a magazine was aware that it contained advertisements for hard core pornography would be necessary at the outset in order to uphold a conviction. Second, the seller must be "aware of the character" of the "hard core pornography" itself. Depending upon the specific advertisement, the character of the work as a whole may or may not be ascertainable from the advertisement itself. If the true "character of the matter" is not ascertainable from the advertisement itself, difficulties could arise in establishing that the seller offered for sale material which he "knew" to be hard core pornography. In other words, proof that the defendant had prior knowledge that hard core pornography was being offered for sale would be required in order to uphold a defendant's conviction. See State v. Buttolph, 204 N.W.2d 824, 825 (Iowa 1972). Such proof could be made by circumstantial evidence as well as by direct evidence if available. Id. at 825.

We would point out that this opinion concerns convictions which could technically occur under the statutes. Whether a

given set of facts violated the criminal laws is to be determined by a jury or judge and not by an Attorney General's Opinion. Whether criminal charges would be brought in the circumstances here discussed rests within the sound discretion of the county attorney. 1980 Op.Att'yGen. 102, 106.

Sincerely,



DAVID L. DORFF
Assistant Attorney General

DLD/cal

COMPTROLLER; Federal Regulation of Social Security Number Information. PL 93-579; 5 U.S.C. § 553(c)(2)(C)(i-ii). State may require disclosure of employee's social security number; number may subsequently be used in conjunction with benefit programs. (Galenbeck to Krahl, State Comptroller, 8/6/85) #85-8-3(L)

August 6, 1985

Mr. William L. Krahl
State Comptroller
LOCAL

Dear Mr. Krahl:

You have requested an Attorney General's opinion whether the Office of the State Comptroller is required by law to assign an employee of the State an identification number other than a social security number if the employee so desires. Of particular relevance is a section of Public Law 93-579, known as the "Privacy Act of 1974." Portions of this act were incorporated into the United States Code at 5 U.S.C. § 552. However, the following section was not incorporated into the Code:

> "Section 7. (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individuals refusal to disclose his social security account number.
>
> (a) (2) . . . .
>
> (b) Any Federal, State or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority it is solicited, and what uses will be made of it.

The above quoted section 7 has been partially repealed by 42 U.S.C. § 405(c)(2)(C)(i-ii):

> "(C)(i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Secretary for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Secretary.
>
> (ii) If and to the extent that any provision of Federal law heretofore enacted is inconsistent with the policy set forth in clause (i) of this subparagraph, such provision shall, on and after October 4, 1976, be null, void, and of no effect."

See also, 42 U.S.C. § 602(a)(25). Case law discussions of the two quoted are not particularly helpful to resolution of the legal questions presented here. But see, Stevens v. Berger, 428 F.Supp. 896 (U.S. Dist. Ct.; E.D.N.Y., 1977); Chambers v. Klein, 419 F.Supp. 569 (U.S. Dist. Ct.; N.J.; 1976); McElrath, et al. v. Califano, et al., No. 77 C 3194, U.S. Dist. Ct., N.D. Ill., E.D. (Slip Opinion, May 23, 1978).

Your question is best answered by identifying guidelines drawn from a joint reading of section 7 of the Privacy Act and 42 U.S.C. § 405(c)(2)(C)(i):

1. Your office may require disclosure by employees of their social security number since this information is essential to federal and state income tax withholding records. 42 U.S.C. § 405(C)(2)(C)(k).

2. I find no statutory limitation in Public Law 93-579 on the use, by your office, of social security numbers lawfully obtained for tax purposes. In other words, the Privacy Act of 1974 does not appear to outlaw use of a social security number as an access number ("key identifier") for non-tax information. The State of Iowa may, therefore, use employee social security numbers in conjunction with benefit programs relating to health, life, and disability insurance.

In conclusion, the Privacy Act of 1974 does limit use of social security number information by the State of Iowa. However, within the context of an employer-employee relationship, disclosure of a social security number is mandatory. Once disclosure of the number has occurred, Public Law 93-579 does not require the Office of the State Comptroller to issue an employee a separate identification number.

Sincerely,

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

CIVIL RIGHTS: AGE DISCRIMINATION: POLICE OFFICER AND FIRE FIGHTER RETIREMENT BENEFIT ALLOWANCE. 29 U.S.C. § 621; Iowa Code Chapters 411, 601A (1985); §§ 411.1(11), 411.1(13), 411.6(1)(a), 411.6(2). Chapter 411 does not discriminate on the basis of age by failing to necessarily provide increased benefits for additional longevity of service beyond twenty-two years. (Baustian to McIntee, State Representative, 8/5/85) #85-8-2(L)

August 5, 1985

The Honorable John E. McIntee
State Representative
House of Representatives
L O C A L

Dear Representative McIntee:

You have requested an opinion of the Attorney General concerning Iowa Code section 411.6(1)(a) (1985). Your inquiry notes that Chapter 411 provides a retirement system for police officers and firefighters and provides a service retirement allowance for a member who shall have attained the age of fifty-five and shall have served twenty-two years or more. Your inquiry further notes that one individual may qualify for a full service retirement allowance at age fifty-five by completing twenty-two years of service, while another individual may complete twenty-five years or more of service before achieving the second required qualification of reaching age fifty-five, with no necessary increase in the retirement allowance, and asks whether this constitutes age discrimination.

The service retirement allowance for police officers and firefighters in all instances shall equal one-half of the member's average final compensation. Iowa Code section 411.6(2) (1985). "Average final compensation" means the average earnable compensation of the member during the three years of service the

member earned the member's highest salary as a police officer or firefighter. Iowa Code section 411.1(13) (1985). Earnable compensation is computed with consideration for the "member's rank or position including compensation for longevity." Iowa Code section 411.1(11) (1985). Thus, additional years of service may have a beneficial effect on the amount of the retirement allowance in that a member's earnable compensation may increase due to further promotion and longevity. Your question, then, is whether the absence in the computation formula for the service retirement allowance of a specific longevity factor discriminates on the basis of age.

In our opinion, the statute in question does not result in age discrimination as defined by federal law and the legislative determination in question is not, therefore, precluded by the Supremacy Clause of the United States Constitution.

A prima facie case to establish a violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, requires the following substantive elements:

> (a) that an employee covered by the act (b) has suffered an unfavorable employment action by an employer covered by the Act (c) under circumstances in which the employee's 'age was a determining factor' in the action in the sense that 'but for' his employer's motive to discriminate against him because of his age, he would not [have suffered the action].

Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982).

Leaving aside the question of whether continuing to make contributions toward a retirement fund is "unfavorable employment action," the situation described in the question posed is not one where age is a determining factor. Indeed, the concern expressed in your question is with the situation where two individuals the same age may receive the same service retirement allowance when one may have completed a greater number of years of service. The employment action in that situation is based on the failure to complete the required years of service.

The Age Discrimination in Employment Act, 29 U.S.C. § 621, has a primary purpose to promote the employment of older persons based on their ability. 1 H. Eglit, Age Discrimination, § 16.02 (1984). (The provisions of Iowa Code Chapter 601A applicable to age discrimination have a similar purpose. Cf. 240 Iowa Admin. Code section 5.1 (Act seeks to avoid exclusion from an employment

right because of arbitrary age limitation).) Nothing in Iowa Code Chapter 411 provides that benefits will be reduced for older employees, or in any way deters older employees from continuing employment.

Sincerely,

Teresa Baustian
TERESA BAUSTIAN
Assistant Attorney General

TB/jds

MOTOR VEHICLES: Personalized Registration Plates. Iowa Code §321.34(5) (1985). Department of Transportation has statutory authority to require $25 application fee for personalized license plates replaced during registration year in which new metal plates are issued. (Ewald to Angrick, Citizens' Aide/Ombudsman 8/2/85) #85-8-1(L

August 2, 1985

Mr. William P. Angrick, II
Citizens' Aide/Ombudsman
Citizens' Aide Office
Capitol Complex
Des Moines, Iowa 50319

Dear Mr. Angrick:

You have requested the Attorney General's opinion on the following question:

> Does the Iowa Department of Transportation have statutory authority to require persons with current personalized license plates to reapply and pay a $25 application fee when the state issues new license plates?

The controlling statute is Iowa Code §321.34(5)"a" and "b" (1985), which states:

> 5. Personalized registration plates
>
> a. Upon application and the payment of a fee of twenty-five dollars, the director may issue to the owner of a motor vehicle registered in this state or a trailer with a gross weight of one thousand pounds or less, personalized registration plates marked with initials, letters, or a combination of numerals and letters requested by the owner. Upon receipt of the personalized registration plates, the applicant shall surrender the regular registration plates to the county treasurer. The fee for issuance of the personalized registration plates shall be in addition to the regular annual registration fee.
>
> b. The county treasurer shall validate personalized registration plates in the same manner as regular

> registration plates are validated under this section at an annual fee of five dollars in addition to the regular annual registration fee.

The Department of Transportation (DOT) interprets this statute to mean that the $5 annual fee applies only when the county treasurer validates a personalized registration plate. On the other hand, if the owner of a personalized plate replaces the plate in a registration year during which the state is issuing new metal registration plates, then the person must reapply and pay the $25 issuance fee rather than the $5 validation fee. In both cases, the fee is in addition to the regular annual registration fee.

This practice of the DOT does not appear to be inconsistent with its own rules which provide that "renewal fees" for personalized plates are due at the same time as registration fees. <u>See</u> 820 Iowa Administrative Code [07,D]11.41(2)"d"(7) and 11.41(5). Those rules, according to the DOT, have always employed the term "renewal fee" to mean "validation fee", and the term "initial fee" to mean "issuance fee". While it would have been preferable for the rules to have repeated the statutory terms, we do not find the rules to be <u>ultra vires</u> or otherwise invalid, or the DOT's construction of them to be unreasonable. <u>Dameron v. Neumann Bros., Inc.</u>, 339 N.W.2d 160, 162 (Iowa 1983) (administrative interpretation of its own rules controls unless plainly erroneous or inconsistent); <u>Meads v. Social Services</u>, 366 N.W.2d 555, 558 (Iowa 1985).

Although the meaning of a statute is always a matter of law, deference is also given to an agency's interpretation of a statute which it administers. <u>Mathis v. State Conservation Commission</u>, ___ N.W.2d ___, (Iowa 1985); <u>Johnson v. Charles City Community Schools Board</u>, 368 N.W.2d 74, 82 (Iowa 1985); <u>Ballstadt v. Iowa Dept. of Revenue</u>, 368 N.W.2d 147, 148 (Iowa 1985). <u>Cf.</u> <u>Good v. Iowa Civil Rights Commission</u>, 368 N.W.2d 151, 155 (Iowa 1985) (court may give "some weight" to agency interpretation).

The statute, which has been amended a number of times, now requires a $25 issuance fee for personalized registration plates and an annual $5 validation fee. However, before 1975 there were no personalized plates and new plates or validation stickers were issued every year for an annual registration fee. <u>See</u>, <u>e.g.</u>, Iowa Code §321.34 (1973). In 1975 the legislature authorized the

issuance of personalized plates upon application and payment of a $25 fee in addition to the regular annual registration fee. 1975 Iowa Acts, ch. 174, §2. The personalized plates were to be validated in the same manner as regular plates. Id.

In 1977 the legislature added a provision which required an additional $5 annual validation fee for personalized plates. 1977 Iowa Acts ch. 103, §10.

In 1980 section 321.34 was amended to allow handicapped plates, prisoner of war plates, and national guard plates for an additional annual registration fee of $5 ($15 for POW plates), but with no additional annual validation fee. 1980 Iowa Acts ch. 1094, §6.

Finally, in 1982 the legislature instituted a comprehensive new system of staggered vehicle registration. New metal plates would be issued for all vehicles based on a "registration year" determined by the vehicle owner's month of birth. 1982 Iowa Acts ch. 1062, §34; Iowa Code §321.26 (1985). The staggered registration system went into effect on December 1, 1983 for the 1984 registration year. 1982 Iowa Acts ch. 1062, §35; Iowa Code §321.27 (1985); see also 820 Iowa Admin. Code [07,D]ch.11, especially §§11.3, 11.41.

Under the new staggered registration system, and in light of other previous amendments, the DOT has interpreted section 321.34(5) and its rules promulgated thereunder to require "reissuance" of personalized plates during the 1984 registration year rather than "validation". The DOT reasons, not irrationally, that the unavailability of the validation process during implementation of the staggered registration system requires reissuance of plates. That is, everyone who registers or reregisters a car under the new staggered system must "apply" or "reapply" for issuance or reissuance of a new plate rather than merely "validating" an old plate by means of a validation sticker. This interpretation is consistent with the historical fact that whenever the state has issued new metal plates the vehicle owner has had to pay an issuance fee.

For persons owning vehicles with regular plates this interpretation entails no additional fee. This is also the case for persons with amateur radio call letter plates, handicapped plates, or national guard plates, since a $5 (or $15) additional

annual registration fee is statutorily prescribed. See §321.34(3), (7), (8), (9). The only persons affected are those owning personalized plates, for which the legislature has prescribed a $25 issuance fee and a $5 annual validation fee.

The DOT's interpretation of section 321.34(5) and its rules is also supported by the fact that issuance of new personalized plates involves additional administrative expense in manufacturing the plates and in recordkeeping. When a new personalized plate is ordered the county treasurer and the DOT rather than routinely issuing the next plate in a numerical sequence, must individually process each personalized plate application after determining that the combination of characters has not been previously issued or is not otherwise disallowed. See 820 Iowa Admin. Code [07,D]11.41(2)"d". The plate is then hand set and manufactured at the Iowa State Men's Reformatory in Anamosa, Iowa. On the other hand, if an existing personalized plate is merely validated, no significant additional administrative expenses accrue. Thus the DOT would be justified in construing section 321.34(5) to require it to charge more for issuance of a new personalized plate than for validating an existing one.

In summary, based on the legislative history of section 321.34(5) and the apparent intent of the legislature that owners of personalized plates be required to pay for additional administrative expenses involved in issuing them, it is not unreasonable for the DOT to consider the $25 issuance fee rather than the validation fee applicable in all cases where a new metal personalized plate must be issued. The $5 validation applies only in those registration years when a validation sticker is available. This practice is not inconsistent with DOT rules which use the term "renewal fee" to mean "validation fee".

Yours truly,

ROBERT P. EWALD
Assistant Attorney General

MOTOR VEHICLES: Driver's Licenses. Iowa Code §§ 111.3, 111.35, 111.36, 111A.10, 279.8, 297.9, 321.1(2)(a), 321.1(48), 321.174, 321.176, 321.236(5), 321.248, 364.12(2) (1985). No driver's license is required to operate a motor vehicle on public lands that are not "highways". However, authorities vested with jurisdiction over various types of public property may regulate or prohibit use of motor vehicles thereon. (Ewald to McKean, State Representative, 9/25/85) #85-9-3(L)

September 25, 1985

The Honorable Andy McKean
State Representative
House District 44
R.R. 1, Box 517
Morley, Iowa 52312

Dear Representative McKean:

In a recent letter you requested an opinion of the Attorney General on the following question: Would it be lawful for a person not licensed to operate a motor vehicle to operate a moped or go-cart on public lands such as a school yard, and if so under what conditions?

The short answer to your question is that there is no state law which would prohibit an unlicensed person from driving a go-cart in a school yard. However, entities vested with jurisdiction over various types of public property would in most cases have authority to regulate or prohibit the use of motor vehicles on that property.

A more detailed answer involves consideration of a number of statutes. The starting point is Iowa Code § 321.174, which states, "A person, ... shall not drive any motor vehicle upon a highway in this state unless such person has a valid motor vehicle license issued by the department." The term "motor vehicle" is defined in § 321.1(2)(a), and would include a go-cart or moped. The term "highway" is defined at § 321.1(48) to mean "the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic." From this definition it is clear that a school yard would not be a highway, nor would most other public lands. The effect of these three statutes is that the state department of transportation has no driver licensing authority except as it pertains to the use of streets and highways.

Under Iowa Code § 321.176, certain persons are exempt from the license requirement, specifically, certain military personnel, farmers operating implements of husbandry, and non-residents, but that statute does not appear to be relevant to your question.

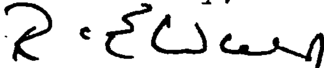
There are, however, a number of other statutes which may be relevant depending upon the particular circumstances. Where a school yard is involved, local authorities have the power to make rules for the care and use of schoolhouse grounds. See Iowa Code §§ 279.8, 297.9. They would thus have authority to regulate how a school yard is used and could prohibit the driving of mopeds or go-carts on school property.

The state conservation commission has statutory authority to maintain state parks and to regulate the operation of vehicles within the boundaries of state parks, preserves, or other lands or waters under its jurisdiction. Iowa Code §§ 111.3, 111.35. In such parks and preserves, all driving is by statute confined to designated roadways. § 111.36. See also § 111A.10 (county conservation board).

Under Iowa Code § 321.248, local authorities are empowered to exclude vehicles from any cemetary, park, or part of a park system. Local authorities may also regulate the speed of vehicles in public parks. Section 321.236(5). Under Iowa Code § 364.12(2) a city is given authority to maintain all public grounds within its jurisdiction.

In summary, state law requires a driver's license only for the operation of motor vehicles on streets or highways. Licensed or unlicensed operation on other public lands is subject to regulation by state agencies or local authorities.

Yours truly,



ROBERT P. EWALD
Assistant Attorney General

RPE:plr

COUNTIES; Board of Supervisors; County Hospital; County Care Facility; County contribution of funds to county hospital; election requirement. Iowa Constitution, Art. III, § 31; Iowa Code §§ 253.1; 331.361(3); 331.461(1)(d); 347.7; 347.14(12); 347.26 (1985). The county board of supervisors may contribute funds to the county hospital, and the board of hospital trustees may accept those funds, on the condition that the funds be used for the construction and operation of a health care facility. These funds may be expended by the hospital trustees for this purpose without submitting the question to the voters. (Weeg to Schroeder, Keokuk County Attorney, 9/17/85) #85-9-2(L)

September 17, 1985

Mr. John E. Schroeder
Keokuk County Attorney
101½ South Jefferson
P.O. Box 231
Sigourney, Iowa 52591

Dear Mr. Schroeder:

You have requested an opinion of the Attorney General on several questions relating to construction of a county care facility. You state the county currently has adequate funds on hand to construct a care facility. These funds are the proceeds from the sale of the previous county home several years ago. Your specific questions are as follows:

> 1. May the county donate those funds to the hospital;
>
> 2. May the county specify its use for the establishment, construction, operation and maintenance of a care facility;
>
> 3. May the county public hospital accept and use the funds to comply with the terms under which given;
>
> 4. Would such a donation constitute unappropriated funds with which the Board of Trustees may erect, equip and expand county public hospitals without election approval;
>
> 5. Does a care facility constitute such hospital erections, equipment and additions?

In answer to your first three questions, it is our opinion that the county may give the funds in question to the county hospital, and the hospital may accept those funds, on condition that the hospital use the funds to establish and operate a county care facility.

There are no statutory restrictions on the board of supervisors' authority to dispose of property by gift except for real property. That restriction is found in § 331.361(3), and provides:

> The board shall not dispose of real property by gift except for a public purpose, as determined by the board, in accordance with other state law. . . .

Because the property here in question is not real property, this section is inapplicable.

