INCOMPATIBILITY OF OFFICES: Conflict of Interest. Iowa Code ch. 273; Iowa Code § 281.4 (1985). The doctrine of incompatibility does not apply where an employee of an Area Education Agency, AEA, is also a member of the board of directors of a school district within the AEA. Conflict of interest problems are decided on the basis of the particular facts and circumstances in each case. We do not decide evidentiary questions. (Fleming to Murphy, State Senator, 1-22-87) #87-1-15(L)

January 22, 1987

The Honorable Larry Murphy
State Senator
L O C A L

Dear Senator Murphy:

You have asked for our opinion concerning the applicability of the principles of incompatibility and conflict of interest to an employee of an Area Education Agency, AEA, who is elected to the board of directors of a school district which is within the boundaries of the AEA. In our opinion principles of incompatibility do not apply to such a situation. The conflict of interest doctrine has some bearing on such a circumstance and we will discuss that concept more fully.

While the issues you present are not of constitutional dimension, we believe cases concerning proscriptions on running for office and limitations on voting rights are instructive. Durational residency requirements have met with disfavor. Antonio v. Kirkpatrick, 453 F. Supp. 1161 (W.D. Mo. 1978) (ten year residency requirement for state auditor candidates). Statutes that restrict candidacy in other ways have been overturned. Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849 (1972) (Texas filing fees); Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d (1966) (poll taxes). Barriers to seeking office have first amendment implications for

both the candidate and voters. Bullock, 405 U.S. at 143, 92 S. Ct. at 856, 31 L.Ed.2d at 99. See also Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973) (overturning city charter prohibition against city civil service employees as candidates for public office). The concerns expressed in those cases are relevant here.

We discussed the concepts of incompatibility and conflict of interest at length in an earlier opinion, Fortney to Angrick, 1982 Op.Att'yGen. 220. That opinion discussed the propriety of one person serving as both county attorney and city attorney for a city within the county. We concluded that the doctrine of incompatibility did not apply but there were inherent conflict of interest problems.

Incompatibility and conflict of interest doctrines tend to be confused but they are quite different. 1982 Op.Att'yGen. at 221. We said that the "doctrine of incompatibility is concerned with the duties of an office apart from any particular office holder." Id. See State v. White, 257 Iowa 606, 133 N.W.2d 903, 904 (1965); State v. Anderson, 155 Iowa 271, 136 N.W. 128, 129 (1912). When a conflict of interest problem is discussed, "one must look to how a particular office holder is carrying out his or her official duties in a given fact situation." Id.

The critical determination to be made under the incompatibility doctrine is whether both positions are considered to be "offices" as defined in State v. Taylor, 260 Iowa 634, 144 N.W.2d 289 (1966). The incompatibility doctrine does not apply whenever the person holds one office and is merely employed by another body. 1968 Op.Att'yGen. 257. A school board member clearly holds an "office," White, 257 Iowa at 609, 133 N.W.2d at 905 (1965), but an employee of an AEA does not hold an "office." Thus, it is clear that the circumstance you have presented does not violate incompatibility doctrine.[1]

We now turn to conflict of interest doctrine. While we may discuss the issue in the context of the situation you describe, we should not be understood to be deciding a particular case because a conflict of interest generally develops whenever a person serving in public office may gain any private advantage, financial or otherwise from such service. Thus, a conflict of interest problem raises what must be characterized as an evidentiary question.

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[1] We do not believe Iowa Code § 277.27 (1985) applies to this circumstance.

You describe a situation where a member of a school board is an employee of the AEA and works on a daily basis in that school district in connection with special education services provided by the AEA to the school district. Thus, the person interacts with other AEA employees, but more importantly, with employees of the district where he holds the office of board member. We may not possess all the relevant facts. Moreover, the circumstances may have changed; e.g. the person may have been transferred to duties in other school districts in the AEA. Because we do not sit as judge, we cannot decide the evidentiary issue.

Nevertheless, a few comments are appropriate because there appears to be a potential for conflict of interest problems. The leading Iowa conflict-of-interest case is Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). Conflict of interest issues were discussed in the context of the impact of a vote cast by a person who had a conflict of interest.

The Iowa court pointed out in Wilson that the "employer-employee relationship has always been recognized as one source of possible conflict of interest." Id. at 823. Analysis in cases involving the employment setting hinge on a person being required to decide "between public duty and private advantage." Id. at 822. Further, it is not necessary that the advantage be a financial one. Id.

Where an AEA employee works in the school district in which the person serves on the board, the person may work with school district administrators, teachers and others over which the board member exercises authority. In addition, a school board member is ordinarily a participant in the convention which selects the AEA board of directors. Iowa Code § 273.8(2). The precise points of contact which might give rise to a conflict of interest will vary with the circumstances but may arise in voting situations. We understand that conflicts may be avoided in some situations by abstention from voting on issues where a conflict or a potential for conflict exists. We are aware of the continuing relationship between the AEA and the school districts within it. See e.g. Iowa Code ch. 273 (1985) (Area Education Agency) and Iowa Code § 281.4 (1985) (powers of a school board with respect to providing special education). Thus, problems could be avoided by abstention from voting. We cannot establish the points on which a board member who is an AEA employee should abstain from voting. Nor can we, in the abstract, decide at what point the interaction would produce such a level of conflict that service in both positions should not continue.

We acknowledge that there may be conflict of interest problems where a school board member is an AEA employee and works on a daily basis in the school district where he serves as a member of the board of directors. Such cases turn on the facts of the particular circumstance and we do not decide such matters. On the other hand, if an AEA employee is assigned to work in one or more of the other school districts of the AEA, the potential for conflict would be minimal and could be avoided by the person abstaining from voting on matters that present conflict or the potential for conflict. Of course, there would be no problem if the person worked in a different AEA.

In summary, the doctrine of incompatibility does not apply where an AEA employee is also a member of the board of directors of a school district within the AEA. We should not be understood to be deciding evidentiary issues which conflict of interest determinations in a particular case require.

Sincerely,

Merle Wilna Fleming

MERLE WILNA FLEMING
Assistant Attorney General

MWF/cjc

PUBLIC RECORDS: CRIMINAL LAW: Confidentiality of Victim Impact Statements. 1986 Iowa Acts ch. 1178; Iowa Code ch. 910A; Iowa Code §§ 4.6, 4.7, 22.1, 22.2, 22.7, 602.1601, 901.2, 901.3, 901.4, 901.5, 910A.4, 910A.5, 910A.6, 910A.7, 910A.8, 910A.9, 910A.17 (1985). A victim impact statement is part of the presentence investigation report and is therefore confidential under Iowa Code § 901.4. (Hansen to O'Brien, State Court Administrator, 1-20-87) #87-1-12(L)

January 20, 1987

William J. O'Brien
State Court Administrator
State Capitol
Des Moines, Iowa 50319

Dear Mr. O'Brien:

You have requested an opinion concerning the confidentiality of victim impact statements under 1986 Iowa Acts chapter 1178 (H.F. 2458) [hereinafter chapter 1178], which establishes a formal procedure for crime victims to file impact statements to be considered by the sentencing judge. Chapter 1178, section 2 [Iowa Code section 901.3(5) (1987)] requires the presentence investigator to provide a victim impact statement form to each victim and requires the presentence investigator to "file the completed statement or statements with the presentence investigation report." Chapter 1178, section 6 [Iowa Code section 910A.4 (1987)] requires that "a filed impact statement shall be included in the presentence investigation report."

As you note, Iowa Code section 901.4 (1985) provides that the presentence investigation report is a confidential document. You ask if a victim impact statement is to be treated as a confidential document as part of the presentence investigation report or if it is a nonconfidential document open to public

inspection under chapter 1178, section 2 [Iowa Code section 901.3(5) (1987)] and section 6 [Iowa Code section 910A.4 (1987)].

Generally, all documents in the possession of any public officer or employee are public records open for examination unless declared confidential by statute, Iowa Code §§ 22.1, 22.2, 22.7 (1985); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 299 (Iowa 1979). Judicial proceedings in Iowa are public proceedings. Iowa Code § 602.1601 (1985). However, Iowa Code section 901.4 (1985) provides that the presentence investigation in a criminal case is a confidential document and may be opened only by court order. Chapter 1178 contains no provision specifically making the victim impact statement a confidential document. To determine whether the victim impact statement is confidential, it is necessary to determine whether it becomes part of the presentence investigation under chapter 1178. It is therefore necessary to construe the phrase "filed with" in chapter 1178, section 2 [Iowa Code section 901.3(5) (1987)] and the phrase "included in" in chapter 1178, section 6 [Iowa Code section 910A.4 (1987)] to determine whether the victim impact statement is part of the presentence investigation report.

In construing statutes, the Iowa courts attempt to give the statutes a sensible, practicable, workable and logical construction. Doe v. Ray, 251 N.W.2d 496, 504 (Iowa 1977). The words of the statute are given their usual meanings when the words are precise and unambiguous. Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981). In chapter 1178, the phrases "filed with" and "included in" have precise and unambiguous meanings, but the differences in their meanings made chapter 1178, as a whole, ambiguous.

In Wilkins v. Troutner, 66 Iowa 557, 559, 24 N.W. 37, 38 (1885), the Iowa Supreme Court defined "filed with" to mean placed among the original papers in the court file in the case. A paper could be "filed with" the other papers in the court file if it was placed among them at a later time as a separate document. Id. Therefore, the victim impact statement is "filed with" the presentence investigation report under chapter 1178, section 2 [Iowa Code section 901.3(5) (1987)] if the impact statement is placed in the court file with the presentence investigation report either when the presentence investigation report is filed or at another time as a separate document. Id.

In contrast, the phrase "included in" used in chapter 1178, section 6 [Iowa Code section 910A.4 (1987)] indicates that the impact statement is part of the presentence investigation itself. The word "in" means within. See State v. Smith, 196 N.W.2d 439, 440-41 (Iowa 1972) (larceny in a building, vessel or motor

vehicle). The word "include" means to place within. Phoenix Assur. Co. of N.Y. v. First Bank & Trust Co., 316 F.2d 530, 531 (3rd Cir. 1983); see Weber v. Madison, 251 N.W.2d 523, 525 (Iowa 1977) ("include and embrace" is not term of enlargement). The usual meaning of the word "include" is "to take in or comprise as part of a larger aggregate or principle." Webster's Seventh New Collegiate Dictionary 423 (1963). Therefore, if the impact statement is included in the presentence investigation report itself under chapter 1178 [Iowa Code section 910.4 (1987)], it is a part of the presentence report itself and would be a confidential document under Iowa Code section 901.4 (1985).

Chapter 1178, section 2 [Iowa Code section 901.3(5) (1987)] is silent as to whether the victim impact statement is part of the presentence investigation report since it merely requires that the victim impact statement is to be "filed with" the presentence investigation report. Chapter 1178, section 6 [Iowa Code section 910A.4 (1987)], by contrast specifically states that the victim impact statement is to be "included in" the presentence investigation report. Since section 2 is silent as to the inclusion of the victim impact statement in the presentence investigation and section 6 specifically states that the victim impact statement is included in the presentence investigation report, the specific requirement of section 6 controls and the victim impact statement is included in the presentence impact report. See Iowa Code § 4.7 (1985) (specific provision controls over general provision of statute); Llewllyn v. Iowa State Commerce Comm., 200 N.W.2d 881, 883-84 (Iowa 1972). Therefore, the victim impact statement would be a confidential document as part of the presentence investigation report. Iowa Code section 901.4 (1985).

This interpretation, making a victim impact statement a confidential document, is not inconsistent with the requirement of chapter 1178, section 15 [Iowa Code section 910A.17 (1985)] requiring that the victim registration statement be kept confidential. The victim registration permits the victim to express a desire to be informed of pending court proceedings, chapter 1178, section 7 [Iowa Code section 910A.5 (1987)], of the defendant's correctional status, chapter 1178, sections 8, 9, and 10 [Iowa Code section 910A.6, 910A.7, and 910A.8 (1987)], and the defendant's parole status, chapter 1178, section 11 [Iowa Code section 910A.9 (1987)]. The victim's registration is to be maintained in a separate confidential file and is to be available only to the judicial district department of corrections and to those agencies required to provide information to registered victims. Chapter 1178, § 15 [Iowa Code § 910A.17 (1987)]. The only exception to this confidentiality requirement is that the parole board may disclose the registration to the defendant as part of the parole

consideration process. Compare chapter 1178, § 15 [Iowa Code § 910A.17 (1987) with chapter 1178, § 10(2) [Iowa Code § 910A.9(2) (1987)] (parole board may disclose registration to defendant).

These confidentiality requirements for the victim registration are complimentary to the confidentiality of the presentence investigation report, including the victim impact statement. The presentence investigation is a confidential document which may be shown to the defendant in the trial court's discretion. Iowa Code § 901.4 (1985); State v. Waterman, 217 N.W.2d 621, 624 (Iowa 1974) (disclosure of contents of presentence investigation report to defendant is in trial court's discretion). The victim registration is not disclosed to the defendant except that the parole board may disclose the registration to the defendant as part of the parole consideration process. Compare chapter 1178, § 15 [Iowa Code § 910A.17 (1987)] with chapter 1178, § 10(2) [Iowa Code § 910A.9(2) (1987)]. In both cases, the discretionary disclosure to the defendant occurs in proceedings, sentencing and parole consideration, when the defendant's liberty is at issue and where the victim may present evidence concerning whether the defendant should be at liberty. Chapter 1178, § 3 [Iowa Code § 901.5 (1987)] (sentencing) and chapter 1178, § 17(1)(a) [Iowa Code § 910A.9(1)(a) (1987)] (parole hearing). This disclosure informs the defendant of the evidence which the sentencing court or the parole board is considering in making its decision so that he may rebut unfavorable recommendations by the victim. See Waterman, 217 N.W.2d at 624.

This consistency of confidentiality of the victim impact statement, as part of the presentence investigation report and the confidentiality of the victim registration is an indication that the legislature intended by its specific inclusion of the victim impact statement in the presentence report in chapter 1178, section 6 [Iowa Code § 910A.4 (1987)] that the victim impact statement should be a confidential document available only to specific participants in the sentencing proceedings. Iowa Code § 901.4 (1985). Since the presentence investigation report is specifically confidential by statute, Iowa Code section 901.4 (1985), it would have been superfluous for the legislature to have specifically stated that the victim impact statement was a confidential document. There was no comparable confidentiality requirement for victim registrations before the enactment of chapter 1178 so that it was necessary to declare them to be confidential documents if the legislature intended that they be confidential. See Iowa Code §§ 22.1, 22.2, 22.7 (1985). Therefore, the specific confidentiality requirement for victim registrations in chapter 1178, section 15 [Iowa Code section 910A.17 (1985)] does not make the victim impact statement a

nonconfidential document by negative implication. Chapter 1178, section 6 [Iowa Code section 910A.4 (1987)] specifically makes the victim impact statement a part of the presentence investigation report which is confidential by statute, see Iowa Code section 901.4 (1985), so that there was no reason to make the victim impact statement a confidential document in chapter 1178.

You ask about the confidentiality of victim impact statements in cases, such as class A felonies, in which presentence investigation reports are not required to be filed. See Iowa Code § 901.2 (1985). It is our opinion that since victim impact statements are included as part of presentence investigation reports under chapter 1178, section 6 [Iowa Code § 910A.4 (1987), they would be treated as the presentence investigation in cases in which a complete presentence investigation report is not filed. This interpretation would guarantee victims of offenses in which no presentence investigation report is filed the same protections of their privacy that the victims of other offenses are afforded and would avoid the illogical result that the confidentiality would be dependent on the choice of the presentence investigator to file or not to file a presentence investigation report rather than on the nature of the offense or a clearly expressed legislative policy. Doe, 251 N.W.2d at 504 (goal in statutory construction is to give statutes a sensible and logical construction).

In conclusion, it is our opinion that the victim impact statement is included as part of the presentence investigation report under chapter 1178, section 6 [Iowa Code section 910A.4 (1987)], and is therefore confidential under Iowa Code section 901.4 (1985). When the victim impact statement is the only portion of a presentence investigation report which is filed, it would be confidential because it is a document to be included in a presentence investigation report and in the absence of other portions of a presentence investigation report would, in essence, be the presentence investigation report filed by the presentence investigator. Therefore, in answer to your question, district court clerks should treat chapter 1178 [Iowa Code chapter 910A (1987)] victim impact statements as confidential documents under Iowa Code section 901.4 (1985) which makes presentence investigation reports confidential documents.

Sincerely,

Lona Hansen

LONA HANSEN
Assistant Attorney General

LH/cjc

TAXATION: Requirement of Tax Clearance Statement; County Liability for Rent on Abandoned Mobile Home. Iowa Code §§ 135D.24(4), 135D.24(6), and 562B.27(1) (1985). A mobile home park owner is not required to obtain a tax clearance statement prior to removing an abandoned mobile home from the park. A county is not liable for rent and utilities due on an abandoned mobile home merely because it has a tax lien on the mobile home. If the county acquires a tax deed to the mobile home, it is liable for rent and utilities accruing after that date. (Mason to Richards, Story County Attorney, 1-20-87) #87-1-11(L)

January 20, 1987

Mary E. Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning the interaction of Iowa Code Sections 135D.24(4), 135D.24(6), and 562B.27(1) (1985).

Iowa Code § 135D.24(4) states that the tax imposed on a mobile home pursuant to § 135D.22 "is a lien on the vehicle senior to any other lien upon it." Iowa Code § 135D.24(6) states, in part:

> Before a mobile home may be moved from its present site, a tax clearance statement in the name of the owner must be obtained from the county treasurer of the county where the present site is located certifying that taxes are not owing under this section for previous years and that the taxes have been paid for the current tax period.

Iowa Code § 562B.27(1) provides, in part:

> If a tenant abandons a mobile home on a mobile home space, the landlord shall notify the legal owner or lienholder of the mobile home and communicate to that person that the person is liable for any costs incurred for the mobile home space, including rent and utilities due and owing. However, the person is only liable for costs incurred ninety days before the landlord's communication. After the landlord's communication, costs for which liability is incurred shall then become the responsibility of the legal owner or lienholder of the mobile home.

The specific questions presented by your opinion request are:

1. Does § 135D.24(6) require the mobile home park owner, i.e. the landlord, to obtain a tax clearance statement prior to moving an abandoned mobile home from its present site?

2. May the county, with a tax lien on an abandoned mobile home, be held liable for rent and utilities as a "lienholder" under § 562B.27(1)?

3. Does the county become liable for the rent and utilities due on an abandoned mobile home after the county takes a tax deed to the mobile home?

4. Does a person who purchases the mobile home from the county, after the county acquired the tax deed, become liable for the rent and utilities due on the formerly abandoned mobile home?

It is my opinion that Iowa Code § 135D.24(6) does not require the mobile home park owner to obtain a tax clearance statement prior to moving an abandoned mobile home.

Section 135D.24(6) states that before a mobile home may be moved from its present site, a tax clearance statement "in the name of the owner" must be obtained. This provision does not clearly and unambiguously require someone other than the owner to obtain a tax clearance statement prior to moving a mobile home. The phrase "in the name of the owner" indicates that the requirement of a tax clearance statement may not apply to everyone. In

the presence of an ambiguity in the statute, certain rules of statutory construction may be followed. First, where statutory provisions relate to the same thing and have identical purposes or objects, they should be read in pari materia and harmonized if possible. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985). Iowa Code § 135D.29 (1985 Supp.) provides for a civil penalty against the owner of a mobile home who moves the mobile home without having obtained a tax clearance statement. Sections 135D.24(6) and 135D.29 are both in the Code chapter dealing with mobile homes and parks and have the same purpose of preventing mobile home owners from evading the tax due on the mobile home. If the owner were to move the mobile home out of the county or to some location unknown to the county, the county would not have an effective means of collecting the tax due on the mobile home. Since § 135D.29 penalizes only the owner of the mobile home, it is likely that § 135D.24(6) also applies only to the mobile home owner, or to someone acting pursuant to the owner's directions.

Further, when one of two possible statutory interpretations leads to unconstitutionality and the other to constitutionality, the view must be adopted which upholds rather than defeats the statute. Iowa National Industrial Loan Company v. Iowa State Department of Revenue, 224 N.W.2d 437, 442 (Iowa 1974). In the case of an abandoned mobile home, requiring the park owner to obtain a tax clearance statement before moving the mobile home would result in the park owner being required to pay all of the tax due for previous years and for the current tax period before he would be able to rent the park space to another tenant. The park owner could be forced to pay a substantial amount of money to the county even though he had no legal interest in the mobile home and was not responsible for its abandonment. Therefore, in order to avoid an unconstitutional "taking" of property, § 135D.24(6) should be construed so as not to apply to the mobile home park owner who wishes to move an abandoned mobile home.[1]

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[1]The park owner who removes an abandoned mobile home from his park should notify the county sheriff of the removal. After the owner of the mobile home is notified, the sheriff may sell it if not claimed by the mobile home owner within six months. Iowa Code § 556B.1 (1985). Any proceeds remaining after deducting the cost of the sale and the park owner's costs of removal and storage go into the county treasury. Iowa Code § 556B.1(2) (1985).

With regard to the second question presented, it is my opinion that the legislature did not intend to make a county liable for the mobile home rent and utilities as a "lienholder" under § 562B.27(1) merely because of its tax lien on the mobile home.

Sovereign immunity has not been totally desiccated in Iowa, and statutes in derogation of sovereignty are strictly construed. State v. Dvorak, 261 N.W.2d 486, 488-89 (Iowa 1978). Statutory provisions which are reasonably susceptible to being construed as applicable both to the government and to private parties are construed to exempt the government from their operation, in the absence of particular indicia supporting a contrary result in particular instances. Id. at 488; 3 Sutherland, Statutory Construction, § 62.01 (4th ed. 1986). This rule of construction is supported by Iowa Code § 4.4(5) which states that "[i]n enacting a statute, it is presumed that public interest is favored over any private interest." See Sutherland, § 62.04.

> [T]he rule exempting the sovereign from the operation of the general provisions of a statute is premised on a policy of preserving for the public the efficient, unimpaired functioning of government.
>
> There is a further basis for the rule in that the purpose of most legislation is to govern, i.e., to direct the application of the power of government in arranging the affairs of people who are subject to it. For this reason most statutes are intended and understood to apply to members of the public instead of to the government itself. As well stated in a court opinion: "Statutes are ordinarily designed for the government of citizens and residents rather than the state, and. . .the state is not bound by general words of a statute or code provisions which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its function, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears."

(Footnotes and citation omitted.) Sutherland, § 62.01.

Section 562B.27(1) does not clearly apply to the county, and there are no particular indicia supporting county liability as a "lienholder" under that provision.

Further, the differences between voluntary lienholders and the county which has a tax lien support exempting the county from the liability imposed by § 562B.27(1). Unlike the county, voluntary lienholders could avoid liability under § 562B.27(1) by releasing their liens.[2] The county has no choice regarding how or when to realize on the collateral. Whereas other lienholders may have the sheriff sell the mobile home at an execution sale without unreasonable delay, the county is required to comply with Iowa Code chapters 446, 447, and 448 in selling the mobile home to collect the delinquent tax. Iowa Code § 135D.25 (1985). These procedures involve substantial delay. There is a three year period of redemption before the tax sale purchaser may receive the tax deed. Iowa Code §§ 447.1, 447.9, 448.1 (1985). During those three years, additional tax would become due. The county would continue to have a tax lien on the mobile home during those years unless someone paid the taxes accruing after the tax sale. The county could not purchase the mobile home itself at a "scavenger sale" until after it remained unsold for want of bidders after being offered at tax sale for at least two years. Iowa Code §§ 446.18, 446.19 (1985). The county could not receive the tax deed to the mobile home until after an additional nine month redemption period. Iowa Code § 447.9 (1985). Again, there would be a substantial number of years in which the county could still have a tax lien on the mobile home.

The differences between voluntary lienholders and the county are among the reasons why the county should not be considered a "lienholder" under § 562B.27(1). On the other side of the scale, there do not appear to be indicia supporting county liability under § 562B.27(1).

The third question presented is whether the county's position changes upon the taking of a tax deed. Once the county acquires the tax deed, it becomes the legal owner of the mobile home. Beginning at that time, if the county leaves its mobile home in the mobile home park, it becomes liable for the rent and utilities the same as any other park tenant. The county could not constitutionally leave its property on the mobile home park space, depriving the park owner of the use of his land, without proper compensation. For the reasons discussed earlier, the county would not, however, become liable for the rent and utilities which accrued prior to the county's acquisition of the tax deed.

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[2]In the case where the owner and tenant both abandon a mobile home, the mobile home may be of insufficient value for the lienholder to want to keep its lien.

The final question concerns the liability for rent and utilities of a person who purchases the mobile home from the county after the county has acquired the tax deed. This subsequent purchaser would be liable for any rent and utilities accruing after he takes title to the mobile home. It is my opinion, however, that he does not become the "owner" under § 562B.27(1) for purposes of paying rent and utilities accruing prior to his taking of the deed to the mobile home. Section 562B.27(1) applies to mobile homes abandoned by the tenant. At the time the mobile home was abandoned, this subsequent purchaser may have had no interest in the property; he was not the owner and had no right of possession. There is no reason to require him to compensate the mobile home park owner for the park owner's loss caused by an earlier abandonment of the same mobile home he now owns.

Very truly yours,

Marcia Mason

Marcia Mason
Assistant Attorney General

WP4

CIVIL RIGHTS: State Contract Compliance Requirements. Iowa Code §§ 19B.7, 73.16, as amended by 1986 Iowa Acts, ch. 1245, §§ 226, 832. Section 19B.7 requires that the Office of Management establish a contract compliance policy mandating nondiscrimination in and encouragement of the use of minority and women businesses by programs benefiting from state aid. This policy would apply to local governments which are benefiting from state financial assistance. Local governments receiving funds under Iowa Code chapter 315 are subject to § 19B.7. It is within the discretion of the Office of Management whether to require state agencies to develop the specifics of the procedures which will conform to § 19B.7 or to require state agencies to require the programs receiving state aid to develop those specifics. Section 19B.7 does not affect federal block grants to local governments. The set-aside provisions of § 73.16 do not apply to governing bodies of counties, townships, school districts, or cities. (Autry to Groninga, State Representative, 1-13-87) #87-1-9(L)

January 13, 1987

The Honorable John D. Groninga
State Representative
State Capitol
Des Moines, Iowa 50319

Dear Representative Groninga:

You have requested an opinion of this office interpreting Senate File 2175, sections 226 (new Code § 19B.7) and 832 (new Code § 73.16). Specifically your questions are as follows:

1. Do the contract compliance provisions of new Code § 19B.7 apply where it is a local government which is receiving or benefiting from state financial assistance?

2. If § 19B.7 does cover such local government, is it the responsibility of the local government to adopt procedures which conform to § 19B.7 or would they follow state set procedures?

3. Are funds received under the Revitalize Iowa's Sound Economy Fund Program created by chapter 315 of the Code subject to the provisions of § 19B.7?

4. Are federal block grants to local government under § 15.108 (Senate File 2175, § 808) affected by § 19B.7?

5. Do the set-aside provisions of Iowa Code § 73.16(1) apply to local governments?

Section 19B.17 gives the Office of Management the responsibility for the "administration and promotion of equal opportunity in all state contracts and services and the prohibition of discriminatory and unfair practices within any program receiving or benefiting from state financial assistance in whole or in part." The section goes on to require that the Office of Management:

> a. Establish for all state agencies a contract compliance policy, applicable to state contracts and services and to programs receiving or benefiting from state financial assistance, to assure:
> (1) The equitable provision of services within state programs.
> (2) The utilization of minority, women's, and disadvantaged business enterprises as sources of supplies, equipment, construction, and services.
> (3) Nondiscrimination in employment by state contractors and subcontractors.

Also the annual report of the Office of Management must detail, inter alia, "efforts to promote, develop, and stimulate the utilization of minority, women's, and disadvantaged business enterprises in programs receiving or benefiting from state financial assistance."

A contract compliance policy developed pursuant to § 19B.7 would include local governments which are benefiting from, or receiving, state financial assistance. This conclusion follows from the simple observation that § 19B.7 covers, by its terms, programs receiving state financial assistance and no exception is made for local governments. From this it also follows that RISE funds are covered by § 19B.7. Clearly, the money received under the RISE program is state money. These funds can either be spent to directly fund construction and maintenance of roads, § 315.3(1), or can be used for the reimbursement of local governments "of all or part of the interest and principal on general obligation bonds issued . . . for the purpose of financing approved road and street projects. . . .".

Chapter 19B does not answer the question whether it would be the responsibility of the state agency administering funds or of

the program benefiting from them to adopt any specific procedures needed to conform to § 19B.7. The statute says merely that the Office of Management must establish for all state agencies a contract compliance policy applicable to state contracts, services, and programs benefiting from state aid. This language leaves open several possibilities: (1) the Office of Management could require each agency to develop the specifics of the procedures, (2) the Office of Management could require that each agency conform to the general requirements of nondiscrimination and stimulation of utilization of minority business and that the specifics of meeting these goals will be developed by the recipients of state aid, services, or contracts, (3) the Office of Management could again require that each agency conform to the general provision of § 19B.7 but leave to the agencies' discretion who is to work out the details of compliance. Which of these alternatives is to prevail was not answered by the General Assembly. The authority to answer that question was delegated to the Office of Management, and it is that agency's judgment which will prevail.

The next issue is whether § 19B.7 applies to federal block grants. Specifically, the issue relates to grants to local governments received through the Department of Economic Development pursuant to § 15.108. Money received by the state through a block grant is then administered by the executive branch of the Iowa government, deposited in a special fund in the state treasury and is subject to appropriation by the legislature. Iowa Code § 8.41(1). Such money is not considered in determining the general fund balance. Iowa Code § 8.41(1). This money is generated by federal, not state revenue raising measures. While the state government decides the exact utilization of this money, this decision cannot be inconsistent with whatever constraints the federal government chooses to put on the use of such funds. The money is federal money. Programs receiving money via federal block or categorical grants are not by virtue of that fact receiving or benefiting from, in whole or in part, state financial assistance.[1]

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[1] Caution should be used when considering the situation where a program benefits in part from state assistance and in part from federal assistance. One should consider whether the receipt of state money would allow the application of the § 19B.7 contract compliance policy to the federal aid as well as the state aid. The variables in this question are numerous. They include the type of block grant involved, the amount of the aid received, and whether the federal and state aid is being

Finally, the set-aside provisions of new Iowa Code § 73.16(1) do not apply to local governments. Iowa Code section 73.16(1) (S.F. 2175, § 832) provides:

> 1. Every agency, department, commission, board, committee, officer or other governing body of the state shall purchase goods and services supplied by small businesses and targeted small businesses in Iowa. In addition to the other provisions of this section relating to set-asides for targeted small business, all purchasing authorities shall assure that a proportionate share of small businesses and targeted small businesses identified under the uniform small business vendor application program of the department of economic development are given the opportunity to bid on all solicitations issued by agencies and departments of state government.

One could argue that local governments, having authority only by virtue of state law, are "other governing bodies of the state." Here, however, a comparison of § 73.16(1) with § 73.1 leads to the opposite conclusion. Section 73.1 applies to "[e]very commission board, committee, officer or other governing body of the state, or of any county, township, school district or city, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body" (emphasis added).[2] When § 73.1 refers to purchasing agents of "other governing bodies," that phrase is not modified and so refers back to "governing bodies of the state, or of any county, township, school district or city." So § 73.1 specifically covers governing bodies of the state, counties, townships, school districts and cities, while § 73.16(1) only mentions governing bodies of the state. It is axiomatic that "express mention of one thing implies the exclusion of others." Section 73.16(1) expressly mentions governing bodies of the state while leaving out

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n.1 continued

administered by the same agency. Such a question is best answered in a concrete context with the specifics provided. Until such arises, the resolution is best left to the resolution in the Office of Management rulemaking process.

[2] Section 73.5, titled "violations," uses this language as well.

the local governing bodies expressly mentioned in § 73.1. The conclusion is that § 73.16 does not cover these local governing bodies.

In conclusion, section 19B.7, mandating nondiscrimination in and encouragement of the use of minority and women businesses by program's benefiting from state aid, applies to local governments which benefit from state financial assistance. Local governments receiving funds under Iowa Code ch. 315 are subject to section 19B.7. It is within the discretion of the Office of Management whether to require state agencies to develop the specifics of the procedures which will conform to § 19B.7 or to require state agencies to require the programs receiving state aid to develop those specifics. Section 19B.7 does not affect federal block grants to local governments. The set-aside provisions of § 73.16 do not apply to governing bodies of counties, townships, school districts, or cities.

Sincerely,

RICK AUTRY
Assistant Attorney General

RA/cjc

MUNICIPALITIES: Home Rule Authority, Payment of Punitive Damages. Iowa Const., Art. III, §§ 31, 38A, 39A; Iowa Code §§ 613A.4(5), 613A.8. A municipality is not prohibited from indemnifying an employee for an award of punitive damages. (Osenbaugh to Stream, Mahaska County Attorney, 1-12-87) #87-1-7(L)

January 12, 1987

Mr. Charles Stream
Mahaska County Attorney
Box 16, Courthouse
Oskaloosa, Iowa 52577

Dear Mr. Stream:

You have requested an opinion of the Attorney General concerning whether the governing body of a governmental subdivision may voluntarily pay an award of punitive damages entered against an employee.

The governmental subdivision's duty to defend and indemnify its employees is delineated by Iowa Code chapter 613A (1985), the Tort Liability of Governmental Subdivisions Act. Chapter 613A subjects governmental subdivisions to liability for torts committed by the subdivisions' officers and employees and grants governmental subdivisions immunity from all claims not authorized by statute. Pursuant to Iowa Code section 613A.4(5), governmental subdivisions are expressly immune from any award of punitive damages. Likewise, section 613A.8 expressly provides that " . . . the duty to save harmless and indemnify [an employee] does not apply to awards for punitive damages." Accordingly, it is clear that there is no duty or obligation for the governing

body of a governmental subdivision to pay an award of punitive damages entered against an employee.

Generally, in the absence of specific statutory authority a governmental subdivision may invoke its home rule power to authorize its governing body to act. The Constitution of the State of Iowa, article III, sections 38A and 39A.

> A [city/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 city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Iowa Code sections 331.301(1) and 364.1. See also Iowa Code sections 364.2(2) and (3).

However, there are some limitations to the expansive home rule authority vested in municipalities by these amendments. In 1980 Op.Att'yGen. 54, this office discussed the "not inconsistent with state law" language, alternatively referred to as the preemption doctrine. There, we cited a number of Iowa Supreme Court decisions in concluding that following home rule, the power of municipalities in Iowa is "limited only by an express statutory limitation or legislative history which clearly implies an intent to vest exclusive subject matter jurisdiction with the state." 1980 Op.Att'yGen. at 61 (and cases cited therein). The Supreme Court discussed the preemption doctrine more recently in City of Council Bluffs v. Cain, 342 N.W.2d 810 (Iowa 1983). There the Court stated:

> It is a well established principle that municipal governments may not undertake to legislate those matters which the legislative branch of state government has preserved to itself. There are alternative ways for a state legislature to show such a preservation. One is of course by specific expression in statute. Another is, as defendant suggests, by covering a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.

City of Council Bluffs v. Cain, 342 N.W.2d at 812. See also City of Vinton v. Engledow, 258 Iowa 860, 867, 140 N.W.2d 857, 861 (1966).

In the present area, our state legislature saw fit to immunize Iowa governmental subdivisions from liability for punitive damages. This enactment came after punitive damages were allowed against a municipality in Young v. City of Des Moines, 262 N.W.2d 612 (Iowa 1978). There, the Supreme Court compared municipalities to private corporations and reasoned that punitive damages against a municipality could serve public policy by acting as a deterrent and encouraging more care in the selection and training of municipal agents and employees. Id. at 622.

It is arguable that the legislature rejected the Court's reasoning when it immunized municipalities from such awards. However, we note that public policy does not preclude purchase of insurance for punitive damages, nor the allowance of punitive damages against a municipality's insurer. City of Cedar Rapids v. Northwestern Natl. Ins. Co., 304 N.W.2d 228 (1981); Iowa Code § 613A.7. Accordingly, we conclude that the legislature did not intend to absolutely preempt the payment of punitive damages by a municipality willing to pay such a judgment. However, it is also clear that the fiscal powers of municipalities are not without limit.

Article III, section 31 of the Constitution of the State of Iowa provides, " . . . nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by preexisting laws, and no public money or property shall be appropriated for local, or private purposes. . . ." This provision has been held to apply to funds expended by Iowa governmental subdivisions and to preclude the use of public funds for private purposes. See Willis v. City of Des Moines, 357 N.W.2d 567 (Iowa 1984); Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413 (1970); Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930). See also Op.Att'yGen. #86-8-8 at 2.

Thus, the issue raised by your question devolves to whether the payment of an award of punitive damages against an employee serves a public or private purpose. Phrased alternatively, the question is whether such a payment serves "to protect and preserve the rights, privileges, and property of the [subdivision] or its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code sections 331.301 and 364.2.

It is well settled that punitive damages may only be awarded upon a finding of legal or actual malice. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984); Giltner v. Stark, 219 N.W.2d 700 (Iowa 1974). Alternatively, if a defendant's conduct was "wanton or reckless, exhibiting complete disregard for the plaintiffs' rights," an award of punitive damages may be appropriate. Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 623 (8th Cir. 1983). See also Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980); McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362, 368-69 (Iowa 1972). The express purpose of punitive damages is to deter and to punish the defendant. West Des Moines State Bank v. Hawkeye Bancorporation, 722 F.2d 411 (8th Cir. 1983); Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (1979).

This office has previously opined that the State could indemnify an employee for an award of punitive damages even though it had no duty to do so. 1976 Op.Att'yGen. 891, 893. That opinion stated:

> The State is not bound by a finding of a court or jury that an employee acted maliciously if the governing body determines that it is in the best interest of the State, particularly with respect to the maintenance of high morale. Such damages can be paid legally. Douglas v. City of Minneapolis, 230 N.W.2d 577 (Minn. 1975).

We believe the same reasoning would apply equally under Iowa Code ch. 613A.

The determination which must be made is whether it would be in the interests of the taxpayers of a subdivision to relieve a defendant from an obligation to pay such an award. That is a question involving determination of issues of policy and dependent on the facts of each case. We do note that we have previously recommended that when a question exists as to whether an expenditure of public funds is for a public or private purpose, that the governing body make express legislative findings as to public purpose. See Op.Att'yGen. #86-8-8 at 9-10. A reviewing court is not bound by such findings, but does rely on them in determining whether such an expenditure is valid. See John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 93 (Iowa 1977).

In sum, a governmental subdivision may voluntarily pay an award of punitive damages entered against an employee for an act arising from that employment where the governing body of the subdivision finds that the interests of the taxpayers would be served by such an expenditure.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO/cjc

COUNTIES AND COUNTY OFFICERS; Clerk of District Court. Iowa Code § 633.31(2)(k) (1985). The Clerk of District Court should assess fees as allowed by § 633.31 whenever a conservatorship is settled. No probate fee is charged where the conservator has merely commenced a lawsuit -- or is being sued -- and the assets of the estate are indeterminate. (Galenbeck to Poppen, Wright County Attorney, 1-7-87) #87-1-4(L)

January 7, 1987

Lee E. Poppen
Wright County Attorney
P. O. Box 111
Clarion, Iowa 50525

Dear Mr. Poppen:

You have requested an opinion of the Attorney General regarding collection of court fees pursuant to a provision of the Iowa Probate Code. The two circumstances mentioned are:

1. A conservatorship is established to obtain court approval of a tort claim settlement obtained for a minor without the filing of suit.

2. A conservatorship is established to obtain court approval of a tort claim settlement where suit was commenced on behalf of a minor.