However, Iowa Constitution, Art. III, § 31 provides in relevant part as follows:

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

In construing the phrase "public purpose" as used in this constitutional provision, the Iowa Supreme Court has stated it is to be construed broadly. See Dickinson v. Porter, 240 Iowa 393, 35 N.W.2d 66, 80 (1949). The court "will not find an absence of public purpose except where such absence is so clear as to be perceptible by every mind at first blush." Id. See also Grubb v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977). Applying this flexible construction, the Court and this office have found a number of enterprises to constitute "public purposes." See Grubb, supra (public housing assistance); Sampson v. City of Cedar Falls, 231 N.W.2d 609 (Iowa 1975) (statute authorizing joint ownership of electrical generating facilities by cities and private entities); Green v. City of Mount Pleasant, 256 Iowa 1184, 131 N.W.2d 5 (1964) (statute allowing city involvement in industrial development); Dickinson, supra (tax exemption statute); Carroll v. City of Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935) (provision of electricity to another municipal corporation); McAllen v. Hamblin, 129 Iowa 329, 105 N.W. 593 (1906) (street sprinkling); Op.Att'yGen. #83-11-5(L) (contribution to private cemetery); 1978 Op.Att'yGen. 71 and 1972 Op.Att'yGen. 266 (appropriation to osteopathic college); 1976

Op.Att'yGen. 624 (contribution to private alcoholism treatment facility); 1970 Op.Att'yGen. 139 (tuition grants to private college students); 1968 Op.Att'yGen. 80 (contributions to agricultural associations). See also 15 McQuillin, Municipal Corporations § 39.19 (3rd ed.) (". . . the test of a public purpose should be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit.") (footnote omitted). But see Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930) (relinquishment by sewer contractor of claim for additional compensation is not a public purpose); Brooks v. Brooklyn, 146 Iowa 136, 124 N.W. 868 (1910) (construction of opera house is not primarily a public purpose).

Based on the broad construction to be given the phrase "public purpose," and the long line of authority on this issue, we conclude that a county's contribution of funds to a county hospital for construction and operation of a county care facility constitutes a public purpose. The hospital and care facility are public entities that are or will be operated solely for the benefit of the public. Further, the county may certainly impose reasonable conditions on the use of the money being contributed. See 1978 Op.Att'yGen. 71 (state contribution made to private osteopathic hospital on condition that thirty percent of entering classes be Iowa residents constitutes proper public purpose). A condition that the money, which resulted from the sale of the previous county care facility, be used for a purpose that is expressly authorized by statute, i.e., operation of a county care facility in conjunction with the county hospital, §§ 347.14(12) and 347.26, certainly appears reasonable.

With regard to your final two questions, it is our opinion that these funds may be expended for construction and operation of a care facility in conjunction with the county hospital without obtaining voter approval.

There are two alternative means for establishing a county health care facility. Iowa Code § 253.1 (1985) provides that:

> If the board of supervisors proposes to establish a county care facility under this chapter at a cost in excess of fifteen thousand dollars, it shall first submit the proposition to a vote of the people.

This section would appear to require a vote approving construction of a care facility by the board of supervisors, regardless of the source of funds. Alternatively, § 347.14 provides the board of hospital trustees may:

> 12. Operate a health care facility as defined in section 135C.1 in conjunction with the hospital.

Further, § 347.26 further states:

> In any county where there is a county hospital in existence, a health care facility as defined in section 135C.1 may be established to be operated in conjunction therewith, <u>and all of the provisions of this chapter and all of the proceedings authorized thereby relating to hospital buildings and additions thereto, shall apply to erecting, equipping and procuring sites for such facilities and additions thereto, as well as for improvements, maintenance and replacements of such facilities</u>.

(emphasis added) This section authorizes establishment of a health care facility in conjunction with the operation of a county hospital, subject to the governance of the county hospital trustees and the statutory provisions covering county hospitals. <u>See also</u> 1970 Op.Att'yGen. 748; 1964 Op.Att'yGen. 115.

Iowa Code §§ 347.1-347.6 (1981) formerly set forth the procedures for establishing a county hospital upon petition of residents in the county and for obtaining the voters' approval for issuing bonds for that purpose. However, those provisions were repealed by 1981 Iowa Acts, ch. 117, § 1097. Iowa Code § 331.461(1)(d) (1985) currently authorizes the issuance of revenue bonds for equipping and improving a county hospital. This section provides that the voters may petition for an election on this bond issue after notice of that bond issue is published, and sets forth the requirements for the petition and election process. Section 347.7 was not repealed; this section sets forth the procedure for and limitations on the tax levy for county hospitals and provides as follows:

> If a county hospital is established, the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed fifty-four cents per thousand dollars of assessed value in any one year for the erection and equipment of the hospital, and also a tax not to exceed twenty-seven cents per thousand dollars of value for the improvement, maintenance, and replacements of the hospital, as certified by

> the board of hospital trustees. However, in counties having a population of two hundred twenty-five thousand or over, the levy for improvements and maintenance of the hospital shall not exceed one dollar and thirty-five cents per thousand dollars of assessed value in any one year. The proceeds of the taxes constitute the county public hospital fund and the fund is subject to review by the board of supervisors in counties over two hundred twenty-five thousand. <u>However, the board of trustees of a county hospital, where funds are available in the county public hospital fund of the county which are unappropriated, may use the unappropriated funds for erecting and equipping hospital buildings and additions thereto without authority from the voters of the county</u>.
>
> No levy shall be made for the improvement, maintenance, or replacements of the hospital until the hospital has been constructed, staffed, and receiving patients. If revenue bonds are issued and outstanding under section 331.461, subsection 1, paragraph "d", the board may levy a tax to pay operating and maintenance expenses in lieu of the authority otherwise contained in this section not to exceed twenty-seven cents per thousand dollars of assessed value or not to exceed one dollar and twenty-one and one-half cents per thousand dollars of assessed value for improvements and maintenance of the hospital in counties having a population of two hundred twenty-five thousand or over.

As emphasized above, these provisions apply equally to county hospitals and health care facilities operated in conjunction with county hospitals by operation of § 347.26. <u>See</u> 1964 Op.Att'yGen. 115. Also as emphasized, § 347.7 expressly states voter approval is not necessary when the hospital trustees expend unappropriated funds for county hospital purposes, which, as previously discussed, include construction and operation of a health care facility in conjunction with the hospital.

The remaining question is whether the funds here in question are unappropriated funds within the meaning of § 347.7. An appropriation has been defined as "the act by which the . . . government designates . . . a specified portion . . . the money

in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense. . . ." Black's Law Dictionary (5th ed.). Thus, we construe § 347.7 unappropriated funds as including those county hospital monies which have not been allocated by the hospital trustees in the budget process for a particular county hospital purpose. See 1974 Op.Att'yGen. 18 (monies in § 347.14(11) depreciation fund considered "unappropriated" under § 347.7); 1962 Op.Att'yGen. 110 (monies in depreciation fund and surplus in county hospital fund considered "unappropriated"). We believe funds contributed to the county hospital on the condition they be used for the construction of a health care facility constitute unappropriated funds that can be used for the specified purpose without the approval of the voters in accordance with § 347.7.

The question of whether an election is required to approve construction for county hospital purposes has been addressed in a number of opinions by this office extending back to 1928, but the varying conclusions of these opinions is confusing. A brief review of these opinions follows.

In 1928 Op.Att'yGen. 210 we held that the hospital trustees could build a nurses' home without the vote of the people when the money was available without issuing bonds. In this case the funds came from a private gift and the maintenance fund.

In 1930 Op.Att'yGen. 320 we reached the opposite result, concluding that funds from the maintenance levy could not be used by the trustees for construction of a nurses' home. We distinguished the 1928 opinion on the ground that in the current situation, the voters had refused to approve a levy for the construction of the nurses' home, and to authorize use of funds from the hospital maintenance levy for that purpose would indirectly accomplish the opposite result the voters intended.

In 1940 Op.Att'yGen. 101, we did not refer to either the 1928 or 1930 opinions in concluding that the supervisors could not expend more than $5,000.00 for hospital construction without the approval of the voters because of a general statute so limiting any expenditures by the supervisors.

In 1962 Op.Att'yGen. 110 we opined that a surplus in the county hospital fund and unappropriated monies in the hospital depreciation fund could be used by the trustees for hospital construction purposes without voter approval. In referring to our 1940 opinion we stated that the law had since changed to no longer require the board of supervisors to expend funds for the county hospital and that responsibility now devolved upon the hospital trustees. Under the existing statutes, the supervisors

were required to hold an election on the questions of whether to establish a county hospital and to issue bonds for that purpose, and the trustees were required to hold an election on the question of whether to sell hospital property: there was no express requirement that an election be held to approve expenditures of unappropriated county hospital funds for hospital purposes, and we concluded it was therefore not required. We referred in addition to § 347.7, which provided that unappropriated funds, which included monies in the § 347.14(11) depreciation fund, could be spent without submission to the electors. No mention was made in that opinion of the 1930 opinion.

In 1964 Op.Att'yGen. 115, we held that the hospital trustees could establish a county nursing home in conjunction with the county hospital and finance construction of that home through the sale of bonds as Ch. 347 required for county hospitals. We noted that the question of whether to establish the home and borrow money for it were questions that would have to be submitted to the voters as required in Ch. 347, as they would be for county hospitals, and cited our 1940 opinion in support of this conclusion. No reference was made to the 1962 opinion distinguishing the 1940 opinion.

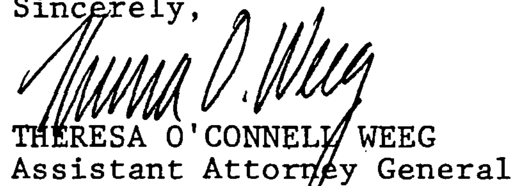
Finally, in 1974 Op.Att'yGen. 18, we cited our 1962 opinion in support of our conclusion that the hospital trustees could use unappropriated depreciation fund reserves for county hospital expansion purposes without the approval of the voters because such use was expressly authorized by § 347.7. No other previous opinions were discussed.

The 1928, 1962, and 1974 opinions make clear that it is not necessary to obtain voter approval to expend unappropriated hospital funds for hospital purposes. The 1930 opinion may be distinguished on the ground that at that time voter approval was required to establish a county hospital and other related operations, such as a nurses' home. Accordingly, expenditures for a purpose previously rejected by the voters would appear to be improper. However, such approval is no longer required, as § 347.1, which imposed that requirement, was repealed in 1981 Iowa Acts, ch. 117, § 1097. The 1940 opinion was properly distinguished in our 1962 opinion; to the extent our 1964 opinion refers approvingly to the 1940 opinion it may be disregarded.

In conclusion, it is our opinion that a county board of supervisors may contribute funds to the county hospital, and the board of hospital trustees may accept those funds, on the condition that the funds be used for the construction and operation of a health care facility. These funds may be expended by the

hospital trustees for this purpose without submitting the question to the voters.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

COUNTIES: Law Enforcement; County Sheriff; Responsibility for transporting prisoners. Iowa Code Chs. 804 and 820 (1985); §§ 331.651-.660; 331.751-.759; 804.28. A person arrested on a state charge in a county other than the one in which the crime occurred should generally be returned to the original county by the county sheriff's office. A person arrested elsewhere in the state on a municipal charge should generally be returned by the city in which the violation occurred. The extradition provisions of Ch. 820 apply when a person is arrested outside of the state on either a state or municipal charge. The county sheriff has a mandatory statutory duty to accept responsibility for housing persons arrested by the department of public safety, even if that county's jail is closed. (Weeg to Neighbor, Jasper County Attorney, 9/4/85) #85-9-1(L)

September 4, 1985

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

Dear Mr. Neighbor:

You have requested an opinion of the Attorney General on several questions relating to the issue of responsibility for prisoners. You stated in your opinion request that your questions arise because your county's jail has been closed and alternative arrangements for county prisoners have been necessary. Your specific questions are as follows:

> 1. Where a defendant is charged by a city law enforcement agency with a State charge and a warrant for arrest is issued by a Magistrate, at what point does the Sheriff assume responsibility for the person so charged? This would arise where the person charged would be apprehended in another county or state and it would be necessary to return the defendant to the jurisdiction of the county where the warrant was issued. Is it the responsibility of the city that commenced the charge to bring the defendant back to the jurisdiction of the Court and keep that defendant in custody until he is brought before the Magistrate for his preliminary arraignment or is this the responsibility of the County Sheriff? If it is the responsibility of the County Sheriff can the

> city be assessed for the expenses of transportation?
>
> 2. Where a city has filed a criminal charge against a defendant based upon a municipal ordinance and a warrant is issued for the arrest of the defendant by a Magistrate on the city charge what are the respective responsibilities of the city and the sheriff where the defendant is arrested in another county or state?
>
> 3. Pursuant to Section 804.28, 1985 Code of Iowa the Sheriff "...shall accept for custody in the county jail of the sheriff's respective county any person handed over to him or her for safe keeping and lodging by any member of the department of public safety." As Jasper County does not have a jail the sheriff does not have a holding facility for department of public safety arrestees. Is it then permissible for the Jasper County Sheriff to designate another county jail as the receiving point for these prisoners and is it then the responsibility of the Department of Public Safety Officer to transport an arrested individual to the designated reception point?

Iowa Code Ch. 804 (1985) sets forth statutory guidelines for arrest procedures. See also Iowa R.Crim. Pro. 7. When an arrest warrant is issued, § 804.4 provides the warrant "may be delivered to any peace officer for execution and served in any county in the state." (emphasis added). A peace officer may arrest a person: 1) pursuant to a warrant delivered to that peace officer, § 804.7, or 2) without a warrant in a number of situations, including:

> Where the peace officer has received from the department of public safety, or from any other peace officer of this state or any other state or the United States an official communication by bulletin, radio, telegraph, telephone, or otherwise, informing the peace officer that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge.

§ 804.7(4). A person arrested either pursuant to a warrant or without a warrant is to be taken "without unnecessary delay"

before the nearest or most accessible magistrate pursuant to the provisions of §§ 804.21 and .22. See also Iowa R.Crim. Pro. 2. There is no general provision[1] in any of those statutes or rules setting forth who is responsible for retaining custody of the arrested person except that in § 804.21(2), which provides that if after an initial appearance the arrested person is not released on bail:

> [T]he magistrate must redeliver the warrant to the officer, and the officer shall retain custody of the arrested person until the person's removal to appear before the magistrate who issued the warrant.

Finally, § 804.27 provides that:

> Every officer or person who shall arrest anyone with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner to such jail on an order of commitment, may be allowed the same fees and expenses as provided for in case of such services by the sheriff.

In sum, there are no statutes which specify the law enforcement agency responsible for returning a defendant to the jurisdiction where the crime was committed.

Nonetheless, it is our opinion that when a state charge is pending, the sheriff of the county in which the crime occurred is responsible for transporting a defendant who is arrested in another county in the state back to the original county. When a municipal charge is pending, the city is responsible for transporting the defendant. However, in the event a defendant on any criminal charge is arrested outside the state, the extradition provisions of Ch. 820 apply. In that situation, only the governor is authorized to appoint a representative to pick up and

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[1] There are, however, provisions governing responsibility for custody of prisoners in specific situations. See, e.g., Iowa Code § 811.7 (1985) (defendant to be arrested and committed to the custody of the sheriff of the county in which a recommitment after bail order is entered); Iowa R.Crim. Pro. 10 (if change of venue is ordered and the defendant is in custody, the defendant is to be delivered to the sheriff of the receiving county, but the transferring county is responsible for all related costs). However, these provisions do not specify who is responsible for initially conveying the prisoners to the custody of the sheriff in these particular situations.

return the defendant to the county in which the offense was committed. See § 820.22. Responsibility for expenses related to arrest of persons in another state and their extradition are provided for in Ch. 820. See §§ 820.12, 820.24. See also 1982 Op.Att'yGen. 560 (#82-12-1(L)) (expenses for extradition of fugitives).

The statutory scheme for criminal investigations and prosecutions makes clear that the county in which an offense occurs is primarily responsible for the investigation, apprehension, and prosecution of the accused person, as well as for the expenses incurred in performing these activities. Section 803.2(1) provides that a criminal action shall generally be tried in the county in which the crime is committed. Sections 331.651-331.660 govern the duties of the county sheriff, the elected county officer responsible for law enforcement in the county. A number of the sheriff's specific statutory duties are detailed in § 331.653. However, one of the primary duties of that office is not specifically set forth in that section but is instead implicit and well-recognized, i.e., the duty to investigate criminal law violations committed within the county. Finally, the county attorney is the elected county officer responsible for prosecuting criminal offenders within the county. Sections 331.751 through 331.759 govern the office of county attorney; § 331.756 specifically details the county attorney's duties, among them being the duty to:

> 1. Diligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the state, county, or as county attorney, except as otherwise provided.

Neither the sheriff nor the county attorney is required by statute to investigate or prosecute violations of city ordinances. Though cooperation among separate law enforcement agencies is customary, primary responsibility for the investigation and prosecution of city ordinances has traditionally been assumed by city law enforcement personnel and the city attorney's office. See § 356.15 (county to pay expenses of all prisoners housed in county jail except those committed or detained on federal charges "and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county."). See also 1982 Op.Att'yGen. 418 (#82-5-9(L)).

This conclusion is supported by a number of previous opinions of this office. Most directly on point is 1922 Op.Att'yGen. 364, in which we concluded that the sheriff of the county, rather than the chief of police, "is charged primarily with the duty of

proceeding to other counties for the purpose of apprehending[2] and returning persons charged with crime." We additionally referred to then-existing statutes which provided that an arrest warrant could be delivered to any peace officer for execution and served in any county in the state. Compare § 804.4. Later, in 1938 Op.Att'yGen. 96, we relied on a number of then-existing statutes to decide that the county is responsible for payment of expenses incurred by city law enforcement officers investigating state criminal charges. Most recently, in 1982 Op.Att'yGen. 418 (#82-5-9(L)), we concluded that the law governing county jails expressly requires a city to pay the cost of housing a prisoner incarcerated for violating a city ordinance, and requires a county to pay the cost of housing a prisoner convicted in that county of violating a county ordinance or state law, even if that county's jail is closed and the prisoners are housed in another county jail.

We do not by this conclusion wish to foreclose cooperation between various law enforcement agencies throughout the state on matters relating to the transportation of prisoners back to the jurisdiction in which the crime in question occurred. Certainly such cooperation is desirable. Situations are likely to arise in which such cooperation is necessary, such as when, for example, the original county's sheriff is short-handed and a defendant needs to be returned to that county. There is nothing which legally prohibits the county sheriff holding that prisoner from returning the prisoner to the original county. This opinion only resolves the question of who is primarily responsible for the transportation of defendants when the issue cannot be resolved satisfactorily between the parties.

Your third question asks who is responsible for transporting a person arrested by a member of the department of public safety to another county jail when the jail in the county to which the arrestee is brought is closed. Section 804.28 provides:

> The sheriff of any county shall accept for custody in the county jail of the sheriff's respective county any person handed over to the sheriff for safekeeping and lodging by any member of the department of public safety.

(emphasis added). This section imposes a mandatory duty on the sheriff to accept in the county jail persons arrested by a member

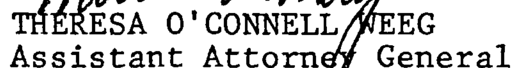
[2] But see 1950 Op.Att'yGen. 72 (sheriff of one county not authorized to serve a warrant of arrest in another county, except where a person escapes or is rescued after being arrested).

of the department of public safety. See § 4.1(36)(a) ('The word "shall" imposes a duty.'). We believe that duty exists regardless of whether that sheriff's jail is open or closed. Thus, in the event the sheriff of a county cannot accept a department of public safety arrestee in that county's jail, that sheriff has the responsibility for ensuring that arrestee is transported to another jail for safekeeping, presumably the jail in which that county's other prisoners are incarcerated.

Again, this conclusion is not intended to foreclose cooperation between county sheriffs and members of the department of public safety. Department of public safety officers may be aware that certain counties do not have jail facilities in that county and that arrangements have been made with another county to accept that county's prisoners. In light of such information, there is nothing which would prohibit the department of public safety officer from transporting that prisoner to the appropriate facility rather than turning the prisoner over to the county sheriff to do the same.