Iowa Code § 633.31(2)(k) (1985) provides:

1. The clerk shall keep a court calendar, and enter thereon such matters as the court may prescribe.

> 2. The clerk shall charge and collect the following fees in connection with probate matters, which shall be deposited in the court revenue distribution account established under section 602.8108:
>
> * * *
>
> k. For other services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under legal disability, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against that person, or as may be otherwise provided herein, where the value of the personal property and real estate of such a person falls within the following indicated amounts, the fee opposite such amount shall be charged.
>
> | | |
> |---|---|
> | Up to $3,000.00 ..... | 5.00 |
> | 3,000.00 to 5,000.00 ..... | 10.00 |
> | 5,000.00 to 7,000.00 ..... | 15.00 |
> | 7,000.00 to 10,000.00 ..... | 20.00 |
> | 10,000.00 to 15,000.00 ..... | 25.00 |
> | 15,000.00 to 25,000.00 ..... | 30.00 |
> | For each additional $25,000.00 or major fraction thereof..... | 20.00 |

(emphasis added). A prior opinion of this office reviewed the provisions of § 633.31. Op.Att'yGen. #80-9-9(L). That opinion notes conservatorships clearly fall within the scope of the statute which applies to "persons laboring under legal disability" and to a "person acting in a representative capacity . . . ".

A more difficult task is to assess the meaning of the language underscored above: ". . . except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against that person, . . . " Statutory construction seeks to provide an unstrained interpretation, giving the usual and ordinary meaning to the language of the statute. Sommers v. Iowa Civil Rights Com'n, 337 N.W.2d 470, 472 (Iowa 1983).

Here the plain meaning of the exception to § 633.31(2)(k) precludes assessment of a fee in probate relating to the commencement of "actions" by or against an administrator, guardian, trustee or representative. Such a fee would be inappropriate in light of the fee authorized to be collected by

the Clerk of District Court pursuant to Iowa Code § 602.8105(1)(a) for the filing of a petition.

In simple terms, only one fee may be collected for the commencement of litigation by or against a personal representative. See § 608.8105(1)(a). This does not affect, however, the probate fee which must be collected for settling an estate, the principal asset of which may be proceeds of such litigation. In conjunction with settlement of a conservatorship, fees should be charged as established by the fee schedule contained in Iowa Code § 633.31(2)(k).

In light of the above, our response to each of your specific questions is the same. Iowa Code § 633.31(2)(k) provides that a probate court fee should be charged in both instances cited, upon the settlement of the conservatorship.

Sincerely,

Scott M. Galenbeck

SCOTT M. GALENBECK
Assistant Attorney General

SMG/cjc

COUNTIES; Veteran Affairs Commission; Combination of veteran affairs commission with other county offices: Iowa Code ch. 250 (1985); §§ 250.1; 250.3; 250.6; 250.7; 331.321(4); and 331.323(1). (1) The legislature intended that the director, rather than the commission, of veteran affairs be one of the offices which may be combined with another county office under § 331.323(1). Such a combination is not a violation of § 250.12, which prohibits duties of the commission from being placed under any other county agency if the commission retains all final decision-making authority over commission business; (2) completion of paperwork by another county office for final action by the commission is not a violation of § 250.12; (3) a petition is required to combine offices under § 331.323(1); the board of supervisors has no authority to combine offices on its own motion; and (4) the commission, and not the board of supervisors, has original jurisdiction over a decision whether to terminate one of its employees; that employee then has a right to appeal to the board of supervisors under § 331.321(4). (Weeg to Poncy, State Representative, 1-6-87) #87-1-3(L)

January 6, 1987

The Honorable Charles N. Poncy
State Representative
653 N. Court Street
Ottumwa, Iowa 52501

Dear Representative Poncy:

You have requested an opinion of the Attorney General on several questions regarding county commissions on veteran affairs. They are as follows:

> 1. Are there "county home rule" provisions that would lawfully allow the circumvention of statutes [sections 250.12 and 331.323] thereby permitting the combining of the duties of the commissions of veterans affairs with another agency or office?
>
> 2. Would the completion of forms and questionnaires by another agency or office for final action by the Commissions of Veterans Affairs be a violation of 250.12 and/or 331.323?
>
> 3. Must a petition be filed to get a proposal to combine offices on the ballot or can this also be done at the request of the Board of Supervisors?

> 4. In Iowa Code section 250.6 it states "the commission, subject to the Board of Supervisors, shall have the power to employ necessary administrative or clerical assistance when needed, the compensation of such employees to be fixed by the board of supervisors." Does the board of supervisors have the authority to terminate such employees or does that authority and decision rest solely with the commission of veterans affairs?

Iowa Code chapter 250 (1985) governs county commissions of veteran affairs. In particular, § 250.12 provides in relevant part:

> It shall be unlawful for any county board of supervisors or any county commission of veteran affairs to place the administration of the duties of the county commission of veteran affairs under any other agency of any county . . .

Section 331.323(1) authorizes counties to combine certain offices in the following manner:

> A county may combine the duties of two or more of the following county officers and employees as provided in this subsection:
>
> a. Sheriff
> b. Treasurer
> c. Recorder
> d. Auditor
> e. Medical examiner
> f. General relief director
> g. County care facility administrator
> h. Commission on veteran affairs
> i. Director of social welfare
> j. County assessor
> k. County weed commissioner
>
> If a petition of electors equal in number to twenty-five percent of the votes cast for the county office receiving the greatest number of votes at the preceding general election is filed with the auditor, the board shall direct the commissioner of elections to call an election for the purpose of voting on the proposal. If the petition

> contains more than one proposal for combining duties, each proposal shall be listed on the ballot as a separate issue. If the majority of the votes cast is in favor of a proposal, the board shall take all steps necessary to combine the duties as specified in the petition.
>
> The petition shall state the offices and positions to be combined and the offices or positions to be abolished. Offices and positions that have been combined may be subsequently separated by a petition and election in the same manner.
>
> If an appointive officer or position is abolished, the term of office of the incumbent shall terminate one month from the day the proposal is approved. If an elective office is abolished, the incumbent shall hold office until the completion of the term for which elected, except that if a proposal is approved at a general election which fills the abolished office, the person elected shall not take office.
>
> When the duties of an officer or employee are assigned to an elective officer, the board shall set the initial salary for the elective officer, which salary shall be at thirty percent greater than the salary otherwise established for the combined office or position with the highest salary. Thereafter, the salary shall be determined as provided in section 331.907. <u>When the duties of officers or employees are combined, the person who fills the combined office shall take the oath and give the bond required for each office and perform all the duties pertaining to each</u>.

(emphasis added)

I.

Your first question is whether it is possible under home rule to lawfully circumvent sections 250.12 and 331.323 in order to combine the veteran affairs commission with another of the county offices designated in § 331.323. This question assumes that § 250.12 serves as a bar to such a combination.

It does appear at first glance that these two statutes conflict. However, in interpreting the relationship between these two statutory provisions we refer to the well-established principle of statutory construction that where two statutes appear to be in conflict, they should be construed, if possible, to harmonize them and give effect to both. See Egan v. Naylor, 208 N.W.2d 915, 918 (Iowa 1973), and Fitzgerald v. State, 220 Iowa 547, 260 N.W. 681, 684 (1935). If it is not possible to reconcile them, effect will be given to the later enactment. Fitzgerald v. State, supra, 260 N.W. at 684.[1] While sections 250.12 and 331.323(1) could be read as conflicting, we believe it is possible to reconcile them and give effect to both.

In 1964 Op.Att'yGen. 130, we stated that the county director of social welfare could not assume the duties of director of the soldier's relief commission (amended in 1978 to be called the veteran affairs commission) without violating § 250.12. However, that opinion did not refer to the statutory provisions governing combination of offices. Later, in 1968 Op.Att'yGen. 908, we held that there was not incompatibility of office for the secretary of the soldier's relief commission to also serve as the executive director of the county poor fund, and that furthermore, this arrangement did not violate § 250.12 because the administration of the soldier's relief fund remained in the jurisdiction of the soldier's relief commission. This opinion seemed to distinguish the 1964 opinion on the ground that in 1964 the arrangement in question placed the administration of veterans affairs under another department. The 1968 opinion likewise did not refer to the statutory provision regarding combination of county offices.

While these opinions do not address the present question, we believe they do provide some assistance in reconciling these two statutes. First, we note that of all the offices that may be combined under section 331.323(1), only the veteran affairs commission is not an office held by a single person. Combining the functions of this multi-member commission with a single office holder raises some problems. First, section 250.3 specifically requires members of the commission to be honorably discharged veterans. Section 250.7 requires the commission to meet at least on a monthly basis. A number of other sections in this chapter govern the commission's duties. The commission is

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[1] Section 250.12 was enacted in 1945. See 1945 Iowa Acts, ch. 124, § 10. Section 331.323(1) (formerly sections 332.17 to 332.22) was enacted in 1959. See 1959 Iowa Acts, ch. 253, § 1. Thus, in the event these statutes were found to be irreconcilable, section 331.323(1), authorizing combination of the veteran's affairs commission with one or more of the designated county offices, would prevail.

authorized to hire or designate an administrative assistant. See § 250.6. In sum, we believe the chapter as a whole evinces the legislature's intent that public assistance to veterans be administered by a group of peers rather than by a single individual or group with no wartime military experience.

A proposal to combine the functions of the commission with another county office under § 331.323(1) could take a number of forms, as this section states the proposal should specify how the combination is to occur: the commission would remain intact and assume the functions of another office, or another office would remain intact and assume the functions of the veteran affairs commission. This latter proposal raises some concerns, for in order for the combination to make sense the commission would presumably need to be dissolved. In this case, a number of questions exist as to the continued applicability of much of chapter 250, such as whether the qualifications for office still apply, whether monthly meetings should be held by one person, and how the legislative intent that decisions be made by a board of veterans can be carried out. Such questions do not arise when an office held by one individual is assumed by another individual, for the duties of such an office are tailored to be performed by an individual rather than by a board or commission.

Because of this difficulty, and in order to reconcile the two statutes in question, it is our opinion that when the legislature specified the veteran affairs commission as one of the offices subject to combination under § 331.323(1), it intended that reference to be to the office of the commission as administered by its director or administrative assistant. In this way, the commission would maintain its statutory duties but the day to day administration of the office would be at the direction of a person who also assumed responsibility for one or more other county offices. This interpretation is consistent with the language of § 331.323(1), which repeatedly refers in the singular form to an "officer or position" that is abolished or to the "duties of an officer or employee" once combined. This interpretation also seems consistent with the overall intent of § 331.323(1) to make administration of county government more streamlined and efficient, yet not diminish the impact of policy-making governing boards. In this regard, we note that several of the offices specified in § 331.323(1) are employees of the board of supervisors. See ch. 253 (county care facility under authority of board of supervisors); §§ 331.321(1)(i) (general relief director); 331.321(1)(l) (weed commissioner); 331.321(1)(m) (medical examiner). The board of supervisors therefore retains overall accountability and policy-making authority for the functions in question. In addition, the director of the social welfare board, rather than the board

itself, is another office that may be combined under § 331.323(1).

In conclusion, the duties of the director of the veteran affairs commission may be combined with any of the offices specified under § 331.323(1). Such a combination does not violate § 250.12 because the commission's duties are not placed under another county agency but instead are co-administered by a single person responsible as well for the duties of another county office. See 1968 Op.Att'yGen. 908. Final decision-making authority still rests with the commission. Accordingly, there is no need to search for home rule authority to allow such a combination of offices.

II.

Your second question is whether completion of paperwork by another county office for final action by the commission would be a violation of § 250.12. We assume this question does not involve a combination of offices pursuant to § 331.323(1). It is our opinion that if the commission retains final decision-making authority on issues for which that paperwork is compiled, there is no violation of § 250.12. Indeed, § 250.6 specifically authorizes the commission to appoint a deputy in the auditor's office to serve as its administrative assistant, with the approval of the supervisors. Unless such employee-sharing arrangements are proper, we cannot see why the legislature would have enacted the provisions of §§ 250.6 and 250.12 in the same chapter.

III.

Your third question is whether a petition for combining offices is required, or whether the supervisors may act unilaterally to combine offices.

The answer to this question is two-fold. If a formal, permanent combination of offices pursuant to section 331.323(1) is sought, that section expressly provides that a petition containing a proposal for combining two or more of the designated offices must be filed with the auditor. Upon the filing of such a petition, the supervisors are required to direct the election commissioner to call an election to decide this proposal. There is no authority for the board of supervisors to combine offices under this section on its own motion. See 1972 Op.Att'yGen. 430. However, this conclusion does not bar the veteran affairs commission from appointing as its administrative assistant a person who is also employed in another county office. Indeed, section 250.6 expressly provides that the commission may appoint, with the approval of the board of supervisors, a deputy auditor

to serve as its assistant. Such an employee-sharing arrangement was discussed and approved in 1968 Op.Att'yGen. 908, discussed above. Such an appointment is at the discretion of the commission and is distinguished from a combination of offices under section 331.323(1) in that it is not so permanent and inflexible in nature.

IV.

Your fourth question is whether the supervisors may terminate employees of the veteran affairs commission or whether the commission has exclusive authority over this function.

As referred to in your opinion request, § 250.6 provides in part that:

> The commission, subject to the approval of the board of supervisors, shall have power to employ necessary administrative or clerical assistants when needed, the compensation of such employees to be fixed by the board of supervisors, . . .

(emphasis added) This section makes clear that the commission makes the initial appointments of its employees, but such appointments are subject to the board's approval. In addition, we believe the supervisors have implicit authority under this section to determine, through the budget process, how many positions in this office will be funded. See §§ 331.433-331.437. We believe that the initial decision of whether to terminate a specific commission employee should first be made by the commission. This is consistent with section 331.321(4), which provides that, except as otherwise provided, county employees may be terminated in writing by the officer making the appointment. The terminated employee may contest the termination by filing a request with the auditor in accordance with the statute. After this filing the employee "shall be granted a public hearing before the board on all issues connected with the removal." § 331.321(4). Thus, if a commission employee contests the commission's termination decision, the board of supervisors holds a hearing on the question of whether the termination was proper. The supervisors do not have authority under § 331.321(4) to terminate commission employees directly. Compare 1984 Op.Att'yGen. 94 (#83-11-4(L)) (elected county officer making appointment, not the board of supervisors, is authorized to initiate disciplinary action against a county employee).

In conclusion, it is our opinion that: (1) the legislature intended that the director, rather than the commission, of veteran affairs be one of the offices which may be combined with

another county office under § 331.323(1). Such a combination is not a violation of § 250.12, which prohibits duties of the commission from being placed under any other county agency if the commission retains all final decision-making authority over commission business; (2) completion of paperwork by another county office for final action by the commission is not a violation of § 250.12; (3) a petition is required to combine offices under § 331.323(1); the board of supervisors has no authority to combine offices on its own motion; and (4) the commission, and not the board of supervisors, has original jurisdiction over a decision whether to terminate one of its employees; that employee then has a right to appeal to the board of supervisors under § 331.321(4).

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

TAXATION: Property Acquisitions Under the Municipal Housing Law of Iowa Code ch. 403A (1985). Iowa Code §§ 403A.10, 427.18 and 441.46 (1985). Sections 427.18 and 441.46 impose property tax for the full fiscal year on property acquired during the fiscal year under § 403A.10 if the property was taxable on July 1 of that fiscal year. (Miller to Mertz, Marion County Attorney, 1-6-87) #87-1-2(L)

January 6, 1987

Martha Mertz
Marion County Attorney
P. O. Box 629
Knoxville, Iowa 50138

Dear Ms. Mertz:

You have requested an opinion of the Attorney General as to whether property purchased under Iowa Code ch. 403A, the "Municipal Housing Law," is exempt from property tax from the date of its acquisition.

More specifically, the City of Knoxville and the Knoxville Low Rent Housing Agency (Agency) entered into an agreement whereby the Agency would purchase property free of all real and personal property taxes under ch. 403A for the purpose of providing low rent housing. The parcels of property in question were purchased from private individuals between November 7, 1985, and June 16, 1986. The property taxes had been assessed and certified to the county treasurer as of July 1, 1985 and each parcel was subject to property tax prior to acquisition. When the property taxes became payable, the county treasurer questioned whether the property tax exemption should be allowed as of the date of acquisition. Therefore, the specific question to be answered is whether property taxes for the acquired properties should be collected for the fiscal year commencing July 1, 1985 and ending June 30, 1986.

Iowa Code § 403A.10 (1985) provides that "The property acquired or held pursuant to this chapter is declared to be public property used exclusively for essential city, or municipal public and governmental purposes and such property is hereby declared to be exempt from all taxes and special assessments of the state or any public body." Property acquired pursuant to this section is exempt from property

tax with no further need to file a claim for the property tax exemption with the appropriate taxing body.[1]

This does not mean, however, that the property is exempt from tax as of the date it is acquired by the Agency. Rather, Iowa Code § 441.46 (1985) states that "If no claim is required to be filed to procure an exemption or credit, the status of the property as exempt or taxable on July 1 of the fiscal year which commences during the assessment year determines its eligibility for exemption or credit." Since the properties in question under the circumstances of your opinion request were taxable on July 1, 1985, the properties remain taxable throughout the entire fiscal year (July 1, 1985 through June 30, 1986).

Iowa Code § 427.18 (1985) further clarifies the legislature's intent that property remains taxable for the full fiscal year even if acquired by a political subdivision or other tax exempt organization.

Section 427.18 states the following:

> If property which may be exempt from taxation is acquired after July 1 by a person or the state or any of its political subdivisions, the exemption shall not be allowed for that fiscal year and the person or the state or any of its political subdivisions shall pay the property taxes levied against the property for that fiscal year, and payable in the following fiscal year. However, the seller and the purchaser may designate, by written agreement, the party responsible for payment of the property taxes due.

(Emphasis added).

The properties acquired by the Agency during the 1985-1986 fiscal year which were taxable on July 1, 1985, remained taxable for that full fiscal year.

Very truly yours,

James D. Miller
Assistant Attorney General

[1] In certain circumstances, such as charitable or benevolent institutions, the organization is required to file a claim for exemption with the assessor before the exemption is allowed. See, Iowa Code § 427.1(23).

STATE OFFICERS AND DEPARTMENTS: Commission on Aging and Area Agencies on Aging. Sale of Insurance by Area Agencies on Aging. 42 U.S.C. § 3001 et seq.; Iowa Code Chapter 249B (1985); Senate File 2175, 71st G.A., 2d Sess. §§ 1012, 1013, 1014. An area agency on aging has no authority to conduct or own an insurance business in its capacity as a governmental agency. The area agency on aging may not take actions which cause it to appear that an insurance business is carried on under governmental authority. An insurance business may be incompatible with the area agency's role as a quasi-governmental body. (Osenbaugh to Tynes, 1-6-87) #87-1-1(L)

January 6, 1987

Karen L. Tynes
Executive Director
Iowa Department of Elder Affairs
236 Jewett Building
Des Moines, IA
L O C A L

Dear Ms. Tynes:

You asked the opinion of our office as to whether the Iowa Lakes Area Agency on Aging may legally own and operate a for-profit subsidiary corporation whose purpose is to sell medigap insurance to senior citizens. The latter corporation is known as Aging Group Enterprise Insurance, Inc. (A.G.E.). You have also inquired about the potential liability of the area agency and the state for the activities of the A.G.E. insurance company.

In answering your first question, it is necessary to analyze the nature and source of the entities involved. The state Department of Elder Affairs is the successor to the Iowa Commission on Aging which was established by Iowa Code Ch. 249B to implement the federal Older Americans Act of 1965, 42 U.S.C. § 3001 et seq. One of the responsibilities of the state agency under federal law is to divide the state into distinct planning and service areas and to then designate a public or nonprofit private agency to act as the area agency on aging for each area. The Iowa Lakes Area Agency on Aging was incorporated in Iowa as a nonprofit corporation in 1977 and has been the designated area agency on aging for area three since 1980.

Formerly, the only reference to area agencies on aging in the Iowa Code was contained in section 249B.8 which provided as follows:

> The commission on aging may establish area agencies on aging for the planning and service areas developed by the office for planning and programming pursuant to the 'Older Americans Comprehensive Services Amendments of 1973', United States Public Law 93-29, section 304. An area agency may be merged with a contiguous planning and service area but not without the approval of each policy-making body which is a party to the merger. Merged planning and service areas forming one area agency shall be governed by only one policy making body.

Iowa Code § 249B.8 (1985).

As a matter of state law, therefore, very little guidance was offered regarding the nature and scope of authority of the area agencies on aging. In 1984, this office was asked whether the Iowa Lakes Area Agency on Aging was a governmental body within the meaning of the state open meetings law, Iowa Code Ch. 21 (1985). In response, we opined that the agency is subject to the open meetings act and noted that:

> Irrespective of the purpose or function for which the corporation had existed prior to designation as the area agency, thereafter the purpose of that organization is to fulfill Area Agency functions. With respect to those public functions, the Area Agency was 'created' by the State Commission and the pursuit of those functions must occur in a meeting open to the public.