In conclusion, it is our opinion that: A person arrested on a state charge in a county other than the one in which the crime occurred should generally be returned to the original county by the county sheriff's office. A person arrested elsewhere in the state on a municipal charge should generally be returned by the city in which the violation occurred. The extradition provisions of Ch. 820 apply when a person is arrested outside of the state on either a state or municipal charge. The county sheriff has a mandatory statutory duty to accept responsibility for housing persons arrested by the department of public safety, even if that county's jail is closed.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

SCHOOLS: Sick Leave for Part-Time Employees. Iowa Code § 279.40 (1985). Part-time public school employees are included within the term "public school employees" in Iowa Code section 279.40. School districts may determine the amount of sick leave which part-time employees receive by bargaining or by rulemaking. (Botts to Benton, State Superintendent of Public Instruction, 10/30/85) #85-10-7(L)

October 30, 1985

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

Dear Dr. Benton:

You have requested an opinion of the attorney general regarding the application of Iowa Code section 279.40 (1985) to part-time employees of a public school district. Specifically you asked:

> (1) Does Iowa Code section 279.40 (1985) contemplate awarding sick leave to part-time employees (e.g. those employed only two days per week or those employed only half-time daily) on the same basis as full-time employees?
>
> (2) If the answer to question (1) above is in the negative, would a district policy or specific contract that reflected a prorated number of days of sick leave for part-time employees (see Iowa Code section 79.1, fifth unnumbered paragraph) be within the spirit of the law?

Section 279.40 provides in relevant part:

> Public school employees are granted leave of absence for medically related disability with full pay in the following minimum amounts:
> 1. The first year of employment....... 10 days.
> 2. The second year of employment...... 11 days.
> 3. The third year of employment....... 12 days.
> 4. The fourth year of employment...... 13 days.
> 5. The fifth year of employment....... 14 days. . .
> 6. The sixth and subsequent years of employment...................... 15 days.
>
> The above amounts shall apply only to consecutive years of employment in the same school district and unused portions shall be cumulative to at least a total of ninety days. . . .
>
> Nothing in this section shall be construed as limiting the right of a school board to grant more time than the days herein specified.

* * *

Application of the statute directly to employees who work part of each day creates no special problem. Those employees work the same number of calendar days as full-time employees. The likelihood that illness would prevent them from working a certain number of work days would presumably be the same as for employees who work a full day. Further, as the employee's compensation for the day missed due to illness would be based on the part-time nature of the employment, the employee who works part of each regular work day would receive no unfair advantage.[1]

However, section 279.40, if directly applied to employees who work fewer days per week than full-time employees, would

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[1] An earlier opinion, 1960 Op.Att'yGen. 188 held that the then enacted version of § 79.1 did not authorize vacation days to part-time state employees because the use of the word "days" in that statute would require employees who worked part of each day to obtain full-time compensation for vacation days. We disagree with that rationale. Section 79.1 now expressly addresses leave for part-time state employees.

create serious problems. As an example, we will consider the employee who works one day per week. Section 279.40, on its face, would suggest that that employee would be entitled to ten days of sick leave per year. Thus, in a school year of thirty-six weeks, the starting employee working one day per week would be able to miss ten weeks of work and be compensated while the starting full-time employee could miss only two weeks of work with pay due to illness. After six years of employment, the employee working one day per week could miss fifteen out of thirty-six weeks if section 279.40 were literally applied.

We do not believe the legislature intended this result. The General Assembly has provided guidance for construction of ambiguous statutes as follows:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:
> 1. The object sought to be attained.
> 2. The circumstances under which the statute was enacted.
> 3. The legislative history.
> 4. The common law or former statutory provisions, including laws upon the same or similar subjects.
> 5. The consequences of a particular construction.
> 6. The administrative construction of the statute.
> 7. The preamble or statement of policy.

Iowa Code § 4.6 (1985). In addition to that statute, we are guided by the principle that statutes are to be construed to avoid unreasonable or absurd results. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). As shown by 1960 Op.Att'yGen. 188, discussed in note 1, supra, statutes providing leave benefits for employees were previously construed as not applicable to part-time employees. Further, we are advised that school districts have not acted as if section 279.40 required the same number of vacation days for part-time employees who work fewer days. These issues may be the subject of bargaining agreements under Iowa Code § 20.9. Additionally, the contracts of the persons working less than five working days each week may provide for specified hours of actual service rather than a regular employment situation.

We conclude that section 279.40 does not establish the minimum days of leave for part-time employees. Mechanisms exist for determination of sick leave entitlement, e.g., by bargaining, § 20.9, or by rulemaking, § 279.8.

Respectfully,

MICHAEL K. BOTTS
Assistant Attorney General

MKB/cjc

HOSPITALS: University Hospital: Indigent Patients. Iowa Code ch. 255 (1985). Payment for medical treatment of indigent persons may be authorized after the treatment has been received. Patients who are admitted for care near the end of a fiscal year but discharged from the hospital during the following fiscal year are allocated to the county's quota for the year in which they were admitted. When a person has been discharged from the hospital, a new court order is required for a new admission to maintain proportionality among Iowa counties. (Fleming to Heitland, Hardin County Attorney, 10/30/85) #85-10-6(L)

October 30, 1985

The Honorable Jon E. Heitland
Hardin County Attorney
321 Stevens Street
P. O. Box 227
Iowa Falls, Iowa 50126

Dear Mr. Heitland:

You have asked for our opinion concerning the operation of Iowa Code ch. 255 which provides for the system of treatment and care of indigent patients by the University of Iowa Hospitals and Clinics. That system has been in effect for over seventy years. The Code requires the issuance of a court order with respect to each patient that is admitted to the University of Iowa Hospitals and Clinics (hereinafter University Hospital), Iowa Code § 255.8 (1985), for treatment at state expense. None of the thousands of such court orders over the past seventy years has resulted in a decision by the Iowa Supreme Court. See 11A Iowa Code Ann., ch. 255. This office has issued numerous opinions in connection with the operation of chapter 255, see id., but none has addressed the issues you present.

The first issue you present is:

> Can payment for medical treatment of indigent persons be authorized when the medical treatment has already been received in a non-emergency case?

We cannot decide questions of fact. We have been advised of the long-standing practices in connection with the operation of chapter 255. All affected state and county entities have acted in concurrence with the practices we describe in responding to your questions. A brief review of the history and the purpose of the statute seems appropriate.

The original version of Iowa Code ch. 255 provided for medical services to Iowa's indigent children and inmates of state institutions. 1915 Iowa Acts, ch. 24. The General Assembly subsequently amended the law to provide medical services at state expense to indigent adults as well. 1919 Iowa Acts, ch. 78.

The basic elements of the statutory system include investigation of the financial status of the person in need of medical service, a court order providing for admission to University Hospitals, and acceptance of the patient for treatment at University Hospital. Iowa Code §§ 255.1-.15. In addition, a county quota system was created by which each county, based on its population, is allocated a quota of such patients to be treated at state expense at University Hospitals. Iowa Code § 255.16 (1985). If a county's quota is exceeded by ten percent, the expenses for care and treatment of patients admitted to University Hospitals "shall be paid from the funds of such county at actual cost . . ." § 255.16.

University Hospital and county officials, over the past seventy years, have developed processes and practices for implementing chapter 255. Some of the processes and practices are in rule form. _See_ Iowa Admin. Code 720-6.1. The questions you present arise in the context of the operation of practices and procedures that have evolved over time with respect to the treatment of indigent patients.

The statutory system eliminates the requirement of investigation of indigency status, notice and hearing prior to admission of patients for emergency care. Iowa Code §§ 255.8, 255.11. However, the statute contemplates issuance of a court order _prior_ to treatment of _any_ patient, on both an emergency and a non-emergency basis. Iowa Code §§ 255.8, 255.11, 255.12. We understand the practice that has evolved over time is to admit patients without a court order and to treat them; other statutory processes occur later.

We understand it is the practice for a patient's status as a recipient of medical treatment and care under a county quota, or from other county funds, or as "clinical pay" patients, Iowa Admin. Code 720-6.3, to be determined after the individual has been admitted to University Hospital. Indeed, an individual's status for payment purposes may be determined long after treatment and care has been given, i.e., a county assigns its quota to patients whose treatment and care has been the most expensive among the indigent patients admitted to University Hospital from that county in a given fiscal year.

In considering your first question -- whether payment for medical treatment of indigent persons may be authorized when the medical treatment has already been received in a non-emergency case -- we are confronted with decades of administrative practice and the absence of litigation. This absence of litigation is striking in the context of a system that requires frequent action and cooperation among state officials and county officials from every county in Iowa.

In examining the meaning of statutes in the context of long-standing administrative practices, we are guided by a number of principles of statutory construction. This observation seems particularly relevant:

> Interpretations by an agency charged with implementation of a statute, particularly over a long period of time, and without legislative intervention, is evidence of compatibility of that agency's interpretation with legislative intent. See Iowa Nat. Ind. Loan Co. v. Iowa State Dept. Rev., 224 N.W.2d 437, 440 (Iowa 1974); section 4.6(6), The Code. Another matter which may be considered in construing the statute is the consequences of a particular construction. Section 4.6(5), The Code.

Churchill Truck Lines v. Transp. Reg. Bd., 274 N.W.2d 295, 297-298 (Iowa 1979). See also Sisco v. Iowa Ill. Gas and Elec. Co., 368 N.W.2d 853, 860 (Iowa App. 1985). Thousands of patients from throughout the state have been admitted to the University Hospital over the past seventy years prior to the court orders which establish eligibility for treatment and care at state expense. We are reluctant to overturn that long-standing practice by an opinion which would require rigid application of the language of Iowa Code § 255.8 and § 255.11. We are particularly reluctant to overturn the practice where the statute, if literally applied, requires a court order to be received by the hospital "at or before the time of the reception of the patient

into the hospital," Iowa Code § 255.12, in cases of "great emergency." Iowa Code § 255.11. Neither the statutes nor rules provide a clear definition of emergency. We are mindful that a statute should not be construed to produce absurd results. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983).

Other principles have a bearing on your first question. Many of the principles have been summarized as follows:

> Our ultimate goal is to determine and effectuate the intent of the legislature. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981); American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). We look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect, rather than defeat, the legislature's purpose. City of Mason City v. Public Employment Relations Board, 316 N.W.2d 851, 854 (Iowa 1982); Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980). We avoid strained, impractical or absurd results in favor of a sensible, logical construction. Ida County Courier and The Reminder v. Attorney General, 316 N.W.2d 846, 851 (Iowa 1982); Iowa Beef Processors, Inc., 312 N.W.2d at 532. We consider all parts of the statute together, without attributing undue importance to any single or isolated portion. Iowa Beef Processors, Inc., 312 N.W.2d at 532; Peffers, 299 N.W.2d at 678. The spirit of the statute must be considered along with its words, Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980), and the manifest intent of the legislature will prevail over the literal import of the words used. Iowa Beef Processors, Inc., 312 N.W.2d 533. Although final interpretation and construction of the statute is for this court, we give deference to an interpretation by the responsible administrative agency. American Home Products Corp., 302 N.W.2d at 143; Charles City Education Association v. Public Employment Relations Board, 291 N.W.2d 663, 666 (Iowa 1980).

Beier Glass Co., 329 N.W.2d at 283.

An earlier opinion of this office took note that the statute "has decidedly humane and beneficial purposes and we believe it was the intention of the Legislature that indigent persons should

receive both medical and surgical care and were not to be subjected to controversy in relation to legal settlement." 1940 Op.Att'yGen. 84. We are aware that court processes take time. The statutory system outlined in ch. 255 does not provide for expedited court procedures. Cf. Iowa R. Crim. Pro. 27 (criminal defendants entitled to a speedy trial). By giving a liberal construction to chapter 255, the clear purposes of that chapter are clearly fulfilled -- the treatment and care of a person who "is suffering from some malady or deformity that can probably be improved or cured or advantageously treated by medical or surgical treatment or hospital care. . . ." Iowa Code § 255.1.

In the light of the principles of statutory construction and the purposes of the chapter, it is our opinion that treatment of indigent persons may be authorized when the medical treatment has already been given.

You state your second question as follows:

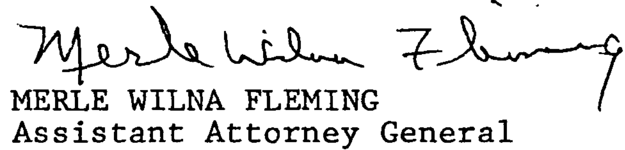
> A related question involves patients whose treatment is properly authorized in one fiscal year, but the treatment must continue into a succeeding fiscal year. Is it necessary for the patient to reapply for assistance under ch. 255 and for the court to reapprove the assistance each succeeding year if the treatment is continuing and part of the same deformity or malady?

Your second question is complex because of the widely varying circumstances of patients. Id. at 345. We understand that a person is considered, by the University Hospital and the counties, to be allocated to a county's quota in the fiscal year in which that patient was first admitted if the person is admitted near the close of the fiscal year and the period of hospitalization extends into the next fiscal year. Illness does not fit its course into fiscal years. We find no requirement in the statute or in logic to require that eligibility for care must be established for each fiscal year in such cases.

It should be understood that University Hospitals is an acute care facility. Many patients, particularly cancer patients, are discharged from the hospital but must be admitted again later. The only way to maintain proportionality among the counties is to require new court orders. Moreover, the indigency status of patients may change over time. For example, serious illness may cause patients who were treated originally on a private or a "clinical pay" basis to seek admission for subsequent hospitalization as indigents. As we indicated above, those administrative practices are long-standing arrangements between University Hospitals and Iowa ninety-nine counties.

In summary, we are unwilling to interfere with long standing administrative practice. Therefore, it is our opinion that payment for medical treatment of indigent persons may be authorized after the treatment has been received. Patients who are admitted for care near the end of a fiscal year but discharged from the hospital during the following fiscal year are allocated to the county's quota for the year in which they were admitted. When a person has been discharged from the hospital, a new court order is required for a new admission to maintain proportionality among Iowa counties.

Sincerely yours,



MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

HIGHWAYS: Road Use Tax Fund; Employee day care services. Iowa Constitution, Article VII, § 8; Iowa Code § 312.1 (1985). The use of road use tax funds to provide day care services to children of DOT, county secondary road, and municipal street department employees does not violate Article VII, § 8. (Weeg to Welden, State Representative, 10/29/85) #85-10-5(L)

October 29, 1985

The Honorable Richard W. Welden
State Representative
612 Forest Drive
Iowa Falls, Iowa 50126

Dear Representative Welden:

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

> 1. Is it a proper and constitutional act for the Department of Transportation to use road use tax funds, real estate acquired with or a building constructed with road use tax funds for the purpose of establishing or operating a child day care center for children of department employees, also children of the general public not associated with or employed by the department?
>
> 2. Is it a proper and constitutional act for counties of the state of Iowa to use road use tax funds to establish or operate child day care centers for children of their secondary road department employees and is it a proper and constitutional act for cities to establish or operate child day care centers for children of employees of their street departments and the general public?

In sum, you ask whether the state, counties, and cities may use road use tax funds to operate day care centers for employees as well as the general public. It is our opinion that these funds may properly be used for this purpose.

We first review the constitutional and statutory provisions relevant to your questions, and the factual circumstances from which your questions arise.

Iowa Constitution, Art. VII, § 8, provides:

> All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds.
>
> . . .

(emphasis added)

Iowa Code § 312.1 (1985) provides that the road use tax fund includes the following:

> 1. All the net proceeds of the registration of motor vehicles under chapter 321.
>
> 2. All the net proceeds of the motor vehicle fuel tax or license fees under chapter 324.
>
> 3. All revenue derived from the use tax, under chapter 423 on motor vehicles, trailers, and motor vehicle accessories and equipment, as same may be collected as provided by section 423.7.
>
> 4. Any other funds which may by law be credited to the road use tax fund.[1]

Accordingly, the fees and taxes subject to the limitations of Article VII, § 8, are included as part of the road use tax fund. Road use tax funds are allocated in various percentages to the state, counties, and cities for road and street construction purposes in accordance with § 312.2.

The Department of Transportation (DOT) in 1984 decided to contract with a non-profit day care center in Ames to operate a day care facility, the primary purpose being to improve productivity of DOT employees by providing accessible and on-site day care for children of DOT employees. Children of DOT employees

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[1] We note that not all of the funds which constitute the road use tax fund are subject to the constitutional limitations of Article VII, § 8.

are to be given preference in acceptance, but at least initially the facility has been open to the general public. The expenses of this program will be paid largely from fees, but in order for the facility to operate on a break-even basis, the DOT Commission agreed to provide certain in-kind support, including rent-free space in an existing building, maintenance, utilities, and security and janitorial services equivalent to those provided in other DOT buildings in that area.

This office recently addressed the question of the constitutionality of use of road use tax funds for a specific purpose in Op.Att'yGen. #84-9-6. In that opinion, a copy of which is enclosed for your review, we held that the Article VII, § 8, limitation on the use of road use tax funds for construction, maintenance, and supervision purposes only did not prohibit payment of tort claims against the Department of Transportation from the primary road fund pursuant to statute. We believe the rationale in support of that conclusion is equally applicable in the present case. Rather than repeat our previous discussion in its entirety, we enclose a copy of our earlier opinion for your review and highlight the major points of that opinion.

Our previous opinion relied heavily on the Iowa Supreme Court's consistently broad reading of Article VII, § 8, in a number of cases, as well as a number of consistent opinions from this office. In Edge v. Brice, 253 Iowa 710, 113 N.W.2d 755 (1962), the court stated the intent and purpose of § 8 was to ensure a source of funds for highway purposes, and not to allow those funds to be used for governmental purposes totally unrelated to highways. Id. at 759. The court went on to broadly construe the term "construction" as used in § 8 as including "all things necessary to the complete accomplishment of a highway for all uses properly a part thereof." See also Slapnicka v. City of Cedar Rapids, 258 Iowa 382, 139 N.W.2d 179 (1965). But see Frost v. State, 172 N.W.2d 575 (Iowa 1969). This office has reiterated the court's liberal view of this constitutional provision in finding the expenditures of road use tax funds for varying purposes constitutional. See Op.Att'yGen. #84-9-6 (DOT tort claims); 1980 Op.Att'yGen. 107 (wind erosion control programs for highways); 1978 Op.Att'yGen. 31 (bikeway construction); 1976 Op.Att'yGen. 734 (traffic control devices); 1972 Op.Att'yGen. 115 (state highway patrol salaries); 1970 Op.Att'yGen. 181 (machine storage facility); 1968 Op.Att'yGen. 494 (safety rest areas). A few opinions have restricted the use of road use tax funds for certain purposes as unconstitutional. See 1972 Op.Att'yGen. 380 (research project on county road liability insurance); 1972 Op.Att'yGen. 362 (acquisition of billboards, signs, and junk yards outside highway right-of-ways); 1970 Op.Att'yGen. 162 (flood control projects unrelated to highways); 1970 Op.Att'yGen.

508 (sidewalk construction not a part of a street construction project).

Consistent with this authority, we conclude that use of road use tax funds for providing day care services to DOT employees does not violate Article VII, § 8, as provision of such services is reasonably related to "construction, maintenance, and supervision of the public highways." There is little question that it is proper to use road use tax funds to pay the salaries of DOT employees, for such employees are essential to the operation of the entire department and therefore the state highway system. See 1972 Op.Att'yGen. 115 (proper to pay state highway patrol salaries from road use tax funds). The provision of fringe benefits in addition to the payment of salaries is certainly not unusual but is instead an accepted, indeed expected, fact in today's labor market.

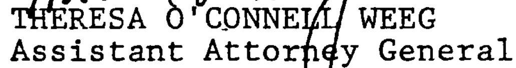
No question has arisen as to whether it is appropriate to expend road use tax funds to pay vacation, sick leave, health insurance, or retirement benefits to DOT employees, as such benefits are seen as standard and necessary to attract and keep qualified employees and therefore further "the construction, maintenance, and supervision of the public highways." The category of "usual" fringe benefits is not a static one but one that has and will continue to change to reflect the needs and expectations of a changing society. For example, as women have entered the workplace in ever-increasing numbers, the need for reliable day care has grown dramatically. In response, provision of day care services for children of employees, sometimes at no cost to the employees, has become an increasingly common fringe benefit.

The Supreme Court has stated constitutional provisions are to be "interpreted broadly to achieve their underlying purposes and flexibility interpreted to meet changing times." Bechtel v. City of Des Moines, 225 N.W.2d 326 (1975). In Edge v. Brice, supra, the court stated the purpose of Article VII, § 8, is to keep road use taxes at a reasonable rate "and not to allow the same to become a general revenue measure to be used for governmental purposes totally foreign to highways." 113 N.W.2d at 759. The provision of day care services to DOT employees is not a governmental purpose totally unrelated to highways, but instead reflects a judgment by the DOT that the availability of such services will aid in recruiting and retaining well-qualified employees. Certainly securing the best possible employees to perform DOT functions will greatly further the competent construction, maintenance and supervision of the public highways.

For these reasons, it is our opinion that the use of road use tax funds to provide day care services to children of DOT

employees does not violate Article VII, § 8, of the Iowa Constitution.[2] For the same reasons, we reach the identical conclusion as to provision of such services to the children of county secondary road and municipal street department employees.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure

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[2] We believe it is reasonable to make these services available to members of the general public if this is an economically viable way to make those services available to DOT employees, particularly if children of DOT employees have preference over children in the general public and members of the general public pay for the services provided, as is the case.

COUNTIES; Sheriff; Residency requirement for deputy sheriffs; Home rule authority. Iowa Const. art. III, § 39A; Iowa Code §§ 331.301(1) and (2); 341A.11(7) (1985). A county sheriff has authority to impose a requirement that deputy sheriffs reside in designated areas of the county if that requirement is reasonably related to law enforcement purposes. (Weeg to O'Meara, Page County Attorney, 10/22/85) #85-10-4(L)

October 22, 1985

Mr. Stephen P. O'Meara
Page County Attorney
Page County Courthouse
Clarinda, Iowa 51632

Dear Mr. O'Meara:

You have requested an opinion of the Attorney General as to whether the county sheriff has the authority to require a deputy sheriff to reside within a specific area of the county as a condition of employment. We have previously informed you that this office cannot resolve a question of fact as to whether such a condition was properly imposed in a particular situation.

Iowa Code § 400.16 (1985) provides in part that city civil service employees:

> . . . shall not be required to be a resident of the city in which they are employed, but they shall become a resident of the state at the time such appointment or employment begins and shall remain a resident of the state during employment. Cities may set reasonable maximum distances outside of the corporate limits of the city that police officers, fire fighters and other critical municipal employees may live.

No such provision is contained in Ch. 341A, which establishes the civil service system for deputy county sheriffs, or in any other statute we can find. Therefore, we conclude there are no express provisions governing residency requirements for deputies of county officers.

In Rehmel v. Board of Supervisors of Muscatine County, 172 Iowa 455, 154 N.W. 596 (1915), the Court held that in the absence of an express statutory residency requirement, deputy sheriffs

are not required to be residents of the state. In that case the county sheriff appointed out-of-state residents to serve as deputy sheriffs during the course of a protracted labor strike. Certain citizens of the county sued the supervisors to enjoin payment of these deputies' salaries on the ground they were ineligible to so serve. The Court noted there was no statutory requirement that deputy sheriffs reside in the state as there was for the sheriff, and rejected the argument that because a deputy often acts in the stead of the principal the deputy must qualify for office as does the principal. The Court appeared to defer to the sheriff's discretion in hiring deputies when it stated: "it is conceivable that a situation may arise where those called upon to preserve law and order should not be permanent residents of the communities in which they serve." 154 N.W. at 598. In this case the strike had lasted two years and even state authorities had been unable to maintain order. The sheriff hired non-resident deputies because they "had no friends to serve nor enemies to punish . . ., and . . . had no interest in the outcome of the controversy between the employers and the employed." Id. See also 1904 Op.Att'yGen. 263 (deputy not required to be state resident and qualified elector though principal officer is so required). But see 1972 Op.Att'yGen. 49; 1940 Op.Att'yGen. 477 (deputy may on occasion act in absence of principal and therefore must meet qualifications set for principal); 1930 Op.Att'yGen. 282.[1]

None of these Iowa authorities specifically address the question of whether a deputy can be required by the sheriff to reside within a particular area of the county. However, we believe the Rehmel decision at least suggests that the sheriff has considerable discretion in determining residency requirements for deputies in accordance with the county's law enforcement needs. We can find no additional Iowa authority which provides guidance on this issue. In the absence of any authority to the contrary, it is our opinion that a sheriff may impose a residency requirement upon deputy sheriffs as a condition of employment if that requirement is reasonably related to county law enforcement needs. See Iowa Const. art. III, § 39A ("Counties . . . are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government . . ."); § 331.301(1) ("A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve

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[1] 1940 Op.Att'yGen. 477 and 1930 Op.Att'yGen. 282 did not refer to the Rehmel decision and for that reason would appear to be of questionable precedential value.

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. . . .")[2] Law enforcement needs may include, but are not limited to, the need for deputies to be available in particular geographical areas of the county in order to promptly respond to emergencies in those various areas.

We believe our conclusion is supported by the trend of authority in other jurisdictions. One leading commentator has reviewed the authority from other jurisdictions on the question of residency requirements for municipal employees. See 3 McQuillin, Municipal Corporations (3rd ed.), § 12.59 at 242-243. Such requirements, or the prohibition thereof, are often imposed in other jurisdictions by constitution or statute, as they are not in Iowa, or are provided for by municipal ordinance. It appears that challenges to statutes and ordinances imposing residency requirements of the type here in question are generally upheld:

> . . . It has been held, . . . that a requirement that all classified employees of a city, including school teachers, be or become, within a specified time of their employment, residents within the boundaries of the city unless granted a special permit for certain specified reasons, would be invalid as placing a restriction on a fundamental right of its employees to live where they wish, unless the requirement that the employees live within the city serves a public interest which is important enough to justify the restriction on private right. [footnote omitted] Under an ordinance providing for a waiver of the residency requirement, and requiring the civil service commission to

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[2] Section 331.301(2) provides that the power of the county is vested and should be exercised by the board of supervisors except as otherwise provided by law. It is our opinion independently elected county officers may exercise county powers, including the exercise of home rule authority, in accordance with their statutory duties, for such is otherwise provided by law. See McMurray v. Board of Supervisors of Lee County, 261 N.W.2d 688 (Iowa 1978); Smith v. Newell, 254 Iowa 496, 117 N.W.2d 883 (1962); Op.Att'yGen. #85-6-3; Op.Att'yGen. #84-10-5. Cf. Smith v. Board of Supervisors of Des Moines County, 320 N.W.2d 589 (Iowa 1982).

> base its determination as to waiving the requirement on the nature of the work, location of the work, and all other pertinent facts concerning employment -- personal hardship factors must be considered even though the best interests of the city are paramount. [footnote omitted]. . . . Also held valid has been an ordinance requiring certain classes of city employees to reside within a "residency area" which is peripheral to the municipal boundaries insofar as its purpose was to require the city's public safety employees to live at places from which they could effectively be called to duty when needed. [footnote omitted]
>
> * * *
>
> In some municipalities it is required that an officer or employee continue to maintain his residence within the municipality after his appointment, [footnote omitted] and it has been held that such a requirement is not unfair, unreasonable and arbitrary, [footnote omitted] nor does it unconstitutionally infringe upon the employee's right to travel. [footnote omitted]

3 McQuillin, § 12.59 at 242-243 (and cases cited therein).

In concluding, we note that in the event a deputy sheriff is disciplined for failure to comply with a residency requirement imposed by the sheriff, § 341A.11 applies. That section provides that a deputy may be removed or discharged or otherwise disciplined for a number of reasons, including:

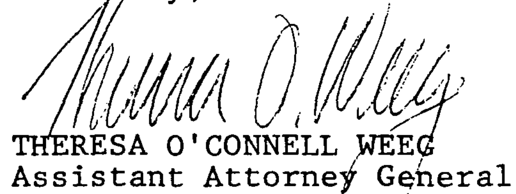
> 7. Any other act or failure to act or to follow reasonable regulations prescribed by the sheriff which in the judgment of the commission is sufficient to show the offender to be unsuitable or unfit for employment.

Accordingly, the reasonableness of the sheriff's requirements regarding residency are subject to review by the civil service commission in the event failure to follow such requirements subjects a deputy to disciplinary action.

To summarize, it is our opinion that a county sheriff has authority to impose a requirement that deputy sheriffs reside in

designated areas of the county if that requirement is reasonably related to law enforcement purposes.

Sincerely,



THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

STATE OFFICERS AND EMPLOYEES; Fidelity Bonds. Iowa Code §§ 11.7, 18.164, 18.165, 18.169 and 64.6 (1985). Fidelity bond coverage for state officers or employees may not include a deductible provision, unless the state's liability under the bond coverage is in excess of subrogated insuror payments meeting or exceeding amounts required for bonding by statute. (Lyman to Johnson, Auditor of State, 10/21/85) #85-10-3(L)

October 21, 1985

The Honorable Richard D. Johnson
Auditor of State
State Capitol Building
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General regarding the adequacy of fidelity bonds required of state officers and certain employees which feature a deductible coverage clause. Specifically, you inquire whether a blanket bond is sufficient by itself to comply with statutory provisions when the deductible amount of the blanket bond exceeds coverage required by law.

Iowa Code § 64.6 (1985) delineates the state officers requiring fidelity bonding, and the respective coverage requirements of each. Elsewhere in the Code, provisions direct that particular state employees likewise be bonded (see i.e., Iowa Code § 11.7 (1985), relating to the appointment of state auditors and the bonding thereof).

I.

In regard to the bonding of state officers under § 64.6, the statute repeatedly utilizes the phrase "not less than" immediately preceding the specific amounts of bonds to be obtained. Hence, the legislature established a benchmark for the state's financial liability arising from the misfeasance or malfeasance of state officers, directing that a course of self-insurance not be undertaken for such claims smaller in amount than the relevant bonding requirements of § 64.6. In other words, all such claims must be subrogated by a private insuror to the extent of the relevant bonding requirements of § 64.6.

An examination of Chapter 18 of the Iowa Code bolsters the position that the legislature's enactment of § 64.6 reflects the desire for the state to avoid assuming the risk of loss to the

extent of the principal sums stated within § 64.6. Iowa Code § 18.164(1)(l) (1985) authorizes the Risk Management Division of the Department of General Services to determine which risk exposures should be self-insured or assumed by the state. Section 18.165(1)(d) further authorizes Risk Management, in its administration of the state's loss exposure program, to contract for deductible insurance, co-insurance and partial coverage. However, Risk Management's discretion to act under these provisions as they relate to the fidelity bonding of state officers is limited by Iowa Code § 18.165(1)(b), which states in part that

> In carrying out the requirements of section 64.6, the state [through the Risk Management Division] may purchase an individual or a blanket bond insuring the fidelity of state officers <u>subject to the minimum surety bond requirements of section 64.6</u>. (Emphasis added)

Moreover, the argument cannot be made that Iowa Code §§ 18.164 and 18.165 supersede or even modify the bonding requirements of § 64.6, as Iowa Code § 18.169 specifically embodies the legislature's intent that:

> the standards adopted by the [Risk Management Division] shall be subject to any limitations contained in the laws of this state as they exist on and after July 1, 1978. <u>Nothing contained in [§§ 18.160-18.169] shall be deemed to amend or repeal any law of this state or its agencies against risks, and nothing contained in [§§ 18.160-18.169] shall be deemed to delegate to the division or any other person the power to amend or repeal any such law</u>. (Emphasis added)

Considering then the operation of Iowa Code § 64.6, and its relationship with Iowa Code §§ 18.164 and 18.165, the acquisition of fidelity bond coverage which includes a deductible provision and in effect exposes the state to a first dollar risk of loss would vitiate the legislature's intent to protect the state from such losses. The plain meaning of § 64.6 dictates this conclusion, as §§ 18.164 and 18.165 do not serve to modify the minimum bonding requirements.

II.

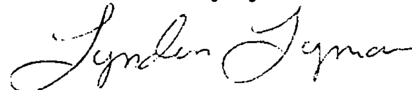
Certain state employees other than those included in Iowa Code § 64.6 are also subject to bonding requirements. While the statutory authority against fidelity bond coverage with a deductible provision on § 64.6 bonds is stronger than that relating to this more generic variety, logic dictates an identical conclusion. Where the legislature has enacted a statute requiring

state employees to be bonded, it has clearly evidenced its intent that the state not self-insure and, consequently, avoid financial exposure up to and including certain limits. An opposite conclusion would frustrate the minimum requirements for fidelity bonding in the first instance.

III.

In conclusion, it is the opinion of this office that fidelity bond coverage for state officers or employees may not include a deductible provision, except in excess of subrogated insuror payments meeting or exceeding amounts required for bonding under statute. This opinion does not address the authority of the Risk Management Division of the Department of General Services in obtaining blanket bonds otherwise consistent with our conclusion (see Op.Att'yGen. #79-2-12).

Sincerely yours,



LYNDEN LYMAN
Assistant Attorney General

LL:jds

COUNTY HOSPITALS: Iowa Code chapter 347 (1985). A county public hospital does not have the authority to operate a medical clinic. (McGuire to Casper, Madison County Attorney, 10/21/85) #85-10-2(L)

COUNTY HOSPITALS: Iowa Code ch. 347 (1985). Op.Att'yGen. #85-10-2(L), opining that a county public hospital does not have authority to operate a medical clinic, was withdrawn on June 25, 1986, by letter from Elizabeth M. Osenbaugh to John E. Casper. Specific fact situations should be analyzed on the basis of 1980 Op.Att'yGen. 388 and the amendments to chapter 347 contained in H.F. 2229 and 2395, 71st General Assembly, 2nd Session.

Mr. John E. Casper
Madison County Attorney
223 East Court Avenue
Winterset, Iowa 50273

Dear Mr. Casper:

You requested an opinion from the Attorney General regarding the authority of a county public hospital organized under Iowa Code chapter 347 to establish and operate a medical clinic. Specifically you ask (1) whether the county hospital has the power to operate a medical clinic and (2) whether the county hospital can expend public funds raised through property taxes for this purpose.

The facts you present are that the county hospital intends to lease, separate from the existing hospital premises, a commercial building, purchase and install all necessary medical equipment and supplies, contract for a physician on a salary basis, and retain responsibility for patient billings and bookkeeping.

A county public hospital organized under chapter 347 is operated by a county board of hospital trustees. Iowa Code § 347.13 (1985). This board's authority is limited to its express statutory authority. The broader authority of county home rule does not apply to the hospital board of trustees. See 1980 Op.Att'yGen. 388, 391.

The powers and duties of the hospital board, both mandatory and optional, are specified in §§ 347.13 and 347.14. Neither of these sections authorizes the hospital board to operate a medical clinic.

Section 347.29 allows the county hospital to construct a medical clinic for sale or lease. However, there is no authority to operate the clinic.[1]

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[1] Note that when the legislature intended the county hospital to operate another facility, it clearly stated so. Section 347.14(12) specifically gave the county hospital authority to "operate a health care facility. . . ." (emphasis added).

As we conclude that the hospital board has no authority to operate the clinic, it is not necessary to reach the funding question.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

June 25, 1986

John E. Casper
Madison County Attorney
223 East Court Avenue
Winterset, Iowa 50273

Dear Mr. Casper:

On October 21, 1985, this office issued an opinion, Op.Att'yGen. #85-10-2(L), which stated generally that a county public hospital does not have the authority to operate a medical clinic. As we discussed, questions have arisen as to the analysis of Op.Att'yGen. #85-10-2(L) and its effect on situations other than the fact situation described in it.

The opinion stated that the board's authority is limited to its express statutory authority, citing 1980 Op.Att'yGen. 388, 391. Our recent opinion failed to note, however, that the prior opinion goes on to state:

> We conclude that power granted by the language of § 347.14(10) is as broad for the board of trustees of a county hospital operating under ch. 347, on the subject matter for which the board is responsible, as is that now enjoyed by the governing bodies of the ninety-nine counties under the Home Rule Amendment. Important constitutional and statutory limitations which apply to financing of local governmental units were not affected, however, by the Home Rule Amendment nor by § 347.13(10).

The Code section cited, § 347.14(10), provides authority to:

> Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining

> to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter.

The General Assembly this session passed a bill, H.F. 2395, which adds new Code section 347.31. That section is entitled "Community Recreation Facilities and Programs." The section provides as follows:

> A county or city hospital may expend available funds for establishment and operation of facilities, programs, and services which provide health benefits to persons served by those facilities, programs, or services. Where appropriate, the county or city hospital shall enter into an agreement pursuant to chapter 28E.

The explanation for the bill states:

> This bill permits a county or city hospital to establish and operate facilities, programs, and services which provide health benefits to persons.

Another bill, H.F. 2229, amended Code sections 347.28 and 347.29 regarding the sale, lease, or use of hospital property. That bill also provides for a long-term community health services and developmental plan.

The new legislation would require re-analysis of the issue addressed in the opinion.

It is our view, after considering these prior opinions and the recent legislation, that specific fact situations should be analyzed as to whether a proposed clinic operation would be within the scope of § 347.14(10) as construed in 1980 Op.Att'yGen. 388, 391 or within the scope of new § 347.31.

Without deciding this question under the facts you presented, we have decided to withdraw Op.Att'yGen. #85-10-2(L) so that the general question of authority to operate medical clinics can remain open for appropriate resolution in individual cases.

Questions concerning construction of chapter 347 should be resolved under the analysis of prior opinions.

We appreciate your understanding in this matter.

Sincerely,

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

the county where the property is located. ~~Bids~~ The hearing shall not ~~be-accepted~~ take place prior to two weeks after the second publication ~~nor-later-than-six-months-after-the-second publication. The-highest-competent-bid-must-be-accepted unless-all-bids-received-are-deemed-inadequate-and-rejected.~~

Sec. 7. NEW SECTION. 347.31 TAX STATUS.

This chapter does not deprive any hospital of its tax exempt or nonprofit status except that portion of hospital property which is used for other than nonprofit, health-related purposes shall be subject to property tax as provided for in section 427.1, subsection 23.

Sec. 8. Section 427.1, subsection 23, Code Supplement 1985, is amended to read as follows:

23. Statement of objects and uses filed. A society or organization claiming an exemption under subsection 6 or subsection 9 of this section shall file with the assessor not later than February 1 a statement upon forms to be prescribed by the director of revenue, describing the nature of the property upon which the exemption is claimed and setting out in detail any uses and income from the property derived from the rentals, leases, or other uses of the property not solely for the appropriate objects of the society or organization. Upon the filing and allowance of the claim, the claim shall be allowed on the property for successive years without further filing as long as the property is used for the purposes specified in the original claim for exemption. When the property is sold or transferred, the county recorder shall provide notice of the transfer to the assessor. The notice shall describe the property transferred and the name of the person to whom title to the property is transferred.