Op.Att'yGen. #84-7-4(L).

The fact that area agencies are quasi-public agencies infused with responsibilities to the public is further evidenced in the recent legislation which reorganized state government. Senate File 2175 contains an entirely new section which enumerates the duties and powers of the area agencies on aging. That section provides as follows:

> Each area agency on aging shall:
> 1. Develop and administer an area plan on aging.
> 2. Assess the types and levels of services needed by older persons in the planning and service area, and the effectiveness of other public or private programs serving those needs.
> 3. Enter into subgrants or contracts to provide all services under the plan.
> 4. Provide technical assistance as needed,

prepare written monitoring reports at least quarterly, and provide a written report of an annual on-site assessment of all service providers funded by the area agency.

5. Coordinate the administration of its plan with federal programs and with other federal, state, and local resources in order to develop a comprehensive and coordinated service system.

6. Establish an advisory council.

7. Give preference in the delivery of services under the area plan to elders with the greatest economic or social need.

8. Assure that elders in the planning and service area have reasonably convenient access to information and referral services.

9. Provide adequate and effective opportunities for elders to express their views to the area agency on policy development and program implementation under the area plan.

10. Designate community focal points.

11. Contact outreach efforts, with special emphasis on the rural elderly, to identify elders with greatest economic or social needs and inform them of the availability of services under the area plan.

12. Develop and publish the methods that the agency uses to establish preferences and priorities for services.

13. Attempt to involve the area lawyers in legal assistance activities.

14. Submit all fiscal and performance reports in accordance with the policies of the commission.

15. Monitor, evaluate, and comment on policies, programs, hearings, levies and community actions which significantly affect the lives of elders.

16. Conduct public hearings on the needs of elders.

17. Represent the interests of elders to public officials, public and private agencies, or organizations.

18. Coordinate activities in support of the statewide long-term care resident's advocate program.

19. Coordinate planning with other agencies and organizations to promote new or expanded benefits and opportunities for elders.

20. Coordinate planning with other agencies for assuring the safety of elders in a natural disaster or other safety threatening situation.

Senate File 2175, 71st G.A., 2d Sess. § 1014 (Iowa 1986).

It is a fundamental tenet of administrative law that administrative bodies have only such power as is specifically conferred or necessarily implied from the statutes creating them. Iowa Department of Social Services v. Blair, 294 N.W. 2d 567, 569-70 (Iowa 1980). Administrative agencies to which this principle applies have been defined as any

> [G]overnmental authority, other than a court and other than a legislative body which affects the rights of private parties through either adjudication, rule making, investigating, prosecuting, negotiating, settling or informally acting. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division or agency.

K. Davis, Administrative Law-Cases, Text, Problems 1 (5th ed. 1973). Some examples of administrative agencies, other than those on the state level, are found in Patch v. Civil Service Commission of the City of Des Moines, 295 N.W. 2d 460 (Iowa 1980), Goreham v. Des Moines Metropolitan Area Solid Waste Commission, 179 N.W.2d 449 (Iowa 1970), and Quaker Oats v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862 (Iowa 1978).

In our opinion, the Iowa Lakes Area Agency on Aging possesses many of the attributes of a governmental body insofar as it has the authority to plan the services which will be provided to the citizens within its boundaries, to determine how said services will be made available, and to spend public funds in accordance with the state-approved area plan. The legislature has recognized, however, that there may be different types of area agencies on aging including a unit of a political subdivision, an office specially designated by any combination of political subdivisions or a nonprofit private agency. S.F. 2175 § 1013(2). If the legislature had intended that area agencies be considered purely public bodies, it probably would not have permitted private nonprofit corporations to be so designated. The Iowa Lakes Area Agency on Aging may be seen as a hybrid which combines some of the features of both a public and a private entity.

To the extent to which the area agency is viewed as an administrative agency of the government which may exercise only those powers that are explicitly granted by statute or necessarily implied therefrom, is it permitted to create a wholly-owned for-profit subsidiary corporation for the purpose of selling a form of health insurance to older Iowans? We are unable to discern any provision in either the state statute cited above or the applicable portions of the Older Americans Act which would

authorize such a venture. Similarly, we find that the power to engage in the insurance business does not arise by necessary implication from the enabling legislation. There seems to be, on the contrary, a mandate that the area agencies not engage in providing services directly to the public. See 42 U.S.C. § 3027(10) (1985), S.F. 2175, § 1012(6). Although we have no reason to doubt the value of the insurance which the area agency is attempting to sell, there is no suggestion in your letter that said insurance is unobtainable in the private market.

We note that in analogous situations there is a general prohibition on governmental bodies from pursuing endeavors of this type. Article VIII, section 3 of the Iowa Constitution provides, for example, that "the state shall not become a stockholder in any corporation." The rationale given for such proscriptions is the recognition that if the business ventures should prove to be unsuccessful, any deficit would have to be accounted for out of public funds which raises the possibility of taxation for a nonpublic purpose. We conclude, therefore, that when viewed as a government agency the Iowa Lakes Area Agency on Aging is not authorized to own and operate a subsidiary, for-profit insurance company.

When focusing on the private character of the area agency, it is unarguably true that nonprofit corporations are permitted to own shares in profit-making companies. Iowa Code § 504A.4(7). This particular nonprofit corporation, however, is in a rather unique position in that it is also a creature of state statute and has been delegated with certain public responsibilities. One of the primary responsibilities of the area agency is to serve as an advocate and focal point for the elderly and to provide information and referral services for them. 42 U.S.C. § 3026. Logically, one may assume that the elderly would need advocacy, counseling, and referrals in regard to the insurance field and especially with reference to "medigap" which is health insurance coverage for the elderly to supplement the Medicare program. If the area agency is itself in the business of selling such policies, albeit through a separate organization, we can foresee circumstances in which conflicts may arise between the area agency's advocacy and referral duties and its desire to maximize the profits of its wholly-owned subsidiary. If, for example, a medigap policy is available in the private market at a cost or with benefits superior to the policy sold by A.G.E., Inc., the area agency would have a duty to inform its clients of this fact which could jeopardize its own insurance business.

Even if this type of conflict does not arise, there are other considerations which make the agency's insurance enterprise problematic. One issue concerns whether the acts of the insurance company owned by the area agency creates a risk of potential liability which would be paid from public funds.

Whether such liability would be found to exist depends on the facts of each particular case and is not the proper subject for an attorney general's opinion.

It is our opinion that the area agency has no authority to conduct or own an insurance business in its capacity as a governmental agency. It has no authority to take any action to create the impression that an insurance business is being carried on under any apparent authority as a public body. The name "area agency on aging" should not be used in any way in connection with the insurance business or its advertising. Any actions which suggest governmental backing of the insurance business are also improper.

Even if the insurance business can be sufficiently separated from the area agency so as to not create the impression of apparent governmental authority, the area agency and the Department of Elder Affairs should carefully examine the compatability of this private business with the entity's designation as an area agency.

In conclusion, it is our opinion that the area agency, insofar as it may be considered a governmental agency, has not been delegated the power to conduct an insurance business to sell medigap policies nor may such power be reasonably inferred from the enabling legislation. The Iowa Lakes Area Agency on Aging has a duty to carry out certain advocacy, counseling and referral services which may conflict with its ownership of the insurance agency. The area agency may not take actions which cause it to appear that the insurance business is carried on under governmental authority. Further entities involved should carefully review whether the insurance business is compatible with its role as a quasi-public body.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH OSENBAUGH,
Deputy Attorney General

jb

ELECTIONS: School Districts. Ch. 275: §§ 275.12, 275.18, 275.23A. Ch. 278: § 278.1. Section 275.23A does not authorize additional boundary adjustments of school director districts after adjustment following the federal decennial census. Additional boundary changes must be made through submission to the voters pursuant to the appropriate statutory process. (Pottorff to Ritsema, State Senator, 2-25-87) #87-2-1(L)

February 25, 1987

The Honorable Douglas Ritsema
223 Boston Ave., NE
Orange City, Iowa 51041

Dear Senator Ritsema:

As a state senator, you requested an opinion of the Attorney General concerning changes in boundaries of school districts under Chapter 275 of the Code. You point out that in 1984 the Boyden-Hull Community School District changed the method by which directors are elected. Previously, voters in the Boyden-Hull Community School District elected one director at large from the entire district and four directors from, and as residents of, director districts into which the entire district had been divided on the basis of population. See Iowa Code § 275.12(2)(c) (1985). In 1984, the voters changed methods of election to elect all directors from, and as residents of, director districts. See Iowa Code § 275.12(2)(b) (1985). Under both methods all school directors are elected by vote of the electors of the entire district. Following this change, in 1986 the school district submitted notice of boundary changes to the office of the Secretary of State pursuant to § 275.23A(3). You state that these boundary changes were intended to "simplify the district boundaries and maintain an equitable population distribution." The notice and supporting documents were retained by the Director of Elections but the boundary changes were not approved by the Director of Elections because boundary changes had already been approved pursuant to § 275.23A in May, 1984.

In view of these developments you ask whether a school district, which has within the last five years changed the method by which it elects its directors under §§ 275.12 and 275.35, may change the boundaries of the districts from which the directors are elected by proceeding under § 275.23A(3). In our opinion the Boyden-Hull Community School District may not utilize the procedures under § 275.23A(3) to change the boundaries of the director districts under the circumstances which you describe.

The Iowa Code contains specific statutory procedures for making boundary changes in school districts. The voters are vested by statute with the power to authorize a change of boundaries in director districts. Iowa Code § 278.1(9) (1985) ("The voters at the regular election shall have power to . . . [a]uthorize . . . a change of boundaries of director districts."). See 1974 Op.Att'yGen. 413, 413-14. The board may direct the county commissioner of elections to provide in the regular election for submitting this proposition to the voters. Iowa Code § 278.2 (1985). Submission of this proposition to the voters is mandatory when requested upon petition by a sufficient number of eligible electors. Iowa Code §§ 278.2, 275.36 (1985).

The Iowa Code also contains specific statutory procedures for reorganization of school districts. Iowa Code §§ 275.1 - 275.23 (1985). Any enlargement, reorganization, or change of boundaries under these provisions must similarly be submitted to the voters. Iowa Code § 275.18 (1985).

Section 275.23A presents another, specific statutory procedure for changing school district boundaries under narrowly described circumstances. Unlike the procedures delineated in Chapters 275 and 278, however, voter participation is not required. Instead, boundaries are adjusted by the respective boards of directors to maintain population equality.

School districts which have directors who represent director districts under § 275.12(2)(b)-(e) are required to be divided into director districts on the basis of population as determined from the most recent federal decennial census. These districts shall be as nearly equal as practicable to the ideal population for the districts "as determined by dividing the number of director districts to be established into the population of the school district." Iowa code § 275.23A(1) (1985). Because shifts in population determined by the federal decennial census may affect the continued population equality of these districts, section 275.23A, in part, provides a mechanism for adjustment in the following language:

* * * *

> 2. If following a federal decennial census a school district fails to meet population equality requirements, the board of directors of the school district shall adopt a resolution redrawing the director districts not earlier than November 15 of the year immediately following the year in which the federal decennial census is taken nor

> later than May 30 of the second year immediately following the year in which the federal decennial census is taken. A copy of the adopted plan shall be filed with the area education agency administrator of the area education agency in which the school's electors reside.
>
> 3. The school board shall notify the state commissioner of elections and the county commissioner of elections of each county in which a portion of the school district is located whenever the boundaries of director districts are changed. The board shall provide the commissioners with maps showing the new boundaries. If, following a federal decennial census a school district elects not to redraw director districts under this section, the school board shall so certify to the state commissioner of elections, and the school board shall also certify to the state commissioner the populations of the retained director districts as determined under the latest federal decennial census. Upon failure of a district board to make the required changes by the dates established under this section, the state commissioner of elections shall make or cause to be made the necessary changes as soon as possible, and shall assess any expenses incurred to the school district. The state commissioner may request the services of personnel of and materials available to the legislative service bureau to assist the commissioner in making any required boundary changes.
>
> * * * *

Iowa Code § 275.23A(2)-(3) (1985). Under this language, a school district which fails to meet population equality requirements following a federal decennial census must adopt a resolution redrawing the districts sometime between November 15 of the year immediately following the year in which the census is taken and May 30 of the second year immediately following the year in which the census is taken.

Separate statutory processes for boundary changes should be read in pari materia. See Metier v. Cooper Transport Co., Inc.,

378 N.W.2d 907, 912 (Iowa 1985). Section 278.1(9) generally addresses submission of boundary changes to the voters at the regular election. Section 275.18 generally addresses submission of boundary changes pursuant to reorganization of school districts to the voters at a special election. Section 275.23A specifically addresses adjustment of boundaries by boards of directors following a federal decennial census. We perceive these statutory processes to authorize boundary changes under separate and distinct circumstances. Accordingly, boundary changes should be implemented under the appropriate statutory process for the circumstances presented.

Applying these principles, we conclude that the Boyden-Hull Community School District may not utilize § 275.23A to change boundaries under the circumstances which you describe. The Director of Elections approved boundary changes pursuant to § 275.23A in May, 1984. Further utilization of § 275.23A to adjust boundaries would effectively nullify the companion statutes which require submission of boundary changes to the voters. Sections 275.18 and 278.1(9) expressly confer this power on the voters.

We note that § 275.23A does require the school board to notify the state and county commissioners of elections "whenever the boundaries of director districts are changed." Iowa Code § 275.23A (1985). Reading this language in light of §§ 275.18 and 278.1(9), however, we construe this provision to require notification when another statutory process is used and not to independently authorize boundary changes not otherwise provided for by law.

In our view, therefore, § 275.23A does not authorize additional boundary adjustments until after the next federal decennial census. Rather, boundary changes must be made through submission to the voters pursuant to the appropriate statutory process.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

OPEN MEETINGS; PUBLIC RECORDS; Advisory Committees. Iowa Code § 21.2(1)(a); § 22.1. For a committee appointed by the Governor to be a governing body expressly created by executive order and thus subject to the open meetings law, the body would have to possess more than advisory authority. A committee appointed by the Governor in his official capacity to make recommendations on an issue concerning state government would be a "committee of the state" and subject to the public records law. Committee materials would be public records if they meet the standards set forth in 1982 Op.Att'yGen. 215 -- i.e., they are comprehensible writings developed or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty. (Osenbaugh to Hammond, State Representative, 3-27-87) #87-3-7(L)

March 27, 1987

The Honorable Johnie Hammond
State Representative
State Capitol
L O C A L

Dear Representative Hammond:

You have requested an opinion of the Attorney General regarding the applicability of the Open Meetings and Public Records Laws, in Iowa Code chapters 21 and 22, to an advisory committee appointed by the Governor.

CHAPTER 21 -- OPEN MEETINGS

Your first question is in reference to § 21.2(1)(a) which defines the term "governmental body" for use in Chapter 21. Section 21.2(1)(a) states:

> As used in this chapter, "Governmental body means: a board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

Your first question asks:

> What is an executive order -- what is required of the Governor in order for a board or commission to be established by executive order? Would a letter from the governor (1) inviting individuals to be a part of a commission, (2) setting out specific public policy development as the mission, (3) naming the chairman, and (4) announcing the hiring

> of a consultant to assist the commission in its work be considered an executive order?

Webster's Third New International Dictionary, Unabridged, defines "executive order" as "regulation:"

> A rule or order having the force of law issued by an executive authority of a government usually under power granted by a constitution or delegated by legislation.

The Governor does from time to time issue documents entitled "executive orders" which purport to govern those agencies of the executive branch under the Governor's control. We believe § 21.2(1)(a) would encompass any ruling designated by the Governor as an "executive order." It could also include other written directives from the Governor which purport to have the force and effect of law.

Chapter 21 is applicable only if the entity in question is a "governing body" -- that is, a body which possesses decision-making or policy-making authority. 1980 Op.Att'yGen. 148, 151-153; 1984 Op.Att'yGen. 152 (Op.Att'yGen. #84-8-1(L). A committee whose authority is limited to studying a problem and providing recommendations is not a governmental body subject to the open meetings law. Id. For an entity created by the Governor to be a "governing body expressly created . . . by executive order," the body would have to possess more than advisory authority.

The body you have described in your question has no decision-making or policy-making authority. According to other information you have provided us, it is an advisory committee to help the Governor formulate legislative options.

Therefore, because the commission has no policy-making or decision-making authority and it does not fall within the definition of "governmental body" in § 21.2(1), it is not a governmental body.

The third part of your first question asks:

> Would such a commission be required to hold open meetings and meet other standards in Ch. 21 because of the statement that ambiguity in the construction or application of this chapter should be resolved in favor of openness?

There is no ambiguity in the construction or application of this chapter to an advisory committee. If the commission has no policy-making or decision-making authority, it does not fit within the definition of "governmental body." Chapter 21 only applies to "governmental bodies." Chapter 21 therefore does not apply to the commission which you have described.

CHAPTER 22 -- PUBLIC RECORDS

Your second question refers to Iowa Code Chapter 22, Examination of Public Records, and the contract with the consultant from your first question. Your second question asks:

> Is the contract with the consultant mentioned above a public record? Would the source of funds for paying the consultant have any effect on the availability of the contract to the public, if the Governor made the contract? Are the minutes and documents presented to the commission, or to the consultant for use in preparing those documents, public records, and open for public inspection, even if the above described commission should not be considered a "governmental body" under Ch. 21.2?

Your second question asks whether the several types of information you have described are public records. Iowa Code § 22.1 defines public records to include:

> Wherever used in this chapter, "public records" includes all records, documents, tape or other information, stored or preserved in any medium, <u>of or belonging to this state</u> or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, <u>or any branch</u>, department, board, bureau, <u>commission, council, or committee of any of the foregoing</u>.

(Emphasis added)

The first question is whether the "commission" appointed by the Governor to develop public policy recommendations is a committee of the State to which the public records law applies. This is a different question than whether the commission is a "governing body" under section 21.2 for application of the open

meetings law. We would note that 1986 Iowa Acts, ch. 1246, § 701(4), contained a $15,706 appropriation to the office of the Governor as follows:

> 4. For the payment of expenses of ad hoc committees, councils, and task forces appointed by the governor to research and analyze a particular subject area relevant to the problems and responsibilities of state and local government, including the employment of professional, technical, and administrative staff and the payment of per diem, not exceeding forty dollars, and actual expenses of committee, council, or task force members.

We believe a committee appointed by the Governor in his official capacity "to research and analyze a particular subject area relevant to the problems and responsibilities of state and local government" would be a "committee of the state" within the meaning of section 22.1. See Op.Att'yGen. #84-8-1(L).

Having concluded that chapter 22 applies to such a committee, the next issue is whether the materials described are "public records."

Chapter 22 broadly defines "public records" to include in relevant part "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to . . . any county . . . ." Iowa Code § 22.1 (1985). Every person has the right to examine and copy public records under the supervision of the lawful custodian. Iowa Code §§ 22.2 - 22.3 (1985). The lawful custodian of the public records, in turn, is alternatively defined. The lawful custodian includes the government body currently in physical possession of the public record. The lawful custodian also includes the government body owning a public record when the record is in the physical possession of persons outside a government body. Iowa Code § 22.1 (1985).

Analyzing this statutory scheme under Chapter 68A, the statutory predecessor to Chapter 22, we have previously expressed our view that the legislature did not intend every piece of paper in the possession of a public employee to be available for public inspection. Op.Att'yGen. #79-12-17(L). Indeed, we have observed that the public records law generally does include all "documents" and "records" in possession of public bodies but every piece of paper does not constitute a "document" or "record." 1982 Op.Att'yGen. 215, 220. Rather, these terms refer to "any

comprehensive writing developed and/or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty." Id. at 220.