PARAGRAPH DIVIDED. The assessor, in arriving at the valuation of any property of the society or organization, shall take into consideration any uses of the property not for the appropriate objects of the organization and shall assess in the same manner as other property, all or any portion of

the property involved which is leased or rented and is used regularly for commercial purposes for a profit to a party or individual. If a portion of the property is used regularly for commercial purposes an exemption shall not be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property.

PARAGRAPH DIVIDED. However, the board of trustees or the board of directors of a hospital, as defined in section 135B.1, subsection 1, may permit use of a portion of the hospital for commercial purposes, and the hospital is entitled to full exemption for that portion used for nonprofit health-related purposes, upon compliance with the filing requirements of this subsection. An exemption shall not be granted upon property upon or in which persistent violations of the laws of the state are permitted. A claimant of an exemption shall, under oath, declare that no violations of law will be knowingly permitted or have been permitted on or after January 1 of the year in which a tax exemption is requested. Claims for exemption shall be verified under oath by the president or other responsible head of the organization. A society or organization which ceases to use the property for the purposes stated in the claim shall provide written notice to the assessor of the change in use.

Sec. 9. Notwithstanding section 347.9, a trustee presently serving on a county public hospital board who is no longer eligible to serve on the board because of this Act may complete the term of office for which the trustee was elected but is not eligible for reelection to the board.

Sec. 10. The state department of health, in consultation with providers and consumers of rural hospital services, shall review actions taken in other states to license hospitals by service and shall specifically evaluate the potential utility and value in developing such a system as an option for

licensing which may be applied to hospitals in Iowa in lieu of current licensing and accreditation systems. The department shall report its findings to the general assembly by January 1, 1987.

DONALD D. AVENSON
Speaker of the House

ROBERT T. ANDERSON
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 2229, Seventy-first General Assembly.

JOSEPH O'HERN
Chief Clerk of the House

Approved ______________, 1986

TERRY E. BRANSTAD
Governor

HOUSE FILE 2229

AN ACT

RELATING TO HOSPITALS BY PERMITTING THE SALE OR LEASE OF PROPERTY OWNED BY THE HOSPITAL UPON APPROVAL BY THE BOARD OF TRUSTEES, PERMITTING COMMERCIAL USE OF PORTIONS OF HOSPITAL PROPERTY, PERMITTING CERTAIN HOSPITALS TO SELL OR LEASE PROPERTY WITH A PUBLIC NOTICE AND A PUBLIC HEARING, REQUIRING A COMMISSION WHICH MANAGES A COUNTY MEMORIAL HOSPITAL TO REQUEST A COUNTY APPROPRIATION FOR THE HOSPITAL FROM THE COUNTY BOARD OF SUPERVISORS, PERMITTING LICENSED PRACTITIONERS AND PHYSICIANS TO SERVE AS COUNTY PUBLIC HOSPITAL TRUSTEES, PROHIBITING TRUSTEES FROM RECEIVING COMPENSATION FROM THE COUNTY PUBLIC HOSPITAL, AND REQUIRING THE DEPARTMENT OF HEALTH TO PROVIDE TECHNICAL ASSISTANCE TO HOSPITALS WHEN FUNDING IS AVAILABLE.

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

Section 1. Section 37.9, unnumbered paragraph 1, Code 1985, is amended to read as follows:

When the proposition to erect any such building or monument has been carried by a majority vote, the board of supervisors or the city council, as the case may be, shall appoint a commission consisting of five members, in the manner and with the qualifications hereinafter provided in this chapter, which shall have charge and supervision of the erection of said the building or monument, and when erected, the management and control thereof of the building or monument.

On or before January 15 of each year, a commission which manages and controls a county memorial hospital shall prepare and submit to the county auditor a request for an appropriation for the next fiscal year from the general fund for the operation and maintenance of the county memorial hospital. On or before January 20, the county auditor shall submit the request to the county board of supervisors. The board of supervisors may adjust the commission's request and may make an appropriation for the county memorial hospital as provided in section 331.427, subsection 2, paragraph "b". For the purposes of public notice, the commission is a certifying board and is subject to the requirements of sections 24.3 through 24.5, sections 24.9 through 24.12, and section 24.16.

Sec. 2. NEW SECTION. 135B.33 TECHNICAL ASSISTANCE.

Subject to availability of funds, the state department of health shall provide technical planning assistance to local boards of health and hospital governing boards to ensure access to hospital services in rural areas. The department shall encourage the local boards of health and hospital governing boards to adopt a long-term community health services and developmental plan including the following:

1. An analysis of demographic trends in the health facility services area, affecting health facility and health-facility-related health care utilizations.

2. A review of inpatient services currently provided, by type of service and the frequency of provision of that service, and the cost-effectiveness of that service.

3. An analysis of resources available in proximate health facilities and services that might be provided through alternative arrangements with such health facilities.

4. An analysis of cooperative arrangements that could be developed with other health facilities in the area that could assist those health facilities in the provision of services.

5. An analysis of community health needs, specifically including long-term care needs, including intermediate care

H.F. 2229

facility and skilled nursing facility care, pediatric and maternity services, and the health facilities potential role in facilitating the provision of services to meet these needs.

6. An analysis of alternative uses for existing health facility space and real property, including use for community health-related and human service-related purposes.

7. An analysis of mechanisms to meet indigent patient care needs and the responsibilities for the care of indigent patients.

8. An analysis of the existing tax levying of the health facilities for patient care, on a per capita basis and per hospital patient basis, and projections on future needs for tax levying to continue for the provision of care.

Providers may cooperatively coordinate to develop one long-term community health services and developmental plan for a geographic area, provided the plan addresses the issues enumerated in this section.

The health facilities may seek technical assistance or apply for matching grant funds for the plan development. The department shall require compliance with subsections 1 through 8 when the facility applies for matching grant funds.

Sec. 3. Section 347.9, Code 1985, is amended to read as follows:

347.9 TRUSTEES -- APPOINTMENT -- TERMS OF OFFICE.

When it has been determined by the voters of a county to establish a county public hospital, the board shall appoint seven trustees chosen from among the resident citizens of the county with reference to their fitness for ~~such~~ office, and not more than four of ~~such~~ the trustees shall be residents of the city ~~or-village~~ at which ~~such~~ the hospital is located. ~~Such~~ The trustees shall hold office until the following general election, at which time their successors shall be elected, two for a term of two years, two for four years, and three for six years, and they shall determine by lot their respective terms, and thereafter their successors shall be

elected for regular terms of six years each~~,-none-of-whom shall-be-physicians-or-licensed-practitioners~~. A person or spouse of a person with medical or special staff privileges in the county public hospital or who receives direct or indirect compensation from the county public hospital or direct or indirect compensation from a person contracting for services with the hospital shall not be eligible to serve as a trustee for that county public hospital.

Sec. 4. Section 347.28, Code 1985, is amended to read as follows:

347.28 SALE OR LEASE OF PROPERTY.

~~Any~~ A county or city hospital may lease or sell any of its property which is not needed for hospital purposes to any person ~~for-use-as-a-physician's-office,-medical-clinic,-or-any other-health-related-purpose~~, upon approval by the board of trustees.

Sec. 5. Section 347.29, Code 1985, is amended to read as follows:

347.29 USE OF PROPERTY ~~FOR-CLINIC~~.

~~Any~~ A county or city hospital may use property received by gift, devise, bequest, or otherwise, or the proceeds from the sale of ~~such~~ property, for the construction of facilities for lease or sale ~~as-a-medical-clinic-or-a-physician's-office subject-to-the-approval-of-the-appropriate-local-health planning-agency~~, upon approval by the board of trustees.

Sec. 6. Section 347.30, Code 1985, is amended to read as follows:

347.30 ~~ADVERTISE-FOR-BIDS~~ NOTICE AND HEARING.

A county or city hospital shall ~~advertise-for-bids~~ serve notice and hold a public hearing before selling or leasing any property pursuant to sections 347.28 and 347.29. The ~~advertisement~~ notice shall definitely describe the property, indicate the date and location of the hearing, and shall be published by at least one insertion each week for two consecutive weeks in a newspaper having general circulation in

HOUSE FILE 2395

AN ACT

AUTHORIZING A CITY OR COUNTY HOSPITAL TO ESTABLISH AND OPERATE FACILITIES, PROGRAMS, AND SERVICES WHICH PROVIDE HEALTH BENEFITS TO PERSONS.

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

Section 1. NEW SECTION. 347.31 COMMUNITY RECREATION FACILITIES AND PROGRAMS.

A county or city hospital may expend available funds for establishment and operation of facilities, programs, and services which provide health benefits to persons served by those facilities, programs, or services. Where appropriate,

the county or city hospital shall enter into an agreement pursuant to chapter 28E.

DONALD D. AVENSON
Speaker of the House

ROBERT T. ANDERSON
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 2395, Seventy-first General Assembly.

JOSEPH O'HERN
Chief Clerk of the House

Approved ______________, 1986

TERRY E. BRANSTAD
Governor

H.F. 2395

CLERK OF COURT: Satisfaction of Child Support Judgments: Iowa Code Sections 598.22; 624.37 (1985); 1985 Iowa Acts, Ch. _____ (H.F. 495). The clerk of court is not allowed to enter an agreed-upon amount on the payment record as satisfaction of a judgment for a child support obligation when payments are made to a person other than the clerk of the district court. (Robinson to Davis, Scott County Attorney, 11/26/85) #85-11-7(L)

November 26, 1985

Mr. William E. Davis
Scott County Attorney
Scott County Courthouse
416 W. 4th Street
Davenport, IA 52801

Dear Mr. Davis:

You recently asked for an opinion of the Attorney General with regard to satisfaction of child support obligations, viz:

> The Clerk of our District Court has requested an interpretation of certain provisions of House File 495, Acts of the 71st General Assembly, 1985 Regular Session, dealing with the payment and application of child support payments. Specifically, the language pertinent to the Clerk's inquiry is found in Section 8 of said House File 495 which amends Section 598.22 of The Code of Iowa...
>
> The question raised by the Clerk is whether payments made outside of the terms of the statute can be utilized to satisfy the judgment if both the petitioner and the respondent wish it to, and attempt to file a satisfaction (assuming the Department of Human Services is not a party by virtue of an assignment of child support) and whether that satisfaction would allow the clerk to enter that amount on the payment record.

The answer is no. The clerk, in our opinion, is not allowed to enter an agreed-upon amount on the payment record as satisfaction.

The 1985 amendments to Iowa Code §598.22 (unnumbered paragraphs 1 and 3) which you quoted in part in your opinion request are more fully set forth:

> All orders or judgments ~~providing~~ entered under chapter 252A, chapter 675, or this chapter which provide for temporary or permanent support payments shall direct the payment of such sums to the clerk of the district court for the use of the person from whom the payments have been awarded. Payments to persons other than the clerk of the district court do not satisfy the support obligations created by such orders or judgments, except as provided for trusts in section 252D.1, 598.22, or 598.23 or for tax refunds or rebates in section 602.8102, subsection 47....
>
> An order or judgment entered by the court for temporary or permanent support or for an assignment shall be filed with the ~~court~~ clerk. The orders ~~shall~~ have the same force and effect as judgments when entered in the judgment docket and lien index and ~~shall be a record~~ are records open to the public. The clerk shall disburse the payments received pursuant to the orders or judgments within ten working days of the receipt of the payments. All moneys received or disbursed under this section shall be entered in a record book kept by the clerk, which shall be open to the public. The clerk shall not enter any moneys paid in the record book if not paid directly to the clerk, except as provided for trusts in section 252D.1, 598.22, or 598.23 or for tax refunds or rebates in section 602.8102, subsection 47.

We believe that the legislature meant what it said when the above language was amended into the statute. The general rule is: "The satisfaction of a judgment refers to compliance with or fulfillment of the mandate thereof." 47 Am.Jur.2d *Judgments* § 979 (1969). The question presented suggests the ignoring of two mandates -- the judicial order and the statute. This the clerk should not do.

This Iowa legislation is in accord with the intent of Congress as found in 42 U.S.C. §654(10) which requires:

> A State plan for child and spousal support must--
>
> . . .
>
> (10) provide that the State will maintain a full record of collections and disbursements made under the plan and have an adequate reporting system;...

The background showing the need for this legislation concerning child and spousal support is found in Senate Report (Finance Committee) No. 93-1356, U.S. Code Congressional and Administrative News 1974, pp. 8133, 8145, to the Social Service Amendments of 1974, and is particularly apropos:

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents. Of the 11 million recipients who are now receiving Aid to Families With Dependent Children (AFDC), 4 out of every 5 are on the rolls because they have been deprived of the support of a parent who has absented himself from the home.

It was to correct the problem outlined above that the Congress enacted §654 and continues to update and address this situation. It is part of the Aid to Families with Dependent Children program which is funded totally by the federal and state governments. Iowa, of course, is not required to establish such a program but once it did (see Iowa Code Ch. 239), it must follow guidelines set out in the federal statutes and regulations. Kelley v. Iowa Department of Social Services, 197 N.W.2d 192, 195 (Iowa 1972); Obershachtick v. Iowa Department of Social Services, 298 N.W.2d 302, 304 (Iowa 1980); Fransen v. Iowa Department of Social Services, No. 247 Iowa Supreme Court, filed November 13, 1985, slip op. at 5-6.

We, as was the legislature, are aware of the following language from Broyles v. Iowa Department of Social Services, 305 N.W.2d 718, 723 (Iowa 1981):

> Ordinarily, the custodial parent may release or compromise a claim for past-due child-support payments, and such action constitutes a defense to enforcement proceedings. 27B C.J.S. Divorce §321(5), at 652 (1959). The release of a judgment, however,

> must be supported by valuable consideration. 49 C.J.S. Judgments §565; see Warman v. Hat Creek Ranch Co., 202 Iowa 198, 201, 207 N.W. 532, 533 (1926) (binding release exists when there is valid consideration); Stoutenberg v. Huisman, 93 Iowa 213, 216-17, 61 N.W. 917, 918 (1895) (partial payment must be accompanied by additional consideration)....
>
> The burden of proving that a judgment has been paid is on the judgment debtor. 49 C.J.S. Judgments §599, at 1031. Donald has failed to meet his burden of proving that Michelle received valuable consideration in exchange for the release....

The legislation in question was enacted to answer the very problem raised in this Broyles case. The ordinary case law pertaining to the release or compromise of a claim is no longer applicable because of this statutory change. Instead of the courts having to determine on a case-by-case basis whether a judgment debtor had adequate notice of an assignment or whether there was adequate consideration for a release, now all child support orders or judgments are to be made payable to the clerk. "Payments to persons other than the clerk of the district court do not satisfy the support obligation...or judgments." §598.22 as amended.

The Iowa Court of Appeals addressed a similar issue (prospective modification of a support decree where rights or liabilities had already accrued) in Pierce v. Iowa Department of Social Services, 334 N.W.2d 359, 361 (Ia. App. 1983), where the following is found:

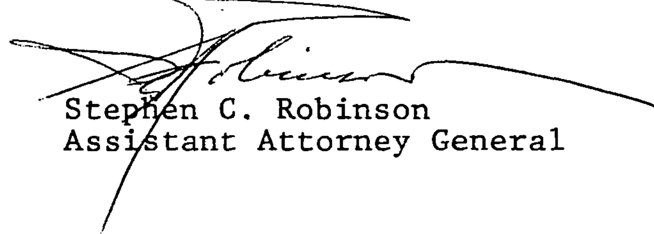
> Guided by these authorities, we conclude that, contrary to the holding of the court below, an Iowa court would not have had the power to credit plaintiff [a former husband] for payments made directly to Martha, his former wife, instead of to the Department as ordered. Because that arrearage had already accrued under the support order and was owing to the Department under Martha's assignment, it could not be modified, exonerated or otherwise eliminated. (Emphasis added.)

If an Iowa court would not have the power, neither would the Clerk of Court.

When Iowa Code §624.37 (satisfaction of judgments) is read with §598.22, we believe the courts will conclude that their clerks do not have the power to satisfy a judgment for child support when payments are made outside the mandate of §598.22.

For all of the above reasons, a clerk is not allowed, in our opinion, to enter an agreed-upon amount on the payment record as satisfaction of a judgment for a child support obligation (even assuming that the Department of Human Services is not a party by virtue of an assignment of child support) when payments were made to a person other than the clerk of the district court.

Sincerely,



Stephen C. Robinson
Assistant Attorney General

SCR/jlf7

TAXATION: Administrative Rules; Sales Tax Exemptions; Health Care Facilities. Iowa Code § 422.45 (1985), amended by 1985 Iowa Acts S.F. 564. The Department of Revenue cannot, by administrative rule, provide a refund provision or tax exemption which effectively relieves contractors from paying tax on building materials used in the fulfillment of construction contracts with health care facilities. (Barnett to Priebe, State Senator and Chair of the Administrative Rules Review Committee, 11/12/85) #85-11-6(L)

November 12, 1985

The Honorable Berl E. Priebe
State Senator and Chair of the
Administrative Rules Review Committee
Statehouse
L O C A L

Dear Senator Priebe:

On behalf of the Administrative Rules Review Committee, you have requested an opinion of the Attorney General with respect to the following question:

> May the Department of Revenue, by rule, provide for the exemption or refund of sales tax on the sales of building materials, supplies and equipment sold to contractors, subcontractors or builders used in the fulfillment of a construction contract with a non-profit corporation specified in 1985 Acts, Senate File 564?

We interpret your question as asking whether the Department of Revenue could, by rule, provide for the refund or exemption which you describe without exceeding the statutory authority of the agency. _See generally_, Iowa Code § 17A.19(8) (1985) (grounds for reversal of agency action).

The Department of Revenue has the authority to prescribe rules which are not inconsistent with the sales tax laws. Iowa Code § 422.68(1) (1985). Its authority to make rules is exceeded if it promulgates a rule which is at variance with a statutory provision or which amends or nullifies legislative intent. _See, e.g._, _Sorg v. Iowa Department of Revenue_, 269 N.W.2d 129, 131 (Iowa 1978). A rule will be found to be within the agency's authority if

a rational agency could conclude that the rule is not inconsistent with a statutory provision. See, e.g., Iowa Auto Dealers v. Iowa Department of Revenue, 301 N.W.2d 760, 762-63 (Iowa 1981). Rules of the Department cannot impose a tax or create a tax exemption. See Des Moines & Central Iowa Railway Co. v. Iowa State Tax Commission, 253 Iowa 994, 999, 115 N.W.2d 178, 181 (1962). Tax laws are made by the legislature; the Department's rules can do no more than carry these laws into effect. See Bruce Motor Freight v. Lauterbach, 247 Iowa 956, 961-62, 77 N.W.2d 613, 616-17 (1956).

As amended, Iowa Code § 422.45 exempts from sales tax "[t]he gross receipts from the sale or rental of tangible personal property or from services performed, rendered, or furnished" to specified, nonprofit, health care facilities. 1985 Iowa Acts S.F. 564. This subsection provides that the specified facilities are no longer required to pay sales tax when they purchase or rent tangible personal property or taxable services at retail. There is nothing in this subsection, however, to indicate that contractors or builders hired by health care facilities are also entitled to a tax exemption or a tax refund on materials which they purchase and use in the fulfillment of construction contracts with these facilities. Sales tax is specifically imposed on the purchase of building materials by contractors through the provisions of Iowa Code §§ 422.42(9) and 422.43. See Sturtz v. Iowa Department of Revenue, No. 84-1890, slip op. at 4, 7-8 (Iowa Sup. Ct. filed Aug. 21, 1985). The Department of Revenue cannot, by rule, provide that contractors dealing with these health care facilities are exempt from tax or entitled to tax refunds unless a reasonable agency could find that § 422.45 as amended was intended to have this result. The intent of the legislature in drafting this subsection must be determined by reference to established rules of statutory construction. See Sorg v. Iowa Department of Revenue, 269 N.W.2d at 132.