Although the public records law has been amended since our previous opinions were issued, we do not perceive these amendments as materially affecting the analysis. The scope of a public record has been expanded from "all records and documents" to include "all records, documents, tape or other information stored or preserved in any medium." Compare Iowa Code § 68A.1 (1983) with Iowa Code § 22.1 (1985). We have not opined on the significance of this new language. Even before this new language was added, however, we had recognized that a "record" could exist in forms not limited to paper. See, e.g., Op.Att'yGen. #81-8-20(L) (city addressograph plates constitute public record). A statutory amendment, moreover, can be for the purpose of clarification. See Knight v. Iowa District Court of Story County, 269 N.W.2d 430, 434 (Iowa 1978). In our view the addition of "tape or other information stored or preserved in any medium" merely clarified that records can exist in other forms but did not alter the requirement that the record, in whatever form, reflect a "convenient, appropriate or customary method by which the body discharges a public duty."

Under this test not every piece of paper in the possession of a committee member would constitute a public record. However, official minutes of committee meetings would constitute a public record under this test. A formal contract with a consultant, if in the possession of the State, would be a public record. 1982 Op.Att'yGen. 215, 219. Furthermore, a public official can be the lawful custodian of records in the possession of a third party if the government body has ownership of the record. § 22.1. If the contract is not in possession of the State, we lack sufficient facts to determine whether it would be a public record.

Minutes and documents presented to the commission would be public records if they meet the standard set forth in the prior opinion -- i.e., they are comprehensible writings developed or maintained as convenient, appropriate, or customary methods to carry out public duties.

You also inquire as to "minutes and documents presented . . . to the consultant for use in preparing those documents." Those minutes and documents which are not presented to the commission or to the Governor would likely not be public records because, if not presented to the commission or Governor, they would appear to not be used to discharge their public duties.

We lack sufficient factual information to determine whether any materials in the possession of the consultant would constitute public records.[1]

You also ask whether a source of funds or the definitions of Chapter 21 have any effect on the determination of what constitutes a public record. The answer to both of these questions is no.

The source of funds for paying a consultant would not be the determining factor in the availability of a public record. Chapter 22 applies only to that information which can be defined as public records. The source of funds is not a determining factor in the definitions of Chapter 22. See Op.Att'yGen. #79-5-16(L) (where we responded negatively to the question whether a private, non-profit agency becomes a governmental body under Chapter 21 when supported by public funds).

The determination of what constitutes a public record also does not depend on the existence of a governmental body as defined in Chapter 21. The definition of "public records" in Chapter 22 has developed independently of the definitions in Chapter 21.

In conclusion, for a committee appointed by the Governor to be a governing body expressly created by executive order and thus subject to the open meetings law, the body would have to possess more than advisory authority. A committee appointed by the Governor in his official capacity to make recommendations on an issue concerning state government would be a "committee of the state" and subject to the public records law. Committee materials would be public records if they meet the standards set forth in 1982 Op.Att'yGen. 215 -- i.e., they are comprehensible writings developed or maintained by a public body or official as a convenient, appropriate, or customary method by which the body or official discharges a public duty.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

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[1] Section 22.2(2) provides that "[a] government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions." Again whether this section applies is an issue of fact.

MENTAL HEALTH: Community supervised apartment living arrangements. Iowa Code §§ 135.6(1), 225C.19, 225C.19(1), 252.16(3) (1987); 441 Iowa Admin. Code Ch. 36, §§ 36.2, 36.3(1), 36.7(1), 36.7(2). Approved community supervised apartment living arrangement (CSALA) providers are institutions within the meaning of § 252.16(3). Persons living in residences provided by the CSALA providers are residents of an institution and precluded from acquiring or changing legal settlement. To the extent that the services provided by CSALA providers are essential for persons to operate in a residential setting, the services constitute support by an institution. Such persons are precluded from acquiring or changing legal settlement. (McCown to Norman, Commissioner, Department of Human Services, 3-24-87) #87-3-5(L)

March 24, 1987

Nancy Norman, Commissioner
Iowa Department of Human Services
Fifth Floor, Hoover Building
L O C A L

Dear Commissioner Norman:

Your predecessor Michael V. Reagen requested an opinion regarding legal settlement of those with supervised apartment living arrangements. The following questions were asked:

1. Is a person living in an approved community supervised apartment living arrangement (CSALA) precluded from acquiring or changing legal settlement on the basis of being an inpatient, resident, or inmate of an institution?

2. Does the "provision of a residence" constitute support? If so, are persons living in a CSALA being supported by an institution?

Legal settlement questions are resolved pursuant to the provisions of Iowa Code § 252.16. Iowa Code § 252.16(3) (1987) in pertinent part provides:

> 3. A person who is an inpatient, a resident, or an inmate of or is supported by an institution whether organized for pecuniary profit or not or an institution supported by charitable or public funds in a county in this state does not acquire a settlement in the county unless the person before

> becoming an inpatient, a resident, or an inmate in the institution or being supported by an institution has a settlement in the county....

The underlying questions to be addressed are:

(1) Is an approved community supervised apartment living arrangement (CSALA) provider agency an institution within the meaning of § 252.16(3)?

(2) Is a person living in a CSALA an inpatient, resident or inmate of an institution?

(3) Are CSALA provider agencies providing support within the meaning of § 252.16(3)?

With respect to the question of whether an approved CSALA provider agency would qualify as an institution within the meaning of § 252.16(3), it is our opinion that it does. In 1982 Op.Att'yGen. 510 (#82-8-12(L)), this office concluded that the term "institution" is broadly defined and can include a privately incorporated non-profit agency established to meet the needs of the mentally retarded. In 1964 Op.Att'yGen. 457, this office concluded that a nursing home or similar facility licensed pursuant to a specific provision of the Code is an institution within § 252.16(3) and that the time a person spends in such an institution cannot be counted in determining the one year of residence necessary to establish legal settlement. For similar reasons, an approved CSALA would be determined to be an institution.

Iowa Code § 225C.19 (1987) defines "community supervised apartment living arrangement" to mean the "provision of a residence in a non-institutional setting to mentally ill, mentally retarded, or developmentally disabled adults who are capable of living semi-independently but require minimal supervision." Under Iowa Code § 135C.6(1) (1987) a community, supervised apartment living arrangement is not required to be licensed as a care facility but is subject to approval by the Department of Human Services under § 225C.19 in order to receive public funding. The Department has adopted rules establishing minimum standards. These rules, set forth in 441 Iowa Admin. Code Ch. 36, outline procedures for the approval of providers under this program.

Strictly speaking, community supervised apartment living arrangements are not required to be licensed to operate. Instead approval by the Department of Human Services is required in order to receive public funding. Approved community supervised apartment living arrangements are subject to State standards. We would conclude that approved facilities would fit within the definition of institution within this Code section.

The question then arises whether a CSALA can be an institution given the specific requirement that these arrangements provide residence in a "noninstitutional setting". A CSALA is defined as the "provision of a residence in a non-institutional setting", Iowa Code § 225C.19(1) (1987) (emphasis added). 441 Iowa Admin. Code § 36.2 more specifically defines it as the "provision of, or assistance to secure, a residence ... in a community setting". Dr. Reagen indicated that since a CSALA is defined as the "provision of a residence in a non-institutional setting", that the Department has operated under the assumption that a person would not be precluded from acquiring or changing legal settlement on the basis of being an inpatient, resident, or inmate of an institution. However, the definition of a CSALA should not be interpreted to mean that the residence provided shall not be in an institution. Rather, it should be viewed as a directive that the living arrangements provided by the institution be characteristic of a normal home. The fact that the residence is characteristic of a normal home has no bearing on whether the residence is part of the institution.

The second question is whether a person living in a CSALA is an inpatient, resident or inmate of an institution. CSALA providers may provide assistance to secure a residence or provide a residence. 441 Iowa Admin. Code § 36.2. In other words, there are instances in which a person actually resides in the community supervised apartment living arrangement and those instances in which the provider merely provides assistance to acquire residence. It is our opinion that when the residence is provided by the CSALA provider, the person is a resident of the institution. Under 252.16(3), a resident of an institution is precluded from acquiring or changing legal settlement.

The third question is whether the "provision of a residence" as found in § 225C.19 constitutes support. It is our opinion that the question of whether a specific arrangement constitutes support would be a question of fact. The Attorney General Opinion issued on August 16, 1982, by Assistant Attorney General Mann defined "supported by an institution" as a "phrase of general welfare and includes the provision of food, clothing, shelter and other necessaries of life".

Iowa Code § 225C.19(1) (1987) defines a CSALA as the "provision of a residence in a non-institutional setting to mentally ill, mentally retarded, or developmentally disabled adults who are capable of living semi-independently but require minimal supervision". The rules set forth in 441 Iowa Admin. Code Ch. 36 provide requirements for programs actually providing residence. 441 Iowa Admin. Code § 36.7(1). The rules also indicate that a program which does not provide the residence shall provide assistance to the consumer to obtain a residence which is comparable with those requirements. 441 Iowa Admin. Code § 36.7(2). The providers are to insure that all consumers receive proper nutrition, adequate shelter, clothing, physical and emotional protection, medical care and twenty-four-hour emergency assistance. The provider is also to insure that each consumer receives academic services, community living skills, training, legal services, self-care training, support, transportation, treatment and vocational training. 441 Iowa Admin. Code § 36.3(1).

In those instances where the provision of a residence includes services which are essential for a person to operate in a residence setting, the "provision of a residence" should be interpreted to be "other necessaries of life" and thus support. Under Iowa Code § 252.16(3) (1987), if a person is "supported by an institution", then that person is precluded from acquiring or changing legal settlement.

As discussed above, approved community supervised apartment living arrangement (CSALA) providers are institutions within the meaning of § 252.16(3). Persons living in residences provided by the CSALA providers are residents of an institution and precluded from acquiring or changing legal settlement. To the extent that the services provided by CSALA providers are essential for persons to operate in a residential setting, the services constitute support by an institution. Such persons are precluded from acquiring or changing legal settlement.

Sincerely,

Valencia Voyd McCown

Valencia Voyd McCown
Assistant Attorney General

VVM/jam

SUBSTANCE ABUSE; Costs: Iowa Code §§ 125.43; 125.44; 230.15 (1987). Costs of substance abuse commitments are not included in costs of care, maintenance and treatment. (McGuire to Ritchie, Buena Vista County Attorney, 3-19-87) #87-3-4(L)

March 19, 1987

Mr. Corwin Ritchie
Buena Vista County Attorney
111 West Sixth Street
Storm Lake, Iowa 50588

Dear Mr. Ritchie:

You requested an opinion from this office on several questions pertaining to costs and financial liability for substance abuse commitment. As clarified by our telephone conversation, your questions pertain to the situation in which a substance abuser is committed to a mental health institute for treatment.

I.

> Under Section 230.15 a substance abuser is legally liable for the total amount of the cost of providing care, maintenance and treatment for the substance abuser while a voluntary or committed patient. Does that liability include the costs of commitment which are the referee fee, attorney for respondent, and sheriff's transportation fees?

Iowa Code ch. 125 governs commitment or voluntary admission for substance abuse treatment. This treatment may be rendered in a mental health institute and if so, Iowa Code § 125.43 governs the funding and costs for treatment.

> Chapter 230 governs the determination of the costs and payment for treatment provided to substance abusers in a mental health institute under the department of human services . . . . Section 125.44 governs the determination of who is legally liable for the cost of care, maintenance and treatment of a substance abuser and of the amount for which the person is liable.

Iowa Code § 125.43, amended by 1986 Iowa Acts, ch. 1001, § 10.

There is no definition or determination of what is included in costs of care, maintenance and treatment of substance abusers. Prior opinions of this office have addressed the question of what is included in the costs of "support" under the commitment for mentally ill, ch. 230.

These earlier opinions determined that, in mental illness commitments under ch. 230, the costs of the hearing itself and costs incurred in the investigation resulting in a commitment are obligations of the county and are not reimbursable by the individual liable for the support of the mentally ill person. 1948 Op.Att'yGen. 189; 1966 Op.Att'yGen. 104. Such costs do not constitute "support" of the mentally ill person. 1966 Op.Att'yGen. 104.

Additionally, a recent Attorney General's opinion concluded that, with substance abuse commitments, the expenditures for detention and commitment must be borne by the particular county incurring those expenses and cannot be shifted to another county. Op.Att'yGen. #85-3-1. This determination is based on the fact that ch. 125 is silent pertaining to costs attendant to the commitment of a substance abuser.

From these opinions it would follow that commitment costs would not be construed to be included in costs of care, maintenance and treatment and are county expenses.

Costs for an attorney for the individual are specifically addressed in § 125.78. If an individual cannot afford an attorney, one is appointed at county expense.

II.

> If the substance abuser is a minor, is there any parental liability for any of the above costs? If so, which ones?

The answer to your first question, that the county is liable for commitment costs, negates the need to answer this question whether parents are liable for any of these commitment costs.

III.

> If a minor "substance abuser" is committed on an emergency commitment and, upon hearing, is found not to be a substance abuser, are the costs incurred at the institution from the date of commitment to the date of hearing costs for "care, maintenance and treatment"?

This question seeks clarification as to whether the substance abuser is liable for the costs incurred at the institution

while there on an emergency basis, although subsequently not found to be a substance abuser.

Iowa Code § 230.15 specifies that "a substance abuser is legally liable for the total amount of the cost of providing care, maintenance and treatment for the substance abuser while a voluntary or committed patient." In the fact situation you present, the minor, after a hearing, has not been found to be a substance abuser. See § 125.82(4). Thus, the minor would appear to not be a substance abuser as required for liability to be imposed under § 230.15.

An early Attorney General's opinion addressed a similar question with regards to an unsuccessful mental illness commitment. This opinion stated that "this section [§ 230.15] talks of support of a 'mentally ill person' and we do not feel it contemplates to cover the situation where the commission does not commit the person under investigation." 1966 Op.Att'yGen. 104, 105.

It would follow that an individual who is not found to be a substance abuser would not be liable for the costs incurred during the emergency commitment.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

COUNTY HOSPITALS. Iowa Code §§ 347A.1, 347A.3 (1987). A depreciation fund to cover expenses which need not be paid the same year cannot be established through a tax levy for chapter 347A county hospitals. (McGuire to Murphy, Kossuth County Attorney, 4-30-87) #87-4-6(L)

April 30, 1987

Mr. James E. Murphy
Kossuth County Attorney
P.O. Box 350
Bancroft, Iowa 50517

Dear Mr. Murphy:

You requested an opinion from this office whether a chapter 347A county hospital may levy a tax in order to fund depreciation for future use for capital equipment and building. It is the opinion of this office that such a fund cannot be established through a tax levy for a 347A hospital.

The law governing county hospitals is found in Iowa Code ch. 347 and ch. 347A. You state that Kossuth County Hospital is a ch. 347A hospital, thus governed by ch. 347A.

A ch. 347A county hospital is funded in several ways. The county may issue revenue bonds per § 331.461(1)(e). § 347A.1. These bonds may be issued for the "acquisition, construction, equipment, enlargement, and improvement" of the hospital. § 331.461(1)(e).

Additionally, the board of trustees shall fix charges such that "revenues will be at all times sufficient in the aggregate to provide for the payment of the interest or principal of all revenue bonds issued and outstanding . . . and for payment of all operating and maintenance expenses of the hospital." § 347A.1.

Finally, the county may levy a tax. § 347A.3. This tax may be levied only in circumscribed conditions and at the discretion of the county board of supervisors. The tax may be levied only in the event the revenues are insufficient in any year to pay the operation and maintenance expenses, after the interest and principal due on revenue bonds has been paid. § 347A.3. Proceeds from such a tax levy may only be used to pay expenses of

operation and maintenance which available revenue does not cover.[1] § 347A.3.

Also, the amount of tax which can be levied is limited to that amount needed to pay the operating and maintenance expenses not met by the existing revenues in the year. § 347A.3. The board of trustees must certify to the board of supervisors that the revenues are insufficient "as soon as [it is] ascertained." § 347A.3.

The language of the statute appears to envision a need for a tax levy only after the income from revenue bonds and hospital charges are insufficient "in any year." The tax is to pay for those expenses for the year the revenues are insufficient.[2] Thus, it is to pay for current expenses of the year.

Because the statute provides for a tax levy only when revenues do not cover expenses of the year, a depreciation fund to cover expenses which need not be paid that year cannot be established through a tax levy.[3]

It should be noted that this opinion does not say a ch. 347A hospital cannot have a depreciation fund, only that a tax cannot be levied under § 347A.3 to establish it.

Sincerely,

Maureen McGuire

MAUREEN McGUIRE
Assistant Attorney General

MM:rcp

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[1] This authority to levy a tax differs from the language found in § 347.7 which allows a tax to be levied for the "improvement, maintenance and replacements of the hospital."

[2] Such an interpretation to pay for current expenses is consistent with an early Attorney General's opinion. This opinion defined the term "maintenance" as applied to county hospitals and their authority to levy a tax for "improvement and maintenance." "The word 'maintenance' should be interpreted to mean current expense of the institution." 1928 Op.Att'yGen. 132, 133 (emphasis added).

[3] This opinion assumes that the hospital is not subject to a mandatory depreciation funding requirement.

CITIES; COUNTIES; CRIMINAL LAW: Parking ticket enforcement. Iowa Const. art. I, § 11; Iowa Code §§ 321.236(1) and 805.6(1) (1987); 1986 Iowa Acts, ch. 1238, §§ 14 and 31; Iowa Code §§ 331.655(1)(b), 602.8105(1), 602.8106(5), 602.8109(6), 805.12, and 815.13 (1987). Responsibility for a municipal parking meter or overtime parking violation alleged by simple notice of fine is "denied" when the specified fine remains unpaid after the due date on the parking ticket. Regardless of whether responsibility for the ticket is actively challenged or the ticket is merely ignored, prosecution can be commenced only by filing of a sworn charging instrument. In overtime parking prosecutions the clerk cannot tax against the defendant the costs of service of process on the defendant; in other cases the clerk must tax against the defendant the costs of serving process on the defendant when they are shown in the clerk's file. The prosecuting governmental body is not entitled to reimbursement of costs until they have been paid by the defendant to the clerk. (Smith to Metcalf, Black Hawk County Attorney, 4-29-87) #87-4-5(L)

April 29, 1987

Mr. James M. Metcalf
Black Hawk County Attorney
P.O. Box 2215
Waterloo, Iowa 50704

Dear Mr. Metcalf:

You have requested an opinion of the Attorney General on three questions relating to recovery of the costs of serving process to obtain the appearance of a defendant charged with violating a municipal ordinance. This response is in three corresponding parts.

I.

Your first question concerns procedures for prosecuting a violation of a municipal parking ordinance after failure of a vehicle owner or operator to pay a fine or appear in response to a ticket for overtime parking or a meter violation. You have explained that prosecution of vehicle owners who do not respond to parking tickets placed on their vehicles is more expensive than prosecution of people who appear in response to parking tickets to deny responsibility for alleged parking violations. Those who appear at a district court clerk's office pursuant to instructions on a parking ticket can be requested to sign a promise to appear before a magistrate. Those who do not respond to tickets placed on their vehicles must often be served with

legal process to obtain their appearance before a magistrate in order for prosecution to be effective.

We paraphrase your first question as an inquiry whether Iowa Code §§ 321.236 and 805.6, as amended by 1986 Iowa Acts, ch. 1238, prohibit taxation of the costs of service of process on a defendant convicted of one or more municipal parking meter or overtime parking violations initially alleged by simple notice of fine. You also ask whether a separate complaint must be filed to commence such prosecutions. These sections contain reciprocal cross references specifying court costs of eight dollars in prosecutions of municipal parking violations that are "denied."

It is our opinion that the cost limitations in §§ 321.236(1) and 805.6(1)(a) preclude taxation of costs in excess of eight dollars per appearance in all prosecutions of parking meter and overtime parking violations that were initially alleged by simple notice of fine. A parking ticket may be filed as a complaint if properly verified. Filing a separate complaint does not avoid effect of the cost limitations in sections 321.236(1) and 805.6(1)(a). We reluctantly conclude that the words "court costs" in sections 321.236(1) and 805.6(1)(a) include all costs of prosecution.