Nothing in the amendment to § 422.45 refers to the sales taxes paid by anyone other than the health care facilities listed in the subsection. 1985 Iowa Acts S.F. 564. If the language of a statute is plain and unambiguous, the language used must be given its ordinary meaning. See Northern Natural Gas Co. v. Forst, 205 N.W.2d 692, 694-95 (1973). There is no room for statutory construction if the statute is not ambiguous. See American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). Since the language of the new subsection is unambiguous and says nothing about exempting building contractors from sales tax or providing them with a sales tax refund, we do not believe that a rational agency could conclude that the amendment provides a sales tax exemption or refund for contractors.

Even if the new exemption to § 422.45 could somehow be considered to be ambiguous due to the fact that it omits reference to taxes paid by contractors, the applicable rules of statutory construction would require the Department to conclude that this exemption does not provide a tax exemption or refund for contractors fulfilling contracts with health care facilities. It is apparent that the legislature is aware that tax exempt entities, through increased construction costs, contribute to the sales taxes paid by the contractors they hire regardless of their own tax exempt status. See Iowa Code § 422.45(7) (1985). Section 422.45(7) specifically provides a procedure by which private, nonprofit, educational institutions and government entities can apply for a refund of sales taxes paid by contractors pursuant to the fulfillment of construction contracts with these tax exempt entities. Like health care facilities, these facilities are themselves exempted from sales tax in separate subsections of § 422.45. Iowa Code §§ 422.45(5), .45(8). If the legislature had intended health care facilities to be entitled to refunds of taxes paid by construction contractors, the legislature could simply have added these facilities to the list of entities subject to the refund provisions of § 422.45(7). When ambiguous, tax exemption statutes are construed narrowly in favor of taxation. See, e.g., Ballstadt v. Iowa Department of Revenue, 368 N.W.2d 147, 148 (Iowa 1985). Similarly, a taxpayer is usually not entitled to a refund of tax voluntarily paid in the absence of a specific refund statute. Cf. Pruss v. Iowa Department of Revenue, 330 N.W.2d 300, 306 (Iowa 1983) (carryback loss statute provided right to refund). The exemption for health care facilities must be interpreted in light of other sales tax exemptions dealing with other tax exempt entities in § 422.45. See Iowa Auto Dealers v. Iowa Department of Revenue, 301 N.W.2d at 765. Under these circumstances, the Department could not rationally conclude that the new subsection in § 422.45 exempts contractors from sales tax or provides them with a refund.

Legislative intent must be determined from what the legislature said rather than from what it should have said or might have said. Iowa Department of Revenue v. Iowa Merit Employment Commission, 243 N.W.2d 610, 614 (Iowa 1976). Section 422.45 as amended cannot be construed as providing for an exemption or tax refund of sales taxes paid by contractors in the construction of health care facilities in the absence of statutory language dealing with sales taxes paid by contractors fulfilling construction contracts with these facilities. The tax on contractors is specifically imposed by statute; a rule creating an exemption or providing for a refund would nullify § 422.42(9). Nullification of a statute by adminstrative rule is beyond the power of the Department of Revenue. See Sorg v. Iowa Department of Revenue, 269 N.W.2d at 131. Accordingly, the Department cannot, by rule, provide a refund provision or exemption which effectively relieves contrac-

tors from paying tax on building materials used in the fulfillment of construction contracts with health care facilities.

Sincerely,

Sherie Barnett
Assistant Attorney General

SB:cmh

cc: Joseph Royce

TAXATION: Property Tax; Interest Penalty; Rounding to Nearest Dollar. Iowa Code §§ 135D.24(1) (1985), 445.5 (1985), 445.39 (1985), as amended by 1985 Iowa Acts, H.F. 640, 447.1 (1985). If a § 445.5 tax receipt includes two or more parcels which were separately listed, assessed, and taxed, H.F. 640 requires interest penalty to be rounded to the nearest whole dollar for each parcel. House File 640 has prospective application for property taxes becoming delinquent on and after July 1, 1985. House File 640 does not affect the tax sale redemption penalty computation in § 447.1 and does not affect the computation of penalty imposed upon delinquent mobile home taxes in § 135D.24(1). (Griger to Johnson, State Auditor, 11/12/85) #85-11-5(L)

November 12, 1985

Richard D. Johnson
State Auditor
Statehouse
L O C A L

Dear Mr. Johnson:

You have requested the opinion of the attorney general with respect to 1985 Iowa Acts, H.F. 640, which requires that the interest penalty imposed upon delinquent property taxes be computed to the nearest whole dollar and which requires the computed amount to be not less than one dollar. Specifically, you have posed the following questions:

(1) If more than one parcel of property is included on a single tax receipt, should the interest penalty be rounded on each parcel or for the total of the receipt?

(2) Is House File 640 applicable to delinquent taxes collected after June 30, 1985 but prior to October 1, 1985?

(3) Does House File 640 affect the penalty computation of section 447.1 of the Code of Iowa?

(4) Does House File 640 affect the penalty computation of section 135D.24(1) of the Code of Iowa?

Iowa Code § 445.39 (1985) provides:

> If the first installment of taxes is not paid by the delinquent date specified in section 445.37, the installment shall become

> due and draw interest, as a penalty, of one percent per month until paid, from the delinquent date following the levy; and if the last half is not paid by April 1 following the levy, the same interest shall be charged from the date the last half became delinquent. However, after April 1 in a fiscal year when late certification of the tax list results in a penalty date later than October 1 for the first installment, penalties on delinquent first installments shall accrue as if certification were made on the previous June 30.

House File 640 amended § 445.39 by adding the following sentence: "The interest penalty imposed under this section shall be computed to the nearest whole dollar and the amount of interest shall not be less than one dollar." There is authority to the effect that this "rounding" of penalty computation would be improper in the absence of an authorizing statute. Bell v. Fee Title Co., 69 Cal. App. 437, 231 Pac. 598 (1924).

With respect to your first question, Iowa Code § 445.5 (1985) provides in relevant part:

> The treasurer shall upon request, make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year. The treasurer shall make the proper entries of the payments on the books or other records approved by the state auditor. . .

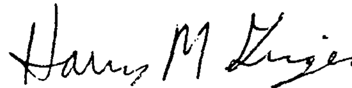
Section 445.5, by its terms, provides for the furnishing of one tax receipt to the taxpayer upon request. If the taxpayer's tax receipt includes parcels of property which have been separately listed, assessed, and taxed then each parcel will be associated with a separate tax calculation. Each taxable parcel, under these circumstances, will accrue its own interest penalty to the extent of delinquency. Therefore, if the taxpayer makes delinquent tax payments and is entitled to the § 445.5 tax receipt, the interest penalty should be computed to the nearest whole dollar for each parcel so separately taxed.

In response to your second question, H.F. 640 only applies to property taxes first becoming delinquent on and after July 1, 1985, the effective date of that statute. In Iowa, a "statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5 (1985). House File 640 does not contain any language which would give it a retrospective application to taxes which became delinquent prior to July 1, 1985, nor is there any "necessary and unavoidable implication" that would require the statute to have a retroactive effect. Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 334 N.W.2d 290, 293 (Iowa 1983). As a consequence, H.F. 640 should be construed to have a prospective effect only.

Your third question is concerned with the penalty computation for purposes of redemption from a tax sale. This four percent penalty imposed in § 447.1, for tax sale redemption purposes, is separate and distinct from the § 445.39 penalty. House File 640, by its terms, is only concerned with the § 445.39 penalty. Thus, H.F. 640 does not affect the penalty computation in § 447.1 for tax sale redemption purposes.

Your fourth question raises the effect, if any, of H.F. 640 on the penalty computation in Iowa Code § 135D.24(1) (1985) which imposes a one percent per month penalty on delinquent mobile home taxes. As noted above, H.F. 640 is only concerned with the penalty imposed in § 445.39. Thus, H.F. 640 does not affect the penalty computation for mobile home tax purposes imposed in § 135D.24(1).

Very truly yours,



Harry M. Griger
Special Assistant Attorney General

HMG:cmh

PUBLIC FUNDS; LOTTERY: Payment of Lottery Prizes. Iowa Code §§ 8.6(2), 12.5, 99E.9(3)(e), 99E.19 (1985); 1985 Iowa Acts, ch. 33 (H.F. 225). The lottery board has authority to adopt rules specifying the manner of payment of lottery prizes and may authorize the lottery commissioner to issue checks without requiring a comptroller's warrant. (Osenbaugh to Krahl, State Comptroller, 11/7/85) #85-11-3(L)

November 7, 1985

Mr. William Krahl
State Comptroller
State Capitol
L O C A L

Dear Mr. Krahl:

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

> Does the Iowa Lottery commissioner have the specific authority to pay lottery prize winners with checks written by the commissioner or should they be paid with warrants written on the state treasury as provided in chapters 12 and 8 of The Code, 1985?

We conclude that the Iowa Lottery Commissioner may pay lottery prize winners with checks written by the Iowa Lottery Commissioner.

Your question arises because the general statutes governing state funds require that payments from the state treasury be made only upon warrants of the comptroller.

Section 8.6(2) provides that the comptroller is:

> To control the payment of all monies into the treasury, and all payments from the treasury by the preparation of appropriate warrants, or warrant checks, directing such collections and payment and to advise the state treasurer monthly in writing of the amount of public funds not currently needed for operating expenses.

The statutes defining the treasurer's duties also reflect the need for comptroller's warrants for payments from the state treasury. This is specifically provided in § 12.5 as follows:

> The treasurer shall pay no money from the treasury but upon the warrants of the comptroller, and only in the order of their presentation.

Sections 8.6 and 12.5 would therefore require that lottery payments be made only upon comptroller's warrants unless the lottery bill creates an exception to these general requirements.[1]

We conclude that the Iowa Lottery Act, new Iowa Code chapter 99E, does authorize the lottery board to determine the method of payment for prizes and to this extent creates an exception to the statutes cited above.

Section 99E.9(3)(e) expressly grants the board authority to adopt rules providing for "the manner of payment of prizes to the holders of winning tickets or shares." That section states also, "Lottery employees shall examine claims and shall not pay any prize for altered, stolen, or counterfeit tickets or shares nor tickets or shares which fail to meet validation rules established for a lottery game." The section also states that "[t]he rules may provide for payment of prizes directly by the licensee." The statute thus confers authority on the board to determine how prizes are to be paid. In providing specifically for payment by licensees, the legislature also contemplated that the board's rules for methods of payment could differ from the usual procedures for state claims.

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[1] Section 8.32 does create a statutory exception for the Fair Board and the Board of Regents.

Other sections of the Iowa Lottery Act further indicate that the lottery board may provide for direct payment by the commissioner, without a comptroller's warrant. Section 19E.19, providing for the distribution of prizes, states that the commissioner shall "award" the designated prize. The section has numerous references to actions by the commissioner with regard to the giving or award of prizes. Section 99E.19(2) also expressly states, "The commissioner is discharged of all further liability upon payment of a prize pursuant to this subsection."

In chapter 99E the legislature created a new revenue-producing entity and comprehensively provided for treatment of the resulting funds. See e.g., §§ 99E.10(1), 99E.20. A claim for a prize under the lottery is redeemable only out of the specific funds held in the Iowa Lottery Fund. Further, a claim for a prize under the lottery does not obligate the state in general (see § 99E.21), and the commissioner is given not only the responsibility of awarding the designated prize upon presentation of the winning ticket but is also discharged from all further liability upon payment thereof pursuant to § 99E.19. Taking the specific language of the statute as a whole as well as the legislative scheme for the creation of the lottery and the payment of prizes awarded pursuant to the lottery, it appears that the legislature has conferred upon the lottery board the authority to determine to pay prize winners with checks written by the commissioner.

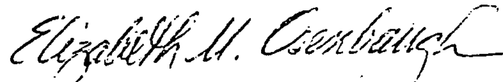
When a general statute is in conflict with a specific statute, the latter prevails whether enacted before or after the general statute. Shriver v. City of Jefferson, 190 N.W.2d 838 (Iowa 1971). See also Iowa Code §§ 4.7 and 4.8 (1985). This same result would be reached if this statutory conflict were viewed as a repeal by implication. As pointed out in Dan Dugan Transport Co. v. Worth County, 243 N.W.2d 655, 658 (Iowa 1976), "where, as here, subsequent legislation which comprehensively and specifically treats a matter included in a prior general statute results in an ambiguity or redundancy, the prior legislation is deemed repealed by implication."

It is our opinion that chapter 99E, being the more comprehensive and specific statutory provision relating to this very narrow question regarding payment of prizes, is the more specific and thus controlling. Consequently, to the extent that the provisions of chapters 8 and 12 are inconsistent with those provisions of chapter 99E, the latter would control. See Iowa Code § 4.8 (1985).

It is our opinion that the Iowa Lottery Commissioner is empowered to pay prize winners under games conducted by the Iowa Lottery consistent with rules adopted by the Iowa Lottery Board and not inconsistent with the provisions of chapter 99E.

It should be emphasized that the result reached in this opinion is limited to the narrow and special circumstances of the lottery enabling legislation. The rationale of this opinion would not reach other extant state departments.

Sincerely,



ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO/cjc

MUNICIPALITIES: Chapter 411 Retirement Systems. Iowa Code Ch. 411 (1985); Iowa Code §§ 411.1(11), 411.3, 411.4, 411.6, 411.8(1)(f), 411.11 (1985). A member of a Chapter 411 retirement system who terminates service prior to having served at least twenty-two years may not continue to contribute to the retirement system as a substitute for the number of years needed to establish eligibility for the service retirement benefit. If a member has served at least twenty-two years and terminates service, no further contribution to the retirement system is permitted or necessary in order to establish eligibility for a service retirement benefit upon reaching the age of fifty-five. A member of a Chapter 411 retirement system who terminates service after eleven years of service may not continue to contribute to the retirement system for four years as a substitute for four additional years of service in order to establish eligibility for a prorated service retirement benefit. (DiDonato to Connors, State Representative, 11/7/85) #85-11-2(L)

November 7, 1985

The Honorable John H. Connors
State Representative
1316 E. 22nd Street
Des Moines, Iowa 50317

Dear Representative Connors:

You have requested an opinion of the Attorney General regarding the applicability of Iowa Code § 411.1(11) (1985) to the current collective bargaining agreement between the City of Marion and the Marion fire fighters. You have also requested an opinion of the Attorney General concerning the ability of a fire fighter to continue to contribute to the Iowa Code Chapter 411 retirement systems after termination of service in order to establish eligibility for a service retirement benefit. The questions that you have presented concerning this latter subject are:

> 1. Can a fire fighter who terminates service in the fire department and becomes employed in a job which is not covered by a Chapter 411 retirement system continue to contribute to the retirement system and receive a full service retirement benefit upon reaching the age of fifty-five?
>
> 2. Can a fire fighter who is transferred or promoted to any other city department not covered by Chapter 411 after eleven years of service as a fire fighter continue

> to contribute to the Chapter 411 retirement system for four years and be eligible to receive a retirement allowance of 11/22 of the retirement allowance that would have been received at retirement if the employment had not been terminated prior to retirement?

I.

We would note at the outset that this opinion concerns only the questions presented regarding the ability of a fire fighter who terminates service prior to retirement to continue to contribute to the Chapter 411 retirement system after termination of service. The questions you raise regarding the applicability of § 411.1(11) to the provisions of the collective bargaining agreement between the City of Marion and Marion Fire Fighters, Local 1937, are matters of construction of that agreement which may not properly be resolved by this office. Those issues do not involve the need for resolution of a conflict in Chapter 411 but instead seek legal advice as to the application of Chapter 411 to an existing agreement. This office is not familiar with the facts and has no authority for obtaining the divergent views of those affected. We therefore conclude that it would be inappropriate for us to attempt to resolve this issue in the abstract.

II.

As you are aware, Iowa Code Chapter 411 (1985) provides for retirement systems for police officers and fire fighters. Under a Chapter 411 retirement system, only a "member in service" is eligible for a service retirement pension after serving twenty-two or more years and attaining the age of fifty-five. § 411.6(1)(a). A "member in service" who has been a member of the retirement system fifteen or more years at age fifty-five is able to receive a prorated service retirement pension of fifteen twenty-seconds of the retirement allowance that would have been received if service had not been terminated, and an additional one twenty-second of such retirement allowance for each additional year of service up to twenty-two years. § 411.6(1)(b). The funding for the service retirement benefit consists of contributions to a pension accumulation fund from a percentage of the member's compensation and funds provided by the city. §§ 411.8(1)(f), 411.11.

Under Chapter 411, there is no provision for a member to continue to contribute to the retirement system after termination of service. Section 411.8(f) provides that the contributions from members of the retirement system shall be made from a percentage of "each member's compensation from the earnable compensation of the member." When a member quits his or her

position as a fire fighter, that person is no longer receiving "earnable compensation" within the meaning of § 411.1(11).

Furthermore, a member of a Chapter 411 retirement system may not substitute years of contribution to the retirement system after termination of service for credit for years of service as a fire fighter. Under Chapter 411, there is a difference, for purposes of establishing eligibility for a service retirement benefit, between being a member of the retirement system and being a "member in service." Section 411.3(1) provides that a police officer or fire fighter is a member of the retirement systems as a condition of employment in a position covered by Chapter 411. Members of the retirement system are required to make contributions to the retirement system. § 411.8(1)(f). However, in order to establish eligibility for a service retirement benefit, the number of years of service rendered by the member, not the duration of the time during which contributions to the retirement system were made, is the determining factor. Section 411.6(1)(a) requires that a police officer or fire fighter be a "member in service" for at least twenty-two years, or complete at least twenty-two years of actual employment in a position covered by Chapter 411, in order to receive a full service retirement allowance upon retirement at age fifty-five. Likewise, a police officer or fire fighter must be a "member in service" for at least fifteen years, or complete at least fifteen years of actual employment in a position covered by Chapter 411, in order to receive a prorated service retirement allowance upon attaining the age of fifty-five. § 411.6(1)(b).

Although § 411.3(2) provides that:

> Should any member in any period of five consecutive years after last becoming a member, be absent from service for more than four years, or should the member become a beneficiary or die, the member shall thereupon cease to be a member of the system.;

this provision does not allow a member who terminates service before establishing eligibility for a service retirement benefit to continue to contribute to the retirement system as a substitute for years of service in order to establish eligibility. It appears that the intent of § 411.3(2) is to allow a member of the retirement system to leave service for a period of up to four years and to retain membership in the Chapter 411 retirement system during that limited time period. In addition, contributions to the retirement system are not credited as service. Section 411.4 makes clear that it is the intent of Chapter 411 that a member not receive credit for service unless service is actually performed by providing that:

> The board of trustees shall fix and determine by proper rules and regulations how much service in any year shall be equivalent to one year of service . . . nor shall the trustees allow credit as service for any period of more than one month duration during which the member was absent without pay.

It therefore appears that a statement made by the Iowa Supreme Court in 1919 that the "obvious purpose" of the fire fighter pension statute is to provide a benefit only to those firemen who have devoted at least twenty-two years to the service of the public, to the exclusion of other employment, would also apply to the current fire fighter retirement system. Seavert v. Cooper, 187 Iowa 1109, 1114, 175 N.W. 19, 21 (1919).