We begin explanation of these conclusions by reviewing authority to tax costs of serving process on a defendant in a criminal case. Violation of a municipal ordinance prohibiting overtime parking is a criminal offense in Iowa, unlike some other states. Iowa City v. Nolan, 239 N.W.2d 102 (Iowa 1976). A misdemeanor prosecution can be commenced only by presenting to a court a sworn complaint charging one or more offenses. Iowa Const. art. I, § 11; Iowa Code §§ 801.4 and 804.1 (1987); State v. Phippen, 244 N.W.2d 574 (Iowa 1976). After approving the complaint, the magistrate, clerk, or deputy clerk issues a warrant of arrest or a citation which may be served in the same manner as an original notice in a civil action. Iowa Code § 804.1 (1987); Iowa R. Crim. P. 38. The warrant or citation may be delivered to any peace officer for execution, and served in any county in the state. Iowa R. Crim. P. 38 and 39; Iowa Code § 804.4 (1987). Thus, the sheriff or other peace officer who executes the warrant or serves the citation acts as an officer of the court.

More than a century ago the Iowa Supreme Court approved the taxation of warrant service fees as costs against a convicted defendant. In State v. Hunter, 33 Iowa 361 (1871), defendants convicted after joint trial moved to retax costs because the clerk had taxed each with costs of separate trials. The appellate court ruled that taxation of the sheriff's warrant execution fees should depend on the number of warrants served.

Like Hunter, the few reported decisions from other jurisdictions that have mentioned warrant execution fees generally have approved such fees as costs without identification of statutory authority. Cases are collected in 65 A.L.R.2d 854, 881-886. One court found sufficient authority to tax costs in a statute similar to Iowa Code § 331.655(1)(b), which authorizes sheriffs to charge specified fees plus necessary expenses for warrant service. People v. Hanei, 81 Ill. App. 3d 690, 403 N.E.2d 16 (1980).

The statutory source of authority to tax costs in criminal cases has been the subject of confusion in the past. In Hayes v. Clinton County, 118 Iowa 569, 92 N.W. 860 (1902), the Iowa Supreme Court assumed that cost provisions now codified in Iowa Code ch. 625 authorized taxation of costs against a defendant convicted in a criminal case. However, in City of Cedar Rapids v. Linn County, 267 N.W.2d 673 (Iowa 1978), the Supreme Court held that chapter 625 did not authorize the clerk to tax costs against a city in a criminal prosecution that resulted in dismissal or aquittal of the defendant. The court commented that, contrary to the assumption in Hayes, statutes now codified in chapter 625 had never been applicable in criminal cases, and that the Hayes court should have relied instead on a statute authorizing the clerk to charge and receive in criminal cases the same fees for the same services as in suits between private parties. 267 N.W.2d at 675. Similar language now appears in Iowa Code Supp. § 602.8105(1)(1) (1987). Although fees for executing arrest warrants or serving citations or summonses are not mentioned in § 602.8105(1), that subsection includes a catch-all provision in paragraph "u" which authorizes the clerk to collect "[o]ther fees provided by law." Therefore, § 602.8105(1), paragraphs "1" and "u", in conjunction with § 331.655(1)(b), authorize the clerk to collect process service fees.

Process service fees are also impliedly included in Iowa Code § 815.13 (1987), which states the following:

> The county or city which has the duty to prosecute a criminal action shall pay the costs of depositions taken on behalf of the prosecution, the costs of transcripts requested by the prosecution, and in criminal actions prosecuted by the county or city under county or city ordinance the fees that are payable to the clerk of the district court for services rendered and the court costs taxed in connection with the trial of the action or appeals from the judgment. The county or city shall pay witness fees and

> mileage in trials of criminal actions prosecuted by the county or city under county or city ordinance. These fees and costs are recoverable by the county or city from the defendant unless the defendant is found not guilty or the action is dismissed, in which case the state shall pay the witness fees and mileage in cases prosecuted under state law.

Logically, the sheriff (or other peace officer who serves the process) prepares a fee bill pursuant to § 331.655(1) and submits it to the clerk who collects it from the prosecuting city or county pursuant to § 815.13. Upon conviction, the fee bill is included in the costs taxed against the defendant. This sequence is also consistent with Temporary Court Transition Rule No. 1.17 promulgated by the Iowa Supreme Court.

Logically, the same process for collecting process service fees should apply in a criminal prosecution for overtime parking violations that have become delinquent. It would be reasonable to assume that a defendant convicted of overtime parking violations should be responsible for costs of serving process after tickets have become delinquent. Such assumption would be consistent with legislative recognition of the problem of delinquent traffic tickets in §§ 321.40 and 321.236(1)(c), which provide for refusal to renew a vehicle registration in certain counties if a warrant is outstanding for the registered owner's arrest for a traffic violation.

Unfortunately, there is no evidence that the General Assembly considered the problem of delinquent parking tickets when enacting statutes that authorize prosecution of municipal overtime parking violations and specify court costs.

Iowa Code § 321.236(1), as amended by 1986 Iowa Acts, ch. 1238, § 14,[1] authorizes municipalities to regulate the standing or parking of vehicles. Subsection 1, in pertinent part, authorizes charging of municipal parking meter and overtime parking violations as follows:

> Parking meter and overtime parking violations which are denied shall be charged

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[1] The 1986 amendment of § 321.236(1) inserted the reference to overtime parking violations, clarifying that parking meter violations and overtime parking violations are alike. The 1986 amendment also added the phrase: "court costs shall be assessed as provided in section 805.6, subsection 1, paragraph 'a' for parking violation cases."

> and proceed before a court the same as other traffic violations and court costs shall be assessed as provided in section 805.6, subsection 1, paragraph "a" for parking violation cases. Parking violations which are admitted:
>
> a. May be charged and collected upon a simple notice of fine not exceeding five dollars payable to the city clerk or clerk of the district court, if authorized by ordinance. No costs or other charges shall be assessed. All fines collected by a city pursuant to this paragraph shall be retained by the city and all fines collected by a county pursuant to this paragraph shall be retained by the county.
>
> b. Notwithstanding any such ordinance, may be prosecuted under the provisions of sections 805.7 to 805.13 or as any other traffic violation.

Iowa Code § 805.6(1)(a), first unnumbered paragraph, as amended by 1986 Iowa Acts, ch. 1238, § 31,[2] provides for charging of costs in parking cases as follows:

> The court costs in cases of parking violations which are denied, and charged and collected pursuant to section 321.236, subsection 1, are eight dollars per court appearance, regardless of the number of parking violations considered at that court appearance . . . .

Our analysis of these two statutes focuses on the words "charged," "charging," and "denied." These words must be interpreted according to the context and approved use of the language. Iowa Code § 4.1(2) (1987). The words "charged" and "charging" have two meanings in these statutes. First, parking violations are "charged" upon a simple notice of fine only in the sense that they are alleged. An officer observes a vehicle parked overtime. If the operator is present the officer may choose to issue a police citation on a uniform citation and

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[2] The 1986 amendment of § 805.6(1) added language clarifying that the cost provision applies only in cases of parking violations which are "denied and charged and collected pursuant to section 321.236, subsection 1." The amendment also added the language clarifying that costs are assessed for each appearance regardless of the number of parking violations considered.

complaint form as authorized by § 321.236(1)(b). If the operator is not present, a simple notice of fine is issued. If the violation alleged by the simple notice of fine is admitted by payment on or before the due date, there is no prosecution.

If the fine is not paid by the due date, the ticketing authority decides whether to prosecute. Prosecution is commenced by filing a complaint which may be in the form of a properly verified parking ticket. The expense of prosecuting violations not "admitted" is increased when process must be served to bring the defendant before a court. Has a vehicle owner "denied" twenty alleged parking violations by stuffing each parking ticket in the vehicle glove compartment and then ignoring it?

The meaning of the word "denied" in §§ 321.236(1) and 805.6(1)(a) is ambiguous. The dictionary definitions of "deny" suggest that denial by passive failure to challenge is a less common usage than active rejection. For example, Webster's Third New International Dictionary (unabridged 1967), lists the following synonyms: gainsay, contradict, negative, traverse, impugn, and contravene. The commentary suggests that denial can include less active forms of rejection, i.e.:

> "Deny" implies a refusal, usually outspoken, to accept as true, to grant or concede, or to acknowledge the existence or the claims of . . . .

To resolve the ambiguity of the word "denied" in §§ 321.236(1) and 805.6(1)(a), we consider the object sought to be attained and the consequences of alternative constructions. Iowa Code § 4.6 (1987). The eight dollars in court costs imposed by § 805.6(1)(a) are retained by the State pursuant to §§ 805.12 and 602.8106(5). The General Assembly clearly intended for court costs to be taxed in every traffic prosecution to help defray the expense of operating the court system. The General Assembly could reasonably decide that the expense to the court system for adjudicating numerous alleged parking violations in one proceeding involving one defendant would not be significantly greater than the expense of adjudicating one violation. Taxation of eight dollars court costs for each violation considered in one appearance might not be justified considering the summary nature of parking violation prosecutions. The obvious object sought to be attained by fixing court costs "per appearance" rather than "per violation" is to make costs more accurately reflect expenses of providing court services. We thus conclude that the General Assembly intended the court costs to be eight dollars per appearance in prosecution of all overtime parking violations that were initially alleged by simple notices of fine.

We are unable to find any authority for a contention that "court costs" in §§ 321.236 and 805.6 are a sub-species of "costs" from which process service costs are excluded. On the contrary, officers who execute warrants or serve citations issued by magistrates or clerks perform services as officers of the court. The legislature simply appears to have failed to qualify the cost limitation in § 805.6(1)(a) to allow fees for serving a warrant or citation to be taxed as costs upon the defendant's conviction. Additional legislation is needed to authorize recovery of process service costs in municipal overtime parking prosecutions.

II.

Your second question is whether a defendant is responsible for payment of costs not shown in the clerk's file at the time the defendant appears to pay the fine and costs. Your question cites the example of costs of serving process to obtain the defendant's appearance. Our answer to your first question explained that costs of service of process cannot be taxed against the defendant in a prosecution for parking violations initially alleged by simple notice of fine. In cases where the clerk is authorized to tax process service costs against a convicted defendant, we can find no provision limiting the clerk from taxing additional costs until all authorized costs have been taxed. The Iowa Rules of Criminal Procedure do not include provision for a motion to retax costs analogous to § 625.16. But we assume a magistrate would have jurisdiction to hear a defendant's motion to retax if the clerk taxed excessive costs.

III.

Your third question is whether the clerk of the district court must reimburse a city costs for service of process on a defendant for violations of city ordinances, before the defendant has paid such costs. Your question cites Iowa Code § 815.13 (1987) which requires a prosecuting city or county to pay prosecution costs in a criminal action. We have opined in answer to your first two questions that officers' fees for service of process generally are recoverable under § 815.13 upon being taxed as costs. We are unable to find any duty of the clerk of the district court to reimburse costs to a prosecuting city except pursuant to § 602.8109(6) (1987). That duty is only to pay "amounts collected by the clerk as costs in an action when these amounts are payable by law to the city as reimbursement for costs incurred by the city in connection with a civil or criminal

action." Thus, the clerk's duty is to pay over those reimbursable costs actually collected from the defendant.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

MUNICIPALITIES: Utility Boards; Elections; Appointment of Officers. Iowa Code §§ 63.1, 63.7, 69.1, 388.3 (1987). A city utility board member may hold over following the expiration of a statutory term until the confirmed appointment of a successor and is entitled to fully participate in those affairs of the board. (Dorff to Poncy, State Representative, 4-23-87) #87-4-4(L)

April 23, 1987

The Honorable Charles N. Poncy
State Representative
State Capitol
L O C A L

Dear Representative Poncy:

You have requested an opinion of the Attorney General concerning mayoral appointments to city utility boards. The question you pose is whether a city utility board member has a right to sit and fully participate in the affairs of the board beyond the expiration of a statutory term and until the confirmed appointment of a successor. You indicate that your question concerns mayoral appointments to the Ottumwa Water Works Board.

We begin by noting that city utilities are governed by Iowa Code chapter 388 (1987). As relevant to your question, section 388.3 provides that "the mayor shall appoint the board members . . . subject to the approval of the council," and "[t]he council shall by resolution provide for staggered six-year terms for . . . board members." Section 388.3 thus defines both the duration of a utility board member's term and provides a procedure for replacing members as their terms expire.

Your question, however, is addressed to a situation where a board member's term expires, and a confirmed appointee is not immediately available to fill the expired term member's position. We note that chapter 388 does not expressly authorize a member to hold over beyond the expiration of a term until such time as a successor is appointed and confirmed. Neither does it prohibit the member from doing so, however. The answer to your question must therefore lie outside of chapter 388.

Iowa Code section 69.1 (1987) states:

> Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until a successor is

> elected and qualified, unless the officer resigns, or is removed or suspended, as provided by law.

Section 69.1 would appear to apply to city utility board members since they are "appointed for a fixed term." Certainly nothing in either chapter 69 or chapter 388 indicates a legislative intent to prohibit application of section 69.1 to situations involving city utility board members.

It could be argued, however, that section 69.1 applies only to offices which are elective in the first instance since the statute declares that the incumbent holds over until his successor is "elected and qualified." (emphasis added). After all, the statute does not read "elected or appointed and qualified." (emphasis added). This limited reading of section 69.1 has been rejected by two earlier opinions of the Attorney General, however. See 1980 Op.Att'yGen. 330; 1976 Op.Att'yGen. 220. The 1976 opinion addressed the question of whether section 69.1 applied to appointive positions on the Natural Resources Council. The opinion held that two incumbents were entitled to hold over under section 69.1 until their successors were legally qualified to take office even though one of the renominations was expressly rejected by the Senate. The 1980 opinion addressed the question of whether section 69.1 applied to appointive positions on the Board of Chiropractic Examiners. The opinion fell short of holding that section 69.1 applies to appointive positions, but expressed reluctance to "overturn the Attorney General's established interpretation of § 69.1." 1980 Op.Att'yGen. at 332. It went on to state that "even if the statute is given a more narrow reading than the 1976 opinion adopts, we believe an Iowa court would find that appointed officials may hold over in office pending selection of a successor under common law authority." Id.

We concur with the Attorney General's earlier interpretations of section 69.1 and find them persuasive in the context of the question posed here. While we in no way imply that the terms "elected" and "appointed" are synonymous, we believe an Iowa court would find that a city utility board member may hold over in office pending selection of a successor under common law authority. "The common law abhors vacancies in office because of the potential paralysis of government functions that could result." 1980 Op.Att'yGen. at 332. See also 3 McQuillin, The Law of Municipal Corporations § 12.105, p. 410 (3rd rev. ed. 1983). Accordingly, "it has been held that an officeholder for a fixed term may hold over at least as a de facto officer until his or her successor qualifies for office, notwithstanding the lack of express statutory authorizations." 1980 Op.Att'yGen. at 332.

See also 3 McQuillin, The Law of Municipal Corporations § 12.105, p. 410 (3rd rev. ed. 1983).

As in our 1980 opinion, we again stress that a person may not hold over in office indefinitely, but only for a reasonable time until a successor can be selected and qualified. See 1980 Op.Att'yGen. at 332. The appointment process cannot be indefinitely frustrated by a refusal to appoint a successor. Id. Where the executive is intransigent, an action in mandamus may lie to compel an appointment. Id.; see also 3 McQuillin, The Law of Municipal Corporations § 12.89, p. 361 (3rd rev. ed. 1983). The law similarly requires the use of good faith in refusing to confirm. 3 McQuillin, The Law of Municipal Corporations § 12.87, p. 357 (3rd rev. ed. 1983).

This does not conclude our analysis of section 69.1, however. Section 69.1 further states that an appointed officer is entitled to hold office until a successor is "qualified." The term "qualified" is not defined by section 69.1. Under Iowa Code section 63.1 (1985), however, an officer qualifies by "taking the prescribed oath" and, when required, giving a bond. In addition, a successor may be required under local statute or ordinance to fulfill residency or age requirements, or other conditions, in order to "qualify" for office. We therefore believe that a "qualified" successor to a city utility board position is one who has taken the prescribed oath of office, given bond if required, and fulfilled such other conditions as are necessary to qualify under local rule.

In summary then, it is our opinion that a city utility board member is entitled to hold office until a successor is appointed by the mayor, approved by the city council, and "qualified" by the taking of the prescribed oath, the giving of a bond if required, and the fulfillment of conditions necessary to qualify under local rule.[1] This brings us to the question of the extent to which a holdover city utility board member may participate in the "affairs" of the utility board.

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[1] We note that holdover appointive officers are required to "qualify anew, within the time provided by section 63.8." Iowa Code § 63.7 (1985). Iowa Code section 63.8 (1985) provides that holdover offices "shall qualify within ten days from . . . [a] failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices." (emphasis added). Thus, a holdover utility board member may be required to renew the prescribed oath of office and provide further bond, if necessary, in order to "qualify anew" under section 63.8. See Iowa Code § 63.1.

Even if section 69.1 were more narrowly construed and the holdover were merely a de facto officer, see 1980 Op.Att'yGen. at 332, the holdover would be able to fully participate in the duties of the board. "The acts of an officer de facto, although his title may be bad, are valid so far as they concern the public or third persons who have an interest in the thing done." Id., § 12.106, p. 411; see also Walker v. Sears, 245 Iowa 262, 266-67, 61 N.W.2d 729, 731 (1953); State v. Central States Electric Co., 238 Iowa 801, 818, 28 N.W.2d 457, 466 (1947). "He is clothed with all the rights and powers he would have enjoyed as a de jure officer, hence his acts are as valid as those of a de jure officer." 3 McQuillin, The Law of Municipal Corporations § 12.106, p. 411 (3rd Ed. 1982). This rule is one of public policy, stemming from a general recognition that "the public interest requires that public offices should be filled at all times without interruption." Id., § 12.105, p. 410.

Accordingly, it is our opinion that a utility board member may hold over after the expiration of a statutory term, and until the confirmed appointment of a successor and is entitled to fully participate in those "affairs" of the board.

Sincerely,

David L. Dorff by EMO

DAVID L. DORFF
Assistant Attorney General

DLD:rcp

GENERAL SERVICES, RACING COMMISSION: Location of Racing Commission offices. Iowa Code §99D.6 (1987). The Department of General Services must provide the Gaming Division of the Iowa Department of Commerce office space for its headquarters within the corporate limits of the City of Des Moines. (Hayward to Ketterer, 4-23-87) #87-4-3(L)

April 23, 1987

Mr. Jack P. Ketterer
Administrator
Iowa State Racing Commission
1918 S.E. Hulsizer Avenue
Ankeny, Iowa 50021

Dear Mr. Ketterer:

You have asked for the opinion of this office concerning the application of Iowa Code §99D.6 (1987) on the location of the headquarters of the Racing Commission. Section 99D.6 states in pertinent part:

> The division shall have its headquarters in the city of Des Moines . . . .

The word division refers back to the Gaming Division of the Department of Commerce mentioned earlier in the section. This is consistent with Iowa Constitution, art. XI, §8, which delineates the City of Des Moines as the seat of government. The Iowa Constitution does not require all state agencies to be located in Des Moines, however, the General Assembly may do so by statute. See, e.g., 68 Op. Att'y Gen. 507.

The question is whether, in light of Iowa Code §99D.6 (1987), the Racing Commission can have its headquarters in Ankeny, a noncontiguous suburb of the City of Des Moines. It is our opinion that such an arrangement is a violation of the law.

The language of §99D.6 in this regard is clear and unambiguous. The "headquarters" of the Gaming Division of the Iowa Department of Commerce, which includes the administrative offices of the Iowa State Racing Commission, must be within the corporate limits of the City of Des Moines. There is no room for

artful construction to the contrary. See, **LeMars Mut. Ins. Co. of Iowa v. Bonnecroy**, 304 N.W.2d 422 (Iowa 1981) (Rules of statutory construction resorted to only when terms of the statute are ambiguous; Legislature presumed to intend to mean what is said, not what it could have said).

The word "headquarters" is to be given its meaning in common usage, Iowa Code §4.1(2) (1987), which is "the main office or center of control." **Websters New World Dictionary**, p. 644 (2d College Edition 1972). Thus a token presence in the City of Des Moines will not satisfy the requirements of the statute. On the other hand, there is no prohibition on the agency establishing satellite offices as are deemed necessary or expedient for its operations.

It is the responsibility of the Department of General Services to provide the Gaming Division of the Iowa Department of Commerce with office space within the City of Des Moines. The location of such space within that city is determined by the Department of General Services. Iowa Code §18.8 (1987).