In response to the first question you presented, if a fire fighter has completed at least twenty-two years of service before termination of service, he will be eligible to receive a full service retirement allowance upon attaining the age of fifty-five. § 411.6(1)(a), (b). Obviously no further contributions to the retirement system are necessary to establish eligibility for the service retirement benefit. If a fire fighter has completed at least fifteen years of service prior to termination of service, he will be eligible to receive a prorated service retirement benefit in proportion to the number of years of service. § 411.6(1)(b). A fire fighter who has terminated service may not increase the number of years of service that he or she is given credit for by continuing to contribute to the retirement system. Likewise, the answer to your second question is that a fire fighter may not establish eligibility for a prorated service retirement benefit after having served only eleven years by continuing to contribute to the retirement system for four years after termination of service.[1]

In conclusion, a member of a Chapter 411 retirement system who terminates service prior to having served at least twenty-two years may not continue to contribute to the retirement system as a substitute for the number of years needed to establish eligibility for the service retirement benefit. If a member has served at least twenty-two years and terminates service, no further contribution to the retirement system is permitted or necessary in order to establish eligibility for a service retire-

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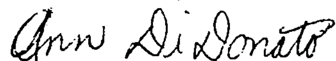
[1] It should also be noted that there is no provision under § 411.6 to receive a prorated service retirement benefit which is less than fifteen twenty-seconds of the retirement allowance the member would receive at retirement if the member's employment had not been terminated prior to retirement.

ment benefit upon reaching the age of fifty-five. A member of a Chapter 411 retirement system who terminates service after eleven years of service may not continue to contribute to the retirement system for four years as a substitute for four additional years of service in order to establish eligibility for a prorated service retirement benefit.

Sincerely,



ANN DiDONATO
Assistant Attorney General

AD:rcp

AUDITORS: Real Estate Transfer Fees. Iowa Code Section 331.507(2)(a); 1985 Iowa Acts, ch. _______ (S.F. 393). Fee charged by auditor for transfer of property is not applicable to correctional deeds. (Ovrom to Maher, Fremont County Attorney, 11/6/85) #85-11-1(L)

November 6, 1985

Mr. Richard B. Maher
Fremont County Attorney
Fremont County Courthouse
Sidney, Iowa 51652

Dear Mr. Maher:

You requested an attorney general's opinion whether the county auditor should charge a $5.00 transfer fee under Code Section 331.507(2)(a) for correctional deeds. In our opinion the fee should not be charged for correctional deeds.

Section 331.507(2)(a), as amended by 1985 Iowa Acts, S.F. 393, states:

> 2. The auditor is entitled to collect the following fees:
>
> a. For a transfer of property made in the transfer records, five dollars of (sic) each separate parcel of real estate described in a deed, or transfer of title certified by the clerk of the district court. However, the fee shall not exceed fifty dollars for a transfer of property which is described in one instrument of transfer . . . .[1]

The fee is clearly to be charged "for a transfer of property made in the transfer records." A correctional deed does not create a transfer of property, therefore we do not think the Section 331.507(2)(a) fee applies to correctional deeds. Correctional deeds as you describe them are made to correct the spelling of a name or otherwise to correct the record on file

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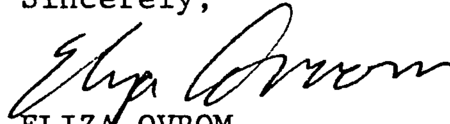
[1] The section has been amended since this office rendered an opinion concerning the definition of "parcel." See Op.Att'yGen. #84-10-7(L).

with the recorder. They clearly do not constitute a transfer of property shown on the transfer records. Thus § 331.507(2)(a) is not applicable.

Sincerely,



ELIZA OVROM
Assistant Attorney General

EO:rcp

TAXATION: Property Tax; Consideration Of Value Of Mineral Rights Underlying Agricultural Land In Valuing Land. Iowa Code §§ 84.18 and 441.21(1)(a), (e) and (g) (1985). Assessor should not give any consideration to the value of minerals, or any rights or interests thereto, underlying agricultural land in determining the actual value of agricultural land. Where § 84.18 applies, the underlying mineral rights or interests are separately assessed and taxed, independently of the agricultural land, to the owner of such rights or interests. (Kuehn to Gustafson, Crawford County Attorney, 12-24-85) #85-12-7(L)

December 24, 1985

Thomas E. Gustafson
Crawford County Attorney
Warren Building--27 South Main
Denison, Iowa 51442

Dear Mr. Gustafson:

You have requested an opinion of the Attorney General concerning the actual value of agricultural land and the value of rights or interests to minerals underlying the land which are being assessed for property tax purposes. Your particular question concerns whether the assessor should give any consideration to the value of rights or interests to minerals underlying agricultural land in determining the actual value of the agricultural land and, conversely, whether or not the assessor should give any consideration to the value of the agricultural land in determining the value of rights or interests to the minerals underlying the land.[1]

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[1] You based your question on Iowa Code § 84.18 (1985) which requires that any rights or interests to minerals underlying agricultural land which are owned by any person other than the owner of the land shall be assessed and taxed separately to the owner of such rights or interests. You requested a clarification of a 1985 Attorney General's opinion, Op.Att'yGen. 85-7-3(L), which opined that a conveyance of any right to extract or mine coal should be assessed and taxed separately to the owner of such a right. That opinion of the Attorney General does not answer the question posed in this opinion request.

Your question is answered by Iowa Code §§ 84.18 and 441.21 (1985). No such consideration should be given, and the agricultural land and the rights and interests in the underlying minerals should be separately valued and taxed.

Section 441.21(1)(a), (e) and (g) states:

> 441.21 Actual, assessed and taxable value.
> 1. a. All real and tangible personal property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and, except as otherwise provided in this section, shall be assessed at one hundred percent of its actual value, and the value so assessed shall be taken and considered as the assessed value and taxable value of the property upon which the levy shall be made.
>
> e. The actual value of agricultural property shall be determined on the basis of productivity and net earning capacity of the property determined on the basis of its use for agricultural purposes capitalized at a rate of seven percent and applied uniformly among counties and among classes of property. Any formula or method employed to determine productivity and net earning capacity of property shall be adopted in full by rule.
>
> * * *
>
> g. Notwithstanding any other provision of this section, the actual value of any property shall not exceed its fair and reasonable market value, except agricultural property which shall be valued exclusively as provided in paragraph "e" of this subsection. (Emphasis supplied)

Section 84.18 states:

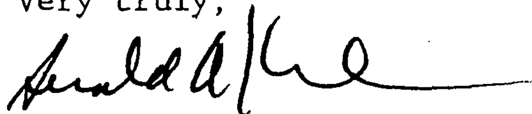
> 84.18 Mineral rights taxed separately. All rights and interests in or to oil, gas or other minerals underlying land, whether created by or arising under deed, lease, reservation of rights, or otherwise, which rights or interests are owned by any person other than the owner of the land, shall be assessed and taxed separately to the owner of such rights or interests in the same manner as other real estate. The taxes on such rights or interests which are not owned by the owner of the land shall not be a lien on the land. (Emphasis supplied)

Section 441.21(1)(a), (e) and (g) clearly indicate that the assessor should not give any consideration whatsoever to the value of minerals (or any rights or interests thereto) underlying the agricultural land in determining the actual value of the agricultural land for property taxes. *See also* 1978 Op.Att'yGen. 589.

Furthermore, under § 84.18, the value of the mineral rights or interests which are owned by someone other than the owner of the agricultural land is taxed separately and independently from the agricultural land. In other words, the legislature has clearly subjected this particular property right or interest to a separate property tax which is totally unrelated to the assessment and valuation of the agricultural land.

In summary, the assessor should not give any consideration to the value of minerals, or any rights or interests thereto, underlying agricultural land in determining the actual value of agricultural land. Where § 84.18 applies, the underlying mineral rights or interests are separately assessed and taxed, independently of the agricultural land, to the owner of such rights or interests.

Very truly,



Gerald A. Kuehn
Assistant Attorney General

GAK:cmh

MUNICIPALITIES: City Finance; Capital Improvements Reserve Fund. Iowa Code § 384.7 (1985). A capital improvements levy, established for a specified time period, may not be repealed prior to the lapse of that period. (Walding to Black, State Representative, 12-18-85) #85-12-6(L)

December 18, 1985

The Honorable Dennis H. Black
State Representative
Rt. 1
Grinnell, Iowa 50112

Dear Representative Black:

We are in receipt of your request for an opinion of the Attorney General regarding capital improvements reserve funds authorized by Iowa Code Section 384.7 (1985). Specifically, you have asked whether a capital improvements levy, established for a specified time period, may be repealed prior to the lapse of that period.

Section 384.7 authorizes a city to levy a tax to establish a capital improvements reserve fund. That reserve fund is intended to be used by cities to accumulate moneys either for the financing of specified capital improvements or implementing a specified capital improvement plan. Id.

The establishment of a capital improvements reserve fund requires approval of a majority of the voters. The time period of the levy and the tax rate to be levied are to be determined at the referendum. A referendum may be held at any city election upon the motion of the city council or, upon receipt of a valid and proper petition, at the next regular city election. Id.

Section 384.7, unnumbered paragraph 3, provides that a "continuing capital improvements levy" may be repealed, upon the city council's motion or upon petition, in a fashion similar to establishment of the levy. The narrower issue then is whether a capital improvements levy for a specified time period is a "continuing capital improvements levy."

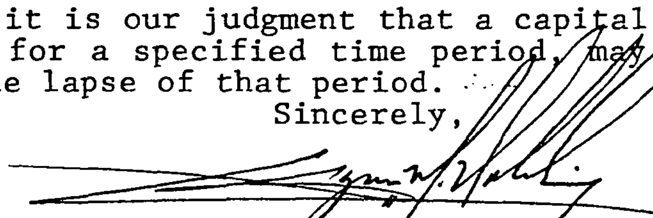
It is our understanding that a continuing capital improvements levy would be a levy for an unspecified time period, as opposed to a levy for a specific time period. A municipality may prefer an open-ended term, for instance, for accumulation of funds in anticipation of capital improvement expenses, such as the projected costs of general building maintenance, which are

undeterminable and speculative. Conversely, a city may prefer a levy for a specified time period to fund a specific capital improvements project, such as the addition to an existing facility, which costs are determinable and may entail financial commitment. Thus, a capital improvements levy for a specified time period is not a continuing capital improvements levy. Of course, the question whether to establish a continuing capital improvements levy should include the fact that the levy would be for an unspecified time period.

Because the legislature specifically provided for the repeal of a continuing capital improvement levy, without reference to capital improvement levies for specified time periods, a levy for a specific period may not be repealed. A principle rule of a statutory construction is that the express mention of one thing in a statute implies the exclusion of others. Stated otherwise, legislative intent is expressed by omission as well as by inclusion. See In Re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Expressio Unis Est Exclusio Alterius is the legal maxim.

Accordingly, it is our judgment that a capital improvements levy, established for a specified time period, may not be repealed prior to the lapse of that period.

Sincerely,



LYNN M. WALDING
Assistant Attorney General

LMW:jds

SCHOOLS: Board of Regents: Lobbyists. Iowa Code §§ 280A.16, 280A.23, 262.9 (1985). A merged area school is not prohibited by law from hiring a lobbyist, but spending of such schools is subject to the approval of the State Board of Public Instruction. The difference in the governance of Regents' institutions and of merged area schools does not create a distinction in connection with the legality of hiring lobbyists or legislative liason staff. (Fleming to Paulin, State Representative, 12/12/85) #85-12-5(L)

December 12, 1985

The Honorable Donald J. Paulin
State Representative
1140 Southdale Drive
LeMars, Iowa 51031

Dear Representative Paulin:

You have asked for our opinion concerning the authority of Iowa educational institutions to employ a lobbyist or legislative liason person. The questions you present are:

1. Is it legal for a merged area school to employ a full time lobbyist?

2. Would there be a difference between the merged area schools and the Regents' institutions?

The questions you present have not been raised before. We cannot say that it is illegal for a merged area school to hire a lobbyist or legislative liason person. The Iowa Supreme Court discussed a variety of issues concerning the powers and duties of merged area schools in <u>Stanley v. Southwestern Com. Col. Merged</u>

Area, 184 N.W.2d 29 (Iowa 1971). In that case, the court observed that the legislature had provided that a merged area school is a separate, independent corporation. Id. at 33. Iowa Code § 280A.16 provides in pertinent part:

> A merged area formed under the provisions of this chapter shall be a body politic as a school corporation for the purpose of exercising powers granted under this chapter, and as such may sue and be sued, hold property, and exercise all the powers granted by law and such other powers as are incident to public corporations of like character and are not inconsistent with the laws of the state.

(emphasis added). We cannot say that hiring a lobbyist is outside the powers of such a public corporation.

We are mindful that other statutes give power to, and control the activities of, merged area schools. Section 280A.23 contains the general grant of authority to merged area boards of directors. Two subsections are particularly relevant to your inquiry:

> 4. Have the power to enter into contracts and take other necessary action to insure a sufficient curriculum and efficient operation and management of the school or college and maintain and protect the physical plant, equipment, and other property of the school or college.
> 5. Establish policy and make rules, not inconsistent with law and administrative rules, regulations, and policies of the state board, for its own government and that of the administrative, teaching, and other personnel, and the students of the school or college, and aid in the enforcement of such laws, rules, and regulations.

§ 280A.23(4) and (5) (emphasis supplied). Under the terms of these code sections, merged area boards hold rather broad authority.

The funds of merged area schools are obtained from a variety of sources as provided by Iowa Code § 280A.17 (property tax); § 280A.18 (federal funds, tuition, state aid, donations and

gifts, student fees and state funds for sites and facilities); and § 280A.22 (tax levies approved by voters).[1]

The funding system for merged area schools is quite complex. You indicate that it is possible that up to $200,000 may be budgeted for lobbying efforts. Budgets of merged area schools are submitted to the State Board of Public Instruction for approval. The State Board supervises the operation of merged area schools in a variety of other ways. See Iowa Code § 280A.25. In an earlier opinion of this office it was stated that "[a]n inherent element of budget review is consideration of the reasonableness of expenditures in the light of available funds." 1968 Op.Att'yGen. 601, 604. Thus, a decision of a merged area school to expend funds for lobbying would be subject to the budget review process of the State Board. Moreover, the legislature has placed limits on the purposes for which some categories of funds may be used. See e.g., § 280A.17 (tax for operation of school, i.e., not available for construction of buildings); § 280A.34 (certain funds not to be used for athletic buildings); § 280A.18(7) (expenditure from student fees subject to approval of student government unit). In our view, a merged area school is not prohibited from hiring a lobbyist, but spending of such schools is subject to the approval of the State Board of Public Instruction.

You also ask whether there would be a difference between the merged area schools and the Regents' institutions as to the legality of hiring a lobbyist. The statutory governance structure of the area schools is very different from that of the universities under the State Board of Regents. For example, neither the Board of Regents nor the universities under its control have taxing authority as do the merged area boards. However, those differences do not affect the legality of hiring lobbyists or legislative liason staff. The Regents' grant of power includes the power to "perform all other acts necessary and proper for the execution of the powers and duties conferred by law upon it." Iowa Code § 262.9(11) (1985). Such a grant of power means that the Board of Regents may determine whether having a lobbyist or legislative liason staff is "necessary and

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[1] We are mindful that some merged area schools have created foundations, as provided by Iowa Code § 280A.22 to support activities that are related to the merged area schools.

proper." Of course, Regents' spending, like other state agency spending, is subject to the scrutiny of the General Assembly.

In summary, a merged area school is not prohibited by law from hiring a lobbyist, but spending of such schools is subject to the approval of the State Board of Public Instruction. The difference in the governance of Regents' institutions and of merged area schools does not create a distinction in connection with the legality of hiring lobbyists or legislative liason staff.

Sincerely yours,

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

ELECTIONS: Township Trustees; Residency Requirement. Iowa Code ch. 39; § 39.22. Ch. 69; § 69.2(3). S.F. 261. Under circumstances in which the township trustee resided inside the corporate limits of a city when Senate File 261 became effective, a vacancy resulted. (Pottorff to Maulsby, State Representative, 12/11/85) #85-12-4

December 11, 1985

Honorable Ruhl Maulsby
State Representative
Rural Route 2
Rockwell City, Iowa 50579

Dear Representative Maulsby:

You have requested an opinion of the Attorney General concerning the application of Senate File 261 to incumbent township trustees. You point out that, under Iowa Code § 39.22, township trustees in townships which include a city shall be elected by voters of the township who reside outside the corporate limits of the city. Senate File 261 amended § 39.22 to further require that "the officers shall reside in the township outside the corporate limits of the city." In view of this amendment, you specifically ask what effect Senate File 261 has on the term of office of a township trustee elected by voters of the township who reside outside the corporate limits of the city but who, himself, lived within the corporate limits of the city when Senate File 261 became effective. It is our opinion that Senate File 261 created a vacancy under these circumstances.

Prior to amendment, § 39.22 did not require township trustees elected by the voters who reside outside the corporate limits of the city to reside outside the corporate limits of the city as well. Section 39.22 provided:

> Township trustees and the township clerk shall, in townships which embrace no city or town, be elected by the voters of the entire township. In townships which embrace a city or town, said officers shall be elected by the voters of the township who reside outside the corporate limits of such city or town; but any such officer may be a resident of said city or town.

Iowa Code § 39.22 (1985) (emphasis added). Under this language, a township trustee elected by the voters who reside outside the corporate limits of the city were expressly permitted to "be a resident of said city or town." Senate File 261, however, struck this permissive language and amended § 39.22 to provide:

> Township trustees and the township clerk in townships which do not include a city, shall be elected by the voters of the entire township. In townships which include a city, the officers shall be elected by the voters of the township who reside outside the corporate limits of the city and the officers shall reside in the township outside the corporate limits of the city.

S.F. 261. The terms of this amendment imposed a requirement of residency outside the corporate limits of the city which did not previously exist.

We have determined in prior opinions that, under circumstances in which residence is imposed as a qualification to hold office, violation of the requirement creates a vacancy in the office. This ground for vacancy is codified in chapter 69. Section 69.2 includes as one of six definitions of vacancy "[t]he incumbent ceasing to be a resident of the state, district, county, township, city or ward by or for which the incumbent was elected or appointed, or in which the duties of the office are to be exercised." Iowa Code § 69.2(3) (1985). We have applied this statutory language to various situations in which elected officials have moved out of the district or ward from which they were elected and required to reside. See 1980 Op.Att'yGen. 494, 495; 1976 Op.Att'yGen. 730, 730-31; 1972 Op.Att'yGen. 18, 19. In these cases we opined that vacancies resulted.

Although the issue which you raise involves a statutory change in the residency requirement rather than a physical change of residence by the elected official, our analysis is not significantly different. The General Assembly clearly may alter or add to the qualifications for holding a statutory office even during the term for which an incumbent was elected. In State v. Huegle,

135 Iowa 100, 112 N.W. 234 (1907), the Iowa Supreme Court reviewed a challenge to the right of elected county superintendent to continue to hold office on the ground that she did not meet statutory qualifications. The office holder, apparently, had not met the statutory qualifications when she was elected and took office. In ruling that she was not qualified, however, the Court clarified the scope of the General Assembly's authority by stating:

> [T]he legislature, in the absence of constitutional prohibition, may at pleasure alter or add to the qualifications for office. And an office created by statute may be abolished, the term increased, or diminished, the manner of filling it changed by will of the legislature at any time even during the term for which the then incumbent was elected or appointed. It may also declare the office vacant, or abolish the office by leaving it devoid of duties.

Id. at 101-02, 112 N.W. at 235 (citations omitted). An example of the principles set out in Huegle often occurs when redistricting pursuant to statute ousts the incumbent from the district in which he or she is required to reside. See e.g., Drake v. Polk County Board of Supervisors, 340 N.W.2d 247 (Iowa 1983) (terms of elected county supervisors terminated by statute following mandatory redistricting); Mauk v. Lock, 70 Iowa 266, 30 N.W. 566 (1886) (term of elected road supervisor terminated by redistricting for highway purposes).

Senate File 261 is another express example of the legislative authority to alter the qualifications for office during the terms of incumbents. Under § 39.22 township trustees from townships which include a city had been elected by voters of the township who reside outside the corporate limits of the city. Senate File 261 altered the qualifications for office by requiring that such township trustees reside within the area in which the electorate reside.