Respectfully yours,

Gary Hayward

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

COUNTY OFFICIALS: RECORDER AND AUDITOR: Name changes. Iowa Code Supp. §§ 674.14, 331.507(2)(b) and 331.602(42) (1985); Iowa Code § 331.604 (1985). A name-change decree transmitted to the county recorder by a district court clerk should be indexed and recorded in the same manner as a deed except that indexing notations should identify the instrument as a change of name. (Smith to Murphy, Kossuth County Attorney, 4-13-87) #87-4-2(L)

April 13, 1987

Mr. James E. Murphy
Kossuth County Attorney
P.O. Box 350
Bancroft, Iowa 50517

Dear Mr. Murphy:

You have requested an opinion of the Attorney General concerning the proper method for the County Recorder to use when indexing a change of name under Iowa Code § 674.14. By comparing a former version of chapter 674 with a 1985 amendment of § 674.14, we find legislative intent that name-change decrees be recorded and indexed in the same manner as instruments transferring title to real estate.

The General Assembly rewrote chapter 674 in 1972 Iowa Acts, ch. 1129. The 1972 revision eliminated a statute that specified procedures for indexing a name change. That statute, in pertinent part provided the following instructions for indexing a name change:

> [The county recorder] shall index the same, both under the former name and under the new name as changed or adopted, in the manner of indexing transfers of real estate, and enter opposite thereto the description of real estate as found in such statement; such indexing shall be in the index of transfers of land or town property according to the description of said real estate, or both as the case may be. The index shall also show the serial number of such [name change document] and book and page where same is recorded in the office of the clerk of the district court, and the words "change of name" shall be written on said index in red ink, at or opposite to the name.

Iowa Code § 674.6 (1971). Since the 1972 revision, chapter 674 has not contained any indexing instructions. Changes made by revision of a statute will not be construed as altering the law, unless the legislature's intent to accomplish a change in its

meaning and effect is clear and unmistakable. Kelly v. Brewer, 239 N.W.2d 109, 114 (Iowa 1976).

The failure of the 1972 revision to specify a different indexing method implies a legislative intent that name changes should continue to be indexed in the same manner as instruments transferring title to real estate. Moreover, a 1985 amendment indicates legislative intent that name-change decrees also be recorded in the same manner as deeds. Iowa Code § 674.14, as amended by 1985 Iowa Acts, ch. 159, § 12, states the following:

> The county recorder and county auditor of each county in which the petitioner owns real property shall charge fees in the amounts specified in sections 331.604 and 331.507, subsection 2, paragraph "b", for indexing a change of name for each parcel of real estate.

The reference to § 331.604 implies that the recorder's fee is for recording an instrument affecting title to real estate rather than just for indexing. The reference to § 331.507(2)(b) is for indexing done by the auditor for each affected parcel of real estate. The recorder's duty to index name changes is also mentioned in Iowa Code Supp. § 331.602(42) (1985), which refers to § 674.14. This section is not inconsistent with the additional duty to record implied in § 331.604. The fee for indexing and recording should be the same as if the instrument were a deed.

In conclusion, it is our opinion that a name-change decree should be recorded and indexed in the same manner as a deed except that indexing notations should identify the instrument as a change of name.

You have also asked whether chapter 674 is the exclusive authority for a district court to authorize a name change. We decline to answer that question because the Attorney General lacks authority to issue binding opinions concerning judicial powers.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:mlr

JUVENILE LAW: Processing of Complaints Alleging Delinquency. Iowa Code §§ 232.2(24), 232.2(25), 232.28(1)-(8), 232.35, 232.35(2), 232.35(3), 331.756 (1987). The juvenile code contemplates that the receipt and initial processing of delinquency complaints is a function of juvenile court officers. Nothing in this statutory scheme precludes a law enforcement officer from conferring with the county attorney at any time. (Phillips to O'Brien, State Court Administrator, 5-20-87) #87-5-4(L)

May 20, 1987

William J. O'Brien
State Court Administrator
State Capitol
Des Moines, Iowa 50319

Dear Mr. O'Brien:

You have presented this office with the question of whether a juvenile delinquency complaint filed by a citizen with a law enforcement officer should be forwarded to the juvenile court officer who has been designated under Iowa Code § 232.28(1) (1987) to receive such complaints, or whether the complaint should be presented to the county attorney before the juvenile court becomes involved.

The answer to your question is somewhat difficult. While the Code outlines a scheme for handling juvenile delinquency complaints, that scheme does not contain two features which are posited by your question: 1) the involvement of law enforcement officials, as a conduit between the citizen complaint-filer and the juvenile court system; 2) a legal assessment of the situation by the county attorney prior to the formation of a complaint. Generally, the question you propose deals with how the complaint-receiving system works prior to the time at which the scheme outlined by the Code commences. Nevertheless, an examination of the scheme outlined by the Code is of use in resolving this question.

The statutory scheme to which I have been referring essentially consists of Iowa Code sections 232.28 - 232.35 (1987). Under that scheme, "any person having knowledge of the facts" may file "a report" with the juvenile court or its designee alleging that a child has committed a delinquent act. Iowa Code § 232.28(1) (1987). Presumably, "any person having knowledge of the facts" could be either a law enforcement officer or a private citizen. The report being filed here is clearly a complaint as the latter

term is defined as "an oral or written report which is made to the juvenile court by any person". Iowa Code § 232.2(8) (1987). A written record is to be made of all oral complaints. Iowa Code § 232.28(1) (1987).

After receipt of a complaint, the juvenile court or its designee refers the matter to an intake officer. Iowa Code § 232.28(2) (1987). The intake officer and the designee for receiving complaints are apparently two different officials. An intake officer has the duty to preliminarily screen complaints to "determine whether the court should take some action and, if so, what action". Iowa Code § 232.2(24), (25) (1987). In conducting a "preliminary inquiry" the intake officer may consult with law enforcement officials, and is specifically empowered to interview witnesses, check court records, examine physical evidence, and hold meetings with interested parties. Iowa Code § 232.28(3)(a)-(e) (1987). If necessary, he or she may consult with the county attorney. Iowa Code § 232.28(6) (1987). The ultimate purpose of this preliminary screening or intake is to determine whether or not the complaint is legally sufficient for filing a petition and whether the filing of a petition is in the best interest of society or the child. Iowa Code § 232.28(6) (1987).

If the complaint is legally sufficient for filing a petition and the filing of a complaint would be in the best interest of the child and the public, the intake officer may request the county attorney to file a petition. Iowa Code §§ 232.28(4) (1987) and 232.35(2) (1987). A county attorney's decision not to file is final. Iowa Code § 232.35(2) (1987).

If the intake officer determines that the complaint is legally sufficient for filing a petition, but that an informal adjustment of the matter is in the best interest of the youth and the community, he or she may pursue that course of action. Iowa Code § 232.28(8) (1987).

If the intake officer decides that the complaint is not legally sufficient, or that the filing of a petition is not in the best interests of the child or the public, he or she may dismiss the complaint. Iowa Code § 232.28(7) (1987). If the complainant appeals that dismissal, the county attorney may overrule the intake officer and reinstate the complaint. Iowa Code § 232.35(3) (1987). If the complainant does not appeal, the decision is final. Id.

Under the statutory scheme described above, juvenile court employees have the primary responsibility for the receipt of complaints and their initial processing and investigation. The

fact that they are to maintain a record of all oral complaints suggests that at some point all complaints, baseless or otherwise, should reach the juvenile court.

Under this scheme, the role of the county attorney is to control the process by which complaints become petitions. He or she has two official functions in fulfilling this process. First, the county attorney is to consult with the juvenile court officer when the latter is deciding whether a complaint is legally sufficient to form the basis for a petition. Second, the county attorney may overrule decisions to file petitions with which he disagrees.

If the above analysis was the only relevant one here, the answer to the issue in question would be simple. The answer would be that the Code contemplates that complaints be referred to the juvenile court, as the juvenile court is assigned the complaint receiving and processing tasks under the Code, whereas the county attorney is essentially charged with controlling which complaints become petitions.

However, this analysis isn't the only one of relevance here. As noted earlier, this statutory scheme doesn't really deal with what happens before the filing of a complaint, or what happens when a complaint is first made to a law enforcement officer. Furthermore, the role of the county attorney is to be analyzed in light of not only that officer's role under the juvenile code, but also in light of that officer's more generalized functions with regard to law enforcement. Those functions are somewhat difficult to define, but it may safely be said that the county attorney occupies a leadership position with regard to the local law enforcement officials. In addition, it may be said that he or she often must function as their legal adviser. See generally Iowa Code § 331.756 (1987) (county attorney is to give legal advice to county officials). The point to be taken here is that it is normal and proper for law enforcement officers to consult with the county attorney as to legal problems that arise in the course of their job. This factor must also be taken into consideration in answering your question.

When that factor is considered along with the statutory scheme described earlier, the following answer to your question is suggested. First, the juvenile code contemplates that the receipt and initial processing of complaints is a function of juvenile court officers. That holds true whether the complainant is a citizen or law enforcement official. Under the juvenile code, the juvenile court has the authority to investigate the complaint and either informally adjust it, or make certain non-final decisions with regard to filing a petition in the

matter. The county attorney makes the final decision as to whether a petition is filed. Nothing in this system precludes a law enforcement official from conferring with the county attorney about a case at any point in time. However, a systematic exclusion of certain complaints from juvenile court processing system would seem to be inconsistent with the statutory scheme in general, and with the specific requirement that the juvenile court keep a list of all oral complaints.

Sincerely,

Charles K. Phillips

Charles K. Phillips
Assistant Attorney General

CKP/jam

REAL PROPERTY; HIGHWAYS; CONSERVATION: Roadside trapping. Iowa Code §§ 109.92, 306.4 and 320.4 (1987). The owner, contract purchaser, or lessee who controls land that is subject to a public road easement may prohibit trapping of animals within the road right of way. (Smith to Pellett, State Representative, 5-20-87) #87-5-3(L)

May 20, 1987

The Honorable Wendell C. Pellett
State Representative
206 East 21st St.
Atlantic, Iowa 50022

Dear Representative Pellett:

You have requested an opinion of the Attorney General on the question whether the public has a right to trap on privately-owned land within the boundaries of a public road right-of-way easement. Stated otherwise, your question is whether public trapping is impliedly within the scope of an easement acquired by the State or a county to construct and maintain a highway for public use.

Your question is relevant to trapping along thousands of miles of Iowa's roads because many secondary and primary highways are maintained on private land. The private owner retains fee title to the land, subject to a public highway easement. Distinguishing "easement" right of way from "fee title" right of way would necessitate a search of records of the county recorder or the public authority that is responsible for maintaining the right of way.[1]

As mentioned in your opinion request, the Nebraska Attorney General recently opined that permission to trap on an "easement" road right of way must be obtained from the owner of the fee title to the land. Neb. Op.Att'yGen. #87024. It is our opinion that Iowa law requires the same conclusion.

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[1] Iowa Code § 306A.5 provides that when real estate interests are purchased for a controlled-access highway, all property rights acquired shall be in fee simple. The Iowa Department of Transportation still acquires easements for most non-controlled-access road projects outside cities. Likewise, most county boards of supervisors continue to purchase easements for secondary road projects.

More than a century ago the Iowa Supreme Court addressed the limited scope of a public highway easement as follows:

> A street or highway is an easement, which comprehends only the right of every individual in the community to pass and repass over the same, with the incidental right of the public to do all things necessary to keep it in repair.

City of Dubuque v. Maloney, 9 Iowa 450 (1859). In the same year, the Court declared that when the public acquires a road right of way, the right of property in the soil and in the herbage thereon belongs to the owner of the soil. Deaton v. Polk County, 9 Iowa 594 (1859). The right of the public highway agency to control vegetation within an easement right of way is dependent on the need to control vegetation for maintenance and use of the roadway. Rabiner v. Humboldt County, 224 Iowa 1190, 278 N.W. 612 (1938). Conversely, the title to the land and all the profits to be derived from it, consistent with and subject to the easement, remain in the owner of the soil. Overman v. May, 35 Iowa 89, 97 (1872); 1980 Op.Att'yGen. 417 (#79-9-21).

In light of Iowa case law limiting the scope of public highway easements and the lack of connection between trapping and public transportation, public road right-of-way easements cannot be stretched to impliedly include a right of the public to trap animals, absent legislative authorization.[2]

The next step in our inquiry is to examine whether the General Assembly has modified the common law. The General

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[2] Appellate courts in two midwestern states have enjoined hunting of certain species of game birds on easement roads. In Ruten v. Wood, 79 N.D. 436, 57 N.W.2d 112 (1953), the court upheld an injunction that prohibited hunting of geese flying over the easement road. The court cited the Minnesota "duck pass" cases, e.g., L. Realty Co. v. Johnson, 92 Minn. 363, 100 N.W. 94 (1904), in which the court held that the public in accepting an easement for highway purposes acquired no right to hunt game while it was passing to and fro across the highway. These cases did not involve circumstances now common along Iowa road rights of way, i.e., where the only nesting and denning habitat is in the road right of way, and that habitat exists only by virtue of the easement which requires ditches and embankments that cannot practically be planted to row crops. Despite such factual differences, these cases provide persuasive support for the conclusion that an easement for public road purposes does not include the right of public trapping, at least in the absence of a legislative declaration.

Assembly has delegated jurisdiction over public roads according to their classification. Iowa Code § 306.4 (1987). Nothing in that delegation of jurisdiction purports to enlarge its scope beyond public transportation purposes. Iowa Code § 320.4 (1987) does authorize some uses of road rights of way that require a broader view of the public right of passage than the Iowa Supreme Court held in the Nineteenth Century. Section 320.4 delegates to the Iowa Department of Transportation and county boards of supervisors authority to permit the following activities in road rights of way:

> 1. To lay gas mains in highways outside cities to local municipal distributing plants or companies, but not to pipeline companies. This section shall not apply to or include pipeline companies required to obtain a license from the utilities division of the department of commerce.
>
> 2. To construct and maintain cattleways over or under such highways.
>
> 3. To construct sidewalks on and along such highways.
>
> 4. To lay water mains in, under, or along highways.

None of those activities encompass a public right to trap animals. Moreover, each of them is related to a public purpose, e.g., a water main transports an essential substance. Consideration of the extent of legislative power to create such an exception would be outside the scope of your opinion request.[3] Likewise, although Iowa Code chapters 109 and 110 contain delegations of authority to the Iowa Department of Natural Resources to regulate trapping, nothing in those chapters purports to create a public right to trap on private land. See, e.g., §§ 109.87, 109.92 and 110.1 (1987).

House File 395, introduced during the 1987 regular session of the General Assembly, would have amended Iowa Code ch. 109 (1987) by imposing restrictions on roadside trapping. The House

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[3] Section 320.4 does not distinguish between "easement" highways and "fee title" highways. The authority of the General Assembly to declare the activities enumerated in § 320.4 within the scope of a public highway easement appears to have been assumed in cases arising under that section. See, e.g., Schwarzkopf v. Sac County Board of Supervisors, 341 N.W.2d 1 (Iowa 1983).

and Senate approved different versions of H.F. 395, and a conference committee report was not adopted. The House version included a provision that would have amended Iowa Code § 109.92 (1987) by adding the following new paragraph:

> Conibear type traps and snares shall not be set on the right-of-way of a public road within one hundred yards of the entry to a private drive serving a residence without the permission of the occupant.

Such language, if enacted, would not necessarily be inconsistent with the requirement of obtaining landowner permission for any type of trapping on a road right-of-way easement. The General Assembly has the power to restrict roadside trapping to protect wildlife and promote public safety, e.g., to protect pedestrians walking in road ditches. But any such restriction on use of certain types of traps in certain roadside areas should not be interpreted as an implied authorization for other public trapping on road right-of-way easements.

In conclusion, it is our opinion that the owner, contract purchaser, or lessee who controls land that is subject to a public road easement may prohibit trapping of animals within the road right of way.

You have also asked whether a trapper would be liable for damages caused by roadside trapping. We decline to predict how issues concerning tort liability would be decided by courts. Plainly, an individual who places traps on a public right of way could be subject to liability for resulting harm to another person or damage to property, depending on the factual circumstances.

Sincerely,

Michael H Smith

MICHAEL H. SMITH
Assistant Attorney General

MHS:rcp

ADMINISTRATIVE AGENCIES; Schools; Board of Nursing; Educational requirements for nursing instructors in community college nursing programs: Iowa Code §§ 152.5(1); 294.2 (1987). 1) Section 294.2 does not prohibit the application of Board of Nursing rules imposing additional educational requirements to area community college nursing education programs; and 2) the Board of Nursing may adopt rules requiring the faculty of an approved nursing program to meet new and more rigorous educational requirements in order for that program to be approved by the Board. (Weeg to Royce, Administrative Rules Review Committee, 5-18-87) #87-5-2(L)

May 18, 1987

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

Dear Mr. Royce:

You have requested an opinion of the Attorney General on behalf of the Administrative Rules Review Committee on two questions relating to rules recently promulgated by the Iowa Board of Nursing.

Iowa Code § 152.5(1) (1987) provides that all educational programs preparing a person to be a registered nurse or licensed practical nurse "shall be approved by the board." Minimum statutory requirements for such programs are contained in this section. The administrative rules of the Board concerning educational programs are found in 590 Iowa Admin. Code. These rules impose requirements for the approval of programs, their organizational and administrative resources, curriculum, faculty, program responsibilities, clinical facilities, and reports to the board. The board recently rescinded chapter 2 and adopted an entirely new chapter 2 governing educational programs. Notice of intended action was published on August 13, 1986. Iowa Admin. Bull., August 13, 1986, ARC 6822. These rules were adopted by the board, and were filed on March 11, 1987. Iowa Admin. Bull., March 11, 1987, ARC 7409. They were to have become effective April 15, 1987. The administrative rules review committee met on April 14, 1987, and voted pursuant to section 17A.4(5) to delay the effective date of these rules for seventy days to consider the rules further. The committee is particularly concerned with the rules relating to faculty educational qualifications: the new rules impose more stringent academic requirements for faculty

in nursing programs which seek Board of Nursing approval. See ARC 7409, § 2.6(2).[1]

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[1] The rules regarding faculty requirements are contained in § 2.6(2) and are as follows:

> Requirements of faculty members who teach nursing are as follows:
>
> a. Current licensure as a registered nurse in Iowa.
> b. Two (2) years of experience in clinical nursing.
> c. The applicable academic qualifications:
> (1) All faculty hired after September 1, 1997, shall have a master's or doctoral degree with a nursing major at the baccalaureate, master's, or doctoral level. The date of hire is the first day employed with compensation.
> (2) A person who is a faculty member on September 1, 1987, and who holds a baccalaureate degree shall obtain at least a master's degree in an applicable field by September 1, 1998.
> (3) A person who is a faculty member on September 1, 1987, and who does not hold a baccalaureate degree shall obtain a baccalaureate degree in an applicable field by September 1, 1998.
> (4) A faculty member who is hired after September 1, 1987, and before September 1, 1997, shall hold a baccalaureate degree with a nursing major by September 1, 1993, and a master's degree in an applicable field by September 1, 1998. The date of hire is the first day employed with compensation.
> (5) A doctoral degree shall be required for faculty of master's and doctoral programs by September 1, 1993.
> d. Submission of a detailed description of qualifications to the board office.
> (1) Each program head shall submit a list of all faculty teaching on September 1, 1987, along with a detailed description of qualifications by which each faculty member's

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[1] (cont'd)

compliance with this subrule can be determined. The list shall be submitted within one month of notification by the board of this requirement. The detailed description of each faculty member's qualifications shall be submitted within another month.

(2) The board shall monitor each program's progress in meeting this subrule at least annually in the annual reports.

Prior to the adoption of these rules, faculty requirements were contained in 590 Iowa Admin. Code § 2.4(2) and stated:

Faculty requirements -- all programs.

a. General requirements for nurse faculty.

(1) Current nurse licensure in Iowa.

(2) Competent practitioner with knowledge and skills of current practice.

b. Educational requirements for faculty.

(1) Senior colleges and universities shall establish educational qualifications for the faculty of the program in nursing comparable to all other faculty. The baccalaureate degree shall be the minimum qualification.

(2) Hospitals conducting programs in nursing shall establish educational qualifications for the nursing faculty. It is recommended that the baccalaureate degree be the minimum qualification.

(3) Community, junior colleges and area schools shall establish educational qualifications for the faculty of a program in nursing as required for other comparable programs leading to a like diploma and degree. It is recommended that the baccalaureate degree be the minimum qualification.