Under circumstances in which the township trustee resided inside the corporate limits of the city when Senate File 261 became effective, a vacancy resulted. By its terms, § 69.2(3) defines a vacancy as "[t]he incumbent ceasing to be a resident of the state, district, county, township, city or ward" by which the incumbent was elected. Iowa Code § 69.2(3) (1985) (emphasis added). The term "district" should be construed to effect a logical, workable, sensible and practical meaning. See Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980). Under this principle, the "district" of a township trustee elected from an area outside

the corporate limits of the city should logically be defined as the geographic area in which his electorate reside. The residency requirement of Senate File 261 became effective on July 1, 1985. See Iowa Code § 3.7 (1985). On that date, the township trustee ceased to be a resident of the "district" within the township by which he or she was elected and required by statute to reside. See Iowa Code § 69.2(3) (1985). A vacancy, therefore, resulted. Any vacancies should be treated according to the provisions of chapter 69. See Iowa Code § 69.8(7) (1985) (Vacancies shall be filled . . . [i]n township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county board of supervisors shall have the power to either instruct the county auditor to fill the vacancies or adopt a resolution stating that the board will exercise all powers and duties assigned by law to the trustees of the township in which such vacancies exist, until such time as the vacancies may be filled by election.").

Sincerely,

JULIE F. POTTORFF
Assistant Attorney General

JPF/cjc

TAXATION: Property Tax Assessment; Forest Reservation. Iowa Code §§ 161.2, 161.12, 443.6 (1985). If the county board of supervisors designates the county conservation board to inspect an area to determine if it satisfies the criteria for a tax-exempt forest reservation, the county assessor may not overrule the conservation board in initially granting the exemption, but the assessor may later add the property to the tax list as "omitted property", under the authority of § 443.6. A portion of a tract of land may be exempt from property tax as a forest reservation while the remainder of the tract is taxable and should be assessed. An aerial photograph can be sufficient to indicate the location of the forest reservation, in lieu of having the reservation surveyed and given a separate legal description. (Mason to Bair, Director of Iowa Department of Revenue and Wilson, Director of State Conservation Commission, 12/10/85) #85-12-3(L)

December 10, 1985

Gerald D. Bair, Director
Iowa Department of Revenue
Hoover State Office Building
LOCAL

Larry J. Wilson, Director
State Conservation Commission
Wallace State Office Building
LOCAL

Dear Mr. Bair and Mr. Wilson:

You have requested an opinion on the following questions:

(1) Iowa Code § 161.12 (1985), as amended by 1985 Iowa Acts, S.F. 509, provides that the county board of supervisors is to designate either the county conservation board or the assessor to inspect properties for which exemption as a forest reservation has been requested. This section also provides it is the duty of the assessor to secure the facts relative to forest reservations by taking the sworn statement, or affirmation, of the owner applying for the exemption. If the inspection is made by the county conservation board and the board determines the application meets the criteria established by the State Conservation Commission, may the assessor overrule the county conservation board and assess the property for taxation?

(2) If the answer to question number one is "yes", may the assessor assess a portion of the designated tract of land and exempt the balance of the tract as a forest reservation?

(3) Iowa Code § 161.2 (1985) provides that a property owner may "...select a permanent forest reservation or reservations..." Would the property owner's submission of an aerial photograph indicating the location of the forest reservation, in lieu of having the area surveyed and given a separate legal description, be sufficient to constitute the making of such a selection?

The legislature is presumed to have inserted every part of a statute for a purpose and to have intended that every part of the statute should be carried into effect. Goergen v. State Tax Commission, 165 N.W.2d 782, 785 (Iowa 1969); Iowa Code § 4.4(2)(1985). If the board of supervisors designates the county conservation board to inspect the area to determine if it meets the criteria established by the state conservation commission, that designation should have some effect. The assessor should not simply disregard the conservation board's determination that an area qualifies for the exemption. If the assessor makes an inspection regardless of the one conducted by the conservation board, then the act of the conservation board becomes meaningless, as does the act of the board of supervisors in making its designation.

It is our opinion that the assessor must assess or exempt the property based upon the conservation board's recommendation. See 730 I.A.C. § 80.9(1). If the board decides that the taxpayer has established a forest or fruit-tree reservation as provided in Iowa Code chapter 161 (1985), the taxpayer "shall be entitled to the tax exemption". See Iowa Code § 161.1 (1985).

Although the assessor may not overrule the conservation board in initially granting the exemption, the assessor has the authority to make an "omitted assessment" after the assessment list has been delivered to the auditor, as long as it is made prior to the time when the tax has been paid or otherwise legally discharged. See Iowa Code § 443.6 (1985); Okland v. Bilyeu, 359 N.W.2d 412, 417 (Iowa 1984); Talley v. Brown, 146 Iowa 360, 125 N.W. 248 (1910).

If the property should have been but was not listed on the assessment roll or tax list, it is omitted property. Okland v. Bilyeu, 359 N.W.2d at 414. This is true where the property was left off the roll because of an erroneous decision that the property was not taxable, as well as through oversight or ignorance of the existence of the property. Talley v. Brown, 125 N.W. at 253-54. The assessor "may assess and list for taxation any omitted property". Iowa Code § 443.6 (1985). The purpose of the grant of authority to make an assessment of omitted property is to prevent taxable property from escaping taxation. Okland v. Bilyeu, 359 N.W.2d at 414.

Before assessing and listing for taxation any omitted property, the assessor is required to give the taxpayer notice and an opportunity to show cause why the assessment should not be made. Iowa Code § 443.7 (1985). The taxpayer may then appeal the assessor's action to the district court. Iowa Code § 443.8(1985)

Your second question is whether the assessor may assess a portion of the designated tract of land and exempt the balance of the tract as a forest reservation. It is our opinion that circumstances may require that this be done when making an omitted assessment. There may be a number of acres, exceeding the minimum number required, which are contiguous and which meet the criteria for a tax-exempt reservation, while other acres in the tract of land do not satisfy all of the criteria. Only those acres satisfying all of the criteria would be exempted as a forest reservation. The remainder of the tract would be assessed. Similarly, only a portion of a tract of land which exceeds ten acres in area could be exempted as a fruit-tree reservation. See Iowa Code § 161.2 (1985).

Your final question is whether the property owner may submit an aerial photograph indicating the location of the forest reservation instead of having the area surveyed and given a separate legal description. If the location of the reservation can be determined from the photograph, or from the photograph as supplemented with additional information, it is our opinion that the assessor should accept it.[1] The assessor should already have a legal description of the tract of land which includes the reservation. If the photograph reveals the reservation's location,

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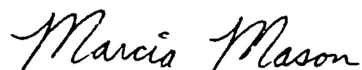
[1]The various acceptable alternatives to having the reservation surveyed and given a separate legal description is a subject which the Department of Revenue might wish to address through its rules.

for example because the trees are visible or because the conservation board has outlined the boundaries on the photograph, the assessor could determine which portion of the tract of land is the designated reservation and which portion remains taxable. Given such circumstances, insisting on a survey and separate legal description would be unreasonable and an abuse of the assessor's discretion.

Sincerely,



Marcia Mason

WP2

COUNTIES; Board of Supervisors; Publication of Claims: Iowa Code §§ 349.16 and 349.18 (1985). Expenditures of every county office or department which are approved by the board of supervisors must be published in accordance with §§ 349.16 and 349.18. (Weeg to Johnson, Auditor of State, 12/10/85) #85-12-2(L)

December 10, 1985

Mr. Richard D. Johnson
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

You have requested an opinion of the Attorney General as to whether Iowa Code § 349.16 (1985) requires publication of the expenditures allowed by the board of supervisors for every county office. As you note in your opinion request, this office provided you a letter of informal advice on February 19, 1980, in which we addressed this question as it applied to expenditures of the county assessor's office, county conservation board, or other county certifying body. In that letter, a copy of which is attached, we reviewed § 349.16, which has not been amended since that time, as well as § 349.18, which also remains unchanged.

Iowa Code § 349.16(2) (1985) provides that the schedule of bills allowed by the board of supervisors shall be published in each official county newspaper. Section 349.18 provides in part that the entire proceedings of each meeting of the board of supervisors shall be published, including the schedule of bills allowed. The statute further provides:

> . . . The publication of the schedule of the bills allowed shall include a list of all claims allowed, . . ., showing the name of the person or firm making the claim and the amount of the claim, . . .

(emphasis added) We concluded in our letter of February 19, 1980, that, absent specific statutory language to the contrary, § 349.18 "requires publication of all expenditures by the board of supervisors, . . ." (emphasis in original). We later stated in that same letter as follows:

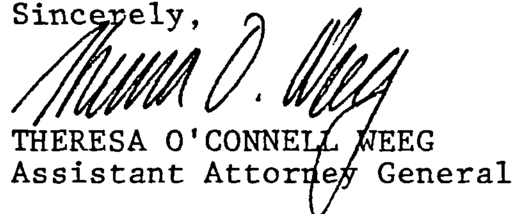
> The origin of the request for payment by the board of supervisors would not be material to

> the requirement of publication once the payment or bill is allowed.

See Op.Att'yGen. #82-4-10(L) (requirements for publication of county secondary road payroll).

Because the statutory provisions previously relied on remain unchanged and because we find the statutory language requiring publication of all claims allowed to be clear and unambiguous, we conclude that expenditures of any county office which are approved by the board of supervisors must be published in accordance with §§ 349.16 and 349.18.

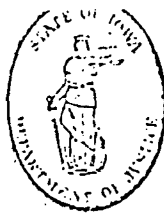
Sincerely,

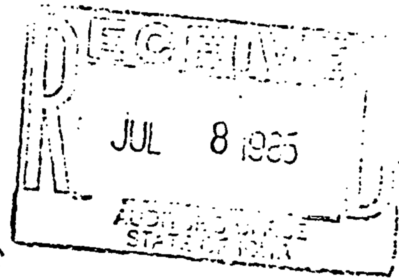


THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosure





Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

2-19-80

Honorable Richard D. Johnson, C.P.A.
Auditor of State
State Capitol
L O C A L

Dear Mr. Johnson:

We have received your request for an opinion from this office concerning legal publication pursuant to ch. 349, The Code 1979. Specifically, you have inquired whether expenditures approved by the county board of supervisors, on behalf of the office of the county assessor's office, county conservation board or other county certifiying body must be published as other county expenditures.

Section 349.16, The Code 1979, provides:

> There shall be published in each of said official newspapers [chosen pursuant to § 349.1, et seq.] at the expense of the county during the ensuing year:
>
> 1. The proceedings of the board of supervisors, excluding from the publication of said proceedings, its canvass of the various elections, as provided by law; witness fees of witnesses before the grand jury and in the district court in criminal cases.
>
> 2. The schedule of bills allowed by said board.
>
> 3. The reports of the county treasurer, including a schedule of the receipts and expenditures of the county and the current

cash balance in each fund in his office together with the total of warrants outstanding against each of such funds as shown by the warrant register in the auditor's office.

* * * *

Section 349.18, The Code 1979, provides:

All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon, except that names of persons receiving relief from the county poor fund shall not be published. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board. [Emphasis added].

The purpose of publication of county business in an official newspaper is to furnish the citizen a convenient method of ascertaining just what business is being transacted by the board of supervisors and how it is being transacted, as well as to furnish a check upon extravagance and to prevent the presentation and allowance of trumped up or padded claims against the county. *See* 1910 Op. Atty. Gen. 223. The clear intent of §§ 349.16 and 349.18, The Code 1979, is to encourage complete disclosure of expenditures of public funds. *See* 1968 Op. Atty. Gen. 743; 1964 Op. Atty. Gen. 92. Absent specific statutory provisions to the contrary, § 349.18, The Code 1979, requires publication of *all* expenditures approved by the board of supervisors, showing the name of each individual to whom payment is made, [1] the purpose for such payment, and the amount allowed.

The county board of supervisors is empowered "[t]o examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law." Section 332.3(5), The

[1] In the case of persons receiving relief from the county poor fund, § 349.18 requires that the names be kept confidential.

Code 1979. The origin of the request for payment by the board of supervisors would not be material to the requirement of publication once the payment or bill is allowed. Since the requirement for publication is incurred by the action of the board of supervisors rather than the particular office or agency, payment for publication should be made from the county general fund. See 1920 Op. Atty. Gen. 259.

Very truly yours,

Alice J. Hyde

ALICE J. HYDE
Assistant Attorney General

AJH:sh

ELECTIONS: Political Nonparty Organizations; Duplication of Designated Titles. Iowa Code ch. 43; §§ 43.2, 43.3. Ch. 44; §§ 44.1, 44.11, 44.12. Ch. 45; §§ 45.1, 45.4. Ch. 49; §§ 49.31(1), 49.36. A candidate who files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization ordinarily should be listed on the ballot under the title designated pursuant to the authority of § 49.31(1). If two candidates file petitions and affidavits of candidacy for the same office pursuant to chapter 45 which designate the same title of a political nonparty organization, the duplication constitutes a failure to designate which creates a duty on the part of the commissioner of elections to select a suitable title for each of the nominees. If a candidate files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization and a candidate is nominated by convention or caucus pursuant to chapter 44 by the same political nonparty organization, the duplication constitutes a failure to designate which creates a duty on the part of the commissioner of elections to select a suitable title for each of the nominees. (Pottorff to Steinbach, Director of Elections, 12/10/85) #85-12-1(L)

Sandra Steinbach
Director of Elections
Office of the Secretary of State
State Capitol
L O C A L

Dear Ms. Steinbach:

You have requested an opinion concerning the appropriate designation on the ballot for a candidate of a political nonparty organization. You point out that a 1934 opinion of this office raises, but does not resolve, the issue of whether a candidate who files a petition and an affidavit of candidacy pursuant to chapter 45 may designate an organization title not appearing elsewhere on the ballot. In view of this ambiguity, you pose the following specific questions:

1. If the petition and the affidavit of candidacy filed pursuant to Chapter 45 of the Code should designate the name of a nonparty political organization not appearing elsewhere on the ballot under which the candidate

desired to have his or her name printed, does the authority exist for the use of that organization's name on the ballot prepared for that election?

2. If the answer to the first question is positive, what procedure should be followed if two candidates who were nominated by petition for the same office submit petitions and affidavits of candidacy designating the name of the same nonparty political organization?

3. If the answer to the first question is positive, what procedure should be followed if a candidate who was nominated by petition designates on the petition and affidavit of candidacy the name of a nonparty political organization which has nominated, or later nominates, a candidate for the same office following the method described in Chapter 44?

It is our opinion that a candidate who files a petition and an affidavit of candidacy pursuant to chapter 45 of the Code is entitled to be placed under the title designated on the petition. If two candidates designate the same title pursuant to chapter 45 or one candidate designates the same title pursuant to chapter 45 under which another candidate is nominated by convention or caucus pursuant to chapter 44, the commissioner of elections has the duty to select the suitable title for each nominee.

There are three principle routes by which a candidate may be placed on the ballot. Candidates of all political parties may petition to be placed on the ballot at a primary election. <u>See</u> Iowa Code § 43.3 (1985). A "political party," in turn, <u>is</u> defined as "a party which, at the last preceding general election, cast for its candidate for president of the United States or for governor, as the case may be, at least two percent of the total vote cast for all candidates for that office at that election." Iowa Code § 43.2 (1985). A political organization which is not a political party within this definition may nominate candidates by proceeding under chapters 44 and 45. Iowa Code § 43.2 (1985).

Chapters 44 and 45 present alternative nomination mechanisms. Chapter 44 provides that a convention or caucus of

eligible electors representing a political nonparty organization may make one nomination of a candidate for each office to be filled at the election. The statutes, however, impose minimum attendance thresholds for this nomination process. Iowa Code § 44.1 (1985). Vacancies, moreover, are filled either in the manner previously provided by the convention or caucus or by the appropriate executive or central committee of the political organization which held the convention or caucus. Iowa Code §§ 44.11, 44.12 (1985).

Chapter 45, by contrast, provides that by petition eligible electors may nominate a candidate for an office to be filled at an election. Iowa Code § 45.1 (1985). The statutes prescribe the number of signatures required. Iowa Code § 45.1 (1985). The time and place of filing the petitions, as well as other procedural issues, are governed by chapter 44. Iowa Code § 45.4 (1985).

In previous opinions this office has focused on the relationship between these nomination procedures. In 1981 we explained that chapter 44 is expressly limited to use by political nonparty organizations. Chapter 45 is not expressly limited to use by political nonparty organizations and, therefore, is the appropriate means for nomination of independent or nonparty candidates who are not affiliated with a political nonparty organization. Op.Att'yGen. #81-10-6(L). We did not, however, foreclose the utilization of the chapter 45 procedure by a member of a political nonparty organization. See also 1934 Op.Att'yGen. 669, 670.

The issue of duplication of designated titles has been litigated. The Iowa Supreme Court faced an analogous situation under the statutory predecessors to chapters 43, 44 and 45. In Lowery v. Davis, 101 Iowa 236, 70 N.W. 190 (1897), a Republican utilized the petition procedure to file for the nomination for the office of state representative. The candidate filed the petition before the Republican party made its own nomination and designated himself as the Republican candidate. A county auditor, however, refused to place his name on the ballot under the title "Republican." The Iowa Supreme Court ruled that the candidate was entitled to be placed on the ballot but was not entitled to be denominated as a "Republican." The Court noted statutory language provided "all nominations of any political party or group of petitioners" shall be placed "under the party appellation or title of such party or group as designated by them in their certificates of nomination or petitions, or if none be

designated, then under some suitable title." Construing this language the Court interpreted the term "designate" to mean "to call by a distinctive title" or "to point out by distinguishing from others." The duplication of titles, therefore, constituted a failure to designate. The Court further explained that, under these circumstances, the legislative intent "although not clearly expressed" was to vest the auditor with the duty "to select a suitable title" when the petitioner's title is "so like that of a party recognized by the law, or that of other petitioners, as to not be readily distinguished." Id. at 239-40, 70 N.W. at 191.

The statutory language in issue in Lowery v. Davis exists in substantially the same form in the current Code. See Iowa Code § 49.31(1) (1985). Section 49.31(1) states that "[a]ll nominations of any political party or group of petitioners . . . shall be placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or if none be designated, then under some suitable title. . . ." The phrase "group of petitioners," as used in § 49.31(1), includes an organization which is not a political party. Iowa Code § 49.36 (1985).

Under the language of § 49.31(1), the designation of title on the petition, itself, authorizes the commissioner of elections to place the candidate under the designated title on the ballot. Section 49.31(1) clearly states that a group of petitioners "shall be placed" under the title of the group as designated by them in the petition. Section 49.3(1), therefore, provides the authority for use of an organization's name. In light of Lowery, however, a duplication of titles constitutes a failure to designate which creates a duty on the part of the commissioner of elections to "select a suitable title."

In response to your specific questions, therefore, it is our opinion:

1. A candidate who files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization ordinarily should be listed on the ballot under the title designated pursuant to the authority of § 49.31(1).

2. If two candidates file petitions and affidavits of candidacy for the same office pursuant to chapter 45 which designate the same title of a political nonparty organization, the duplication constitutes a failure to designate which creates

a duty on the part of the commissioner of elections to select a suitable title for each of the nominees.

3. If a candidate files a petition and affidavit of candidacy pursuant to chapter 45 which designates the title of a political nonparty organization and a candidate is nominated by convention or caucus pursuant to chapter 44 by the same political nonparty organization, the duplication constitutes a failure to designate which creates a duty on the part of the commissioner of elections to select a suitable title for each of the nominees.

Sincerely,

JULIE F. POTTORFF
Assistant Attorney General

JFP/cjc