(4) Practical nurse programs only -- in selected instances a licensed practical nurse who is a graduate of an approved program in practical nursing may be utilized as a faculty member in a practical nurse program.

The committee's specific questions are as follows:

> 1. Does section 294.2, Iowa Code, prevent the Nursing Board of Examiners from imposing additional educational requirements or nursing instructors currently employed by area community colleges?
>
> 2. May a licensed individual, currently employed and in compliance with current regulatory standards for that employment, be compelled to meet new and more vigorous standards as a condition to retaining approval for that employment?

I.

Section 294.2 provides as follows:

> No rules by the state board of education with reference to the qualifications of teachers, requiring the completion of certain college courses or teachers training courses, are retroactive to apply to a teacher who has received endorsement and approval to teach a specific subject or subjects if the certificate of the teacher is valid. However, this section does not limit the duties or powers of a school board in the selection or discharge of teachers or in the termination of teachers' contracts.[2]

This office construed this section in 1978 Op.Att'yGen. 189. In that opinion we held that, pursuant to section 294.2, a teacher with a permanent professional certificate could not be required to take additional course work to meet a new departmental human relations requirement imposed by the state board.

It is our opinion that section 294.2 does not bar the Board of Nursing from imposing additional educational requirements for faculty in community college nursing programs approved by the Board under Iowa Code § 152.5(1). This statute specifically states that no rules "by the state board of education" regarding teacher qualifications may be applied retroactively to teachers who have been endorsed and approved to teach specific subject(s)

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[2] It is our understanding, and we assume for the purposes of this opinion request, that section 294.2 applies to the faculty at community colleges within the state.

and holding valid teaching certificates. (emphasis added) We believe this language is clear and therefore there is no need to refer to principles of statutory construction. See, e.g., State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981) (when a statute is plain and its meaning is clear, courts are not permitted to search for meaning beyond its express terms). Section 294.2 prohibits the state board of education from retroactively imposing new requirements on teacher certificate holders, but that prohibition cannot be read to extend to rules adopted by other state agencies under separate rulemaking authority. We note that, as set forth above, section 152.5(1) gives the board independent authority to approve nursing education programs.

II.

With regard to your second question, this office has recently issued two separate opinions directly on point. In Op.Att'yGen. #85-5-6(L), we relied on Dent v. West Virginia, 129 U.S. 114 (1889), and Green v. Shama, 217 N.W.2d 547 (Iowa 1974), to conclude that it was not a violation of due process for the legislature to repeal statutory provisions for permanent teaching certificates in order to impose new, and more stringent, recertification requirements. We stated that there would be no due process violation if the recertification requirements could be met by reasonable study or application and if those requirements were reasonably related to protecting the general welfare.

Again, in Op.Att'yGen. #86-2-1(L), we held that a statute which required school administrators to complete a staff development program every five years was applicable to all administrators, including those who held permanent certificates prior to the effective date of the statute. We further stated that the board of educational examiners had authority to adopt rules to implement the new requirement, and that those rules could require a different staff development program for administrators certified prior to the statute's effective date.

Rather than reiterating the rationale of those two opinions, we have enclosed copies of them for your review. In sum, it is our opinion that additional educational requirements may be imposed on currently licensed professionals if the additional requirements can be met by reasonable study or application and if the imposition of the additional requirements is reasonable and does not otherwise violate the law. We note that the new Chapter 2 rules do allow a period for implementation of the new educational requirements ranging from six to eleven years, depending on a faculty person's date of hire and the current educational level attained by that person. Your letter asks only whether the regulating authority must exempt current licensees when it substantially raises its requirements. This opinion

addresses only that question and does not address whether these particular rules are reasonable.

In conclusion, it is our opinion that: 1) section 294.2 does not prohibit the Board of Nursing from imposing additional educational requirements on nursing instructors in area community colleges; and 2) the Board of Nursing may adopt rules requiring the faculty of an approved nursing program to meet new and more rigorous educational requirements in order for that program to be approved by the Board.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

Enclosures

COUNTIES AND COUNTY OFFICERS; Board of Supervisors; Veteran Affairs Commission; Authority to hire employees, set salaries, and award benefits: Iowa Code Chapter 250 (1987); §§ 250.6, 250.7, 250.9, 250.10. The veteran affairs commission hires and fires employees in its office; the board of supervisors must approve those appointments, and also sets the salaries for those employees. The commission also decides the amount of benefits to be awarded to what persons within the budget set by the supervisors: the supervisors must then review each claim. The supervisors' approval and review authority is subject to a reasonableness standard. (Weeg to Baker, Veteran Affairs Division, Department of Public Defense, 5-11-87) #87-5-1(L)

May 11, 1987

Mr. Keith Baker
Veterans Affairs Division
Department of Public Defense
7700 N.W. Beaver Drive
Camp Dodge
L O C A L

Dear Mr. Baker:

You have requested an opinion of the Attorney General regarding the relationship between a county board of supervisors and the county veteran affairs commission. In particular, you ask who has authority to set the salaries of the executive director and other employees in the department of veteran affairs. You also ask who has the authority to decide the amounts and kinds of benefits to be made available to eligible veterans.[1]

I.

Iowa Code Chapter 250 (1987) governs the commissions of veterans affairs. Section 250.6 provides in part:

> . . . . The commission, subject to the approval of the board of supervisors, shall have power to employ necessary administrative or clerical assistants when needed, the

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[1] We assume for the purposes of this opinion that the benefits in question do not include benefits paid to defray funeral expenses of veterans, as separate statutory provisions govern these benefits. See §§ 250.13-250.19.

> compensation of such employees to be fixed by the board of supervisors, . . .

This section vests the veteran affairs commission with the authority to hire necessary employees. The supervisors exercise secondary approval authority over the initial appointments made by the commission. The supervisors alone have authority to set the salaries for these appointments. We discussed the scope of this approval authority in 1948 Op.Att'yGen. 140, where we stated that this statutory language:

> . . . . clearly shows an intention upon the part of the legislature to bestow upon the commission the power to determine when the need for administrative or clerical assistants exists and the power to employ such . . . assistants to supply the need which the commission has determined.

In brief, the commission decides the number of assistants to be employed, and which persons should be hired to fill those positions. In addition, only the commission has authority to discharge these employees. Op.Att'yGen. #87-1-3(L); 1948 Op.Att'yGen. at 143. The supervisors are required by statute to approve the appointments and set the salaries. In our 1948 opinion we further clarified the supervisors' authority with regard to salaries:

> . . . [T]he power vested in the board [of supervisors] to fix the salaries of employees does not embrace either expressly or impliedly, the power to control the administration of the relief commission . . . Such power . . . does not embrace the power to vary such compensation or salary to the extent of abolishing the positions of administrators or employees of the commission.

II.

With regard to the authority to decide the amount of benefits, section 250.7 provides that the commission meets monthly and determines "who are entitled to benefits and the probable amount to be expended." The commission is also to prepare an annual budget which is certified to the board of supervisors. This section then states:

> The board may approve or reduce the budget for valid reasons shown and entered of record and the board's decision is final.

Section 250.9 later provides that at each meeting the commission submit to the supervisors a certified list of people to whom benefits are to be paid. The amount paid may be changed, and new names added. Finally, § 250.10 provides in part that all claims certified by the commission "shall be reviewed by the board of supervisors and the county auditor shall issue warrants in payment of the claims."

This statutory scheme provides that, with regard to individual claims, the veteran affairs commission makes the initial decision as to what person should receive benefits and how much should be awarded: the supervisors are then required to review all these claims. With regard to the overall budget for the commission, the statute provides that the commission is to certify a budget to the supervisors: the supervisors are then required to approve the budget. The supervisors may reduce that budget only if they find a valid reason to do so and enter that finding as part of the record.

This office has previously opined regarding the supervisors' authority to review individual claims as well as the overall budget. 1956 Op.Att'yGen. 114. In that opinion, we reviewed the definition of the term "review" and concluded:

> . . . the power of the Board of Supervisors in review is ministerial and contemplates re-examination of the relief claims allowed by the soldiers' relief commission and certified by it to the Board of Supervisors "for the purpose of preventing a result which appears not to be based upon unbiased and reasonable judgment . . . ." It follows that the review by the Board of Supervisors is confined to the record, consisting of the certified list of names and amounts, applications, investigative reports and case records, and may overturn the decision of the soldiers' relief commission only if on examination of the record it can be said that the evidence clearly preponderates against the decision.

1956 Op.Att'yGen. at 116. This conclusion is consistent with other opinions of this office regarding the supervisors' authority to review claims submitted by other county officers. See Op.Att'yGen. #85-6-3 (supervisors may not disapprove claim submitted by elected county officer on ground that claim exceeds line item); and 1982 Op.Att'yGen. 389 (#82-4-2(L)) and 1980 Op.Att'yGen. 664 (supervisors cannot refuse claim submitted by

county officer if claim is within approved budget and for a lawful purpose).

The 1956 opinion did not discuss the authority of the supervisors with regard to the commission's budget, but we believe the statute is straightforward: the supervisors review the commission's budget and either approve it or reduce it for valid reasons. While the statute gives the supervisors considerable discretion regarding the budget, the board is required to state the grounds for making any reductions to the budget, and those grounds must be "valid."

In conclusion, it is our opinion that the veteran affairs commission hires and fires employees in its office; but the board of supervisors must approve those appointments, and also sets the salaries for those employees. The commission also decides the amount of benefits to be awarded to what persons within the budget set by the supervisors: the supervisors must then review each claim. The supervisors' approval and review authority is subject to a reasonableness standard.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:rcp

TAXATION: Real Estate Transfer Taxes Regarding Conveyances In Partition Actions. Iowa Code §§ 428A.1 and 428A.3. Partition referees are not exempt from paying real estate transfer taxes as they are not public officials as defined in § 428A.3. There are no real estate transfer taxes owing if the partitioned realty is subsequently transferred to a third party for consideration of $500.00 or less. (Miller to Richards, Story County Attorney, 6-24-87) #87-6-3(L)

June 24, 1987

Mary Richards
Story County Attorney
Story County Courthouse
Nevada, Iowa 50201

Dear Ms. Richards:

You have requested an opinion of the Attorney General concerning Iowa Code ch. 428A (1987). Specifically, you asked whether a court appointed partition referee is a public official under Iowa Code § 428A.3 (1987) and is therefore exempt from paying real estate transfer taxes involving transfers of realty resulting from partition actions. A second related question is whether the real estate transfer tax would be due if a private partnership immediately transfers realty obtained through the partition action to another private partnership.

With respect to the first question, Iowa Code § 428A.3 specifically exempts "public officials" from real estate transfer tax liability "with respect to any instrument executed by the public official in connection with official duties." The terms "public official" and "public officer" are interchangeable and have received widely varying definitions by numerous courts.

See, Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1945). However, one definition of public officer accepted by the Iowa Supreme Court in Hutton v. State, 235 Iowa 52, 16 N.W.2d 18, 19 (1944), consisted of five indispensable elements necessary for a public office. Included among these elements was the requirement that "the office must have some permanency and continuity, and not be only temporary and occasional."

Court appointed partition referees are the court's disinterested agents who are compensated for their services in securing the partition of particular property. With respect to a partition sale, one of the chief purposes of the partition referee is to obtain for the owners the most advantageous sale that can reasonably be obtained. See, Varnell v. Lee, 243 Iowa 1053, 14 N.W.2d 708, 712 (1944). Once the sale has been approved by the Court and the transaction completed, the referee's duties cease. There is no permanency or continuity of office involving a partition referee. The referee is not acting in the capacity of a public official as contemplated by § 428A.3, but rather, is acting upon the Court's request for the benefit of the particular parties to the partition action. Therefore, a partition referee would not be exempt from liability for the real estate transfer tax under Iowa Code § 428A.1. This tax would be treated as a cost of the partition action and paid under procedures established in Iowa R. Civ. P. 293.

The second question specifically involved whether a transfer tax would be owing when one partnership immediately transfers the property it had obtained in the partition action to another partnership if the transfer was for a title correction.

As the facts are understood in this situation, the real estate involved in the partition action was conveyed to Partnership A pursuant to Court Order. Partnership A was acting on behalf of a group of individuals who had formed a partnership (Partnership B) to purchase the realty subject to the partition action. All members of Partnership A were also members of Partnership B. The partitioned realty was not conveyed by Court Order directly to Partnership B because a name for that partnership had not been determined at the time of the partition hearing approving the sale. In order to avoid the necessity of a second partition hearing approving the sale to Partnership B, it was agreed that the Court would proceed to approve the sale to Partnership A. After the purchase price of the property was paid in full to the partition referee, a Court Officer's deed was recorded conveying the property to Partnership A. The real estate transfer taxes were paid upon the conveyance to Partnership A based upon the full purchase price as paid. Partnership A then immediately proceeded to convey the property to Partnership B via a quit claim deed for the consideration of $1.00.

The question arises whether real estate transfer taxes are due upon the conveyance of property from Partnership A to Partnership B via the quit claim deed. Section 428A.1 clearly exempts real estate transfers from tax "when the deed instrument or writing is executed and tendered for recording as an instrument correction of title, and so states . . . ". The quit claim deed as filed in this example does not appear to state that it was for title correction purposes. Consequently, this conveyance would not be exempt from the transfer tax on the grounds that it was filed as an instrument correcting title.

However, if the consideration paid for the conveyance is $500.00 or less, no transfer taxes would be owing under § 428A.1.[1] Consideration is defined in § 428A.1 as "the full amount of the actual sale price of the real property involved, paid or to be paid . . . ". Since it appears from the facts presented that the actual consideration, if any, paid for the conveyance of property to Partnership B was under $500.00, no transfer taxes would be owing upon that transaction.

Sincerely,

James D. Miller
Assistant Attorney General

WP6

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[1] See, Op. Att'y Gen. #86-5-2(L), which states that "Iowa Code § 428A.1 imposes the transfer tax upon the 'consideration' paid for the conveyance." There it was determined that where an individual transferred his sole interest in real estate to a partnership there was consideration in excess of $500.00 and transfer taxes were owing on the entire convenyance. Here, however, the real purchaser of the partioned realty was always Partnership B, with Partnership A merely acting as a "straw man" for the purpose of immediately transferring the partitioned realty to Partnership B. See, 26 CFR 47.4361-2(b)(2) as an example exempting similar conveyances for not having consideration under the now repealed federal documentary stamp tax.

SCHOOL DISTRICTS; INSURANCE: Ability of school districts to purchase an annuity for its employees invested in mutual funds. Iowa Code sections 294.16, 422.3(5) (1987); 1986 Iowa Acts, ch. 1213, section 7. A school district may purchase an annuity for its employees which is invested in mutual funds so long as the annuity is purchased from an authorized insurance company and an Iowa-licensed agent. (Haskins to Shoultz, State Representative, 6-18-87) #87-6-2(L)

June 18, 1987

The Honorable Don Shoultz
State Representative
295 Kenilworth Road
Waterloo, Iowa 50701

Dear Representative Shoultz:

You have asked the opinion of this office as to whether Iowa Code section 294.16 (1987) prohibits a school district from "establishing custodial accounts that are mutual funds."

It is elemental that the only powers of a school district are those expressly granted or necessarily implied in the district's governing statutes. See Bishop v. Iowa State Bd. of Pub. Instruction, 395 N.W.2d 888, 891 (Iowa 1986). As a corollary to this principle, a school district may purchase insurance from only those entities authorized by statute, see Sioux City Community Sch. Dist. v. Iowa State Bd. of Pub. Instruction, 402 N.W.2d 739 (Iowa 1987), and only the particular type of products statutorily specified, see 1976 O.A.G. 462. Iowa Code section 294.16 (1987) authorizes a school district to purchase "group or individual annuity contracts" for its employees. The annuity contracts are purchased from an insurance company of the employee's choice so long as it is one authorized to do

business in this state and the contract is purchased from an Iowa-licensed insurance agent. The school district may arrange for payment by the employee through payroll deductions. The purchase is to be made in a manner which will qualify the employee for favorable tax treatment under the "Internal Revenue Code of 1954 as defined in Iowa Code section 422.3." Iowa Code section 294.16 (1987) states:

> At the request of an employee through contractual agreement a school district may purchase group or individual annuity contracts for employees, from an insurance organization the employee chooses that is authorized to do business in this state and through an Iowa-licensed insurance agent that the employee selects, for retirement or other purposes, and may make payroll deductions in accordance with the arrangements for the purpose of paying the entire premium due and to become due under the contract. The deductions shall be made in the manner which will qualify the annuity premiums for the benefits under section 403(b) of the Internal Revenue Code of 1954, as defined in section 422.3. The employee's rights under the annuity contract are nonforfeitable except for the failure to pay premiums. If an existing tax-sheltered annuity contract is to be replaced by a new contract the agent or representative of the company shall submit a letter of intent by registered mail to the company being replaced, to the insurance commissioner of the state of Iowa, and to the agent's or representative's own company at least thirty days prior to any action. This letter of intent shall contain the policy number and description of the contract being replaced and a description of the replacement contract.

In 1976 O.A.G. 462, this office opined that section 294.16 did not authorize a school district to purchase for its employees mutual funds to be held in a

custodial account. The rationale for this conclusion was that the then existing section 294.16, see Iowa Code section 294.16 (1976), referred to the authority of school districts to purchase annuities in terms that the deduction for them would qualify for the tax benefits accorded by "section 403(b) of the federal internal revenue code and amendments thereto" (emphasis added). Id. at 463. It was reasoned that, under constitutional principles prohibiting the improper delegation of legislative authority, the legislature could not authorize an activity contingent upon action in the future by another legislative body, specifically the United States Congress. Id. at 464. The version of section 294.16 in effect at the time of the opinion - containing the proscribed "and amendments thereto" language - had been enacted in 1965. See 1965 Iowa Acts, ch. 252, section 1. In 1974, Congress authorized public schools and organizations to create custodial accounts to purchase mutual funds on behalf of their employees. 1976 O.A.G. at 463. This authorization continues to this day, see 26 U.S.C.A. section 403(b)(7) (West Supp. 1987), but was the result of an amendment which was, of course, subsequent to the enactment of the original section 294.16 and thus, because of the nondelegation doctrine, could not serve in 1976 to enlarge the powers of a school district.

In 1986, the legislature amended section 294.16 to drop the offending "and amendments thereto" language and refer to the "Internal Revenue Code of 1954" as being that Act "as amended to and including January 1, 1986." See 1986 Iowa Acts, ch. 1213, section 7, amending Iowa Code section 294.16 to refer to Iowa Code section 422.3(5) (1987). Thus, since that version of section 294.16 contemporaneously encompasses the now-prior amendment to the Internal Revenue Code allowing favorable tax treatment for mutual funds purchased by a school district for its employees, and does not authorize purchase of mutual funds merely by reference to future federal legislation, there is no longer any constitutional reason that a school district could not purchase for its employees an annuity which is invested in mutual funds. It should be noted that the statutory authority conferred in section 294.16 encompasses only "annuity contracts" purchased from an authorized insurance company and through an Iowa-licensed insurance agent. Thus, direct purchase of mutual funds by a school district for its employees, if not done through the vehicle of an annuity contract purchased from an authorized insurance company and an Iowa-licensed insurance agent, would not be within the power of a school district as a matter of state enabling

law, whether or not it would be eligible for favorable federal tax treatment as a permissible custodial account. As indicated, school districts have only those powers statutorily conferred. A school district could not, in other words, create a custodial account to purchase mutual funds for its employees without utilizing the intermediary of an annuity purchased from an authorized insurance company and an Iowa-licensed insurance agent.

In sum, a school district may purchase an annuity for its employees which is invested in mutual funds so long as the annuity is purchased from an authorized insurance company and an Iowa-licensed insurance agent.[1]

Very truly yours,

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/sm

[1] Typically, the kind of product authorized by section 294.16 and contemplated here would be a variable annuity sold by an insurance company.

COUNTIES, TAXATION: Referendum for Unified Law Enforcement (ULE) District and levy. Iowa Code §§ 28E.22, 28E.28 (1987). The authorization of a ULE District and levy by a referendum held pursuant to a statute limiting the effective period of the authorization to five years remains subject to the five year limitation unless or until a post-amendment referendum is held, as the amendment removing the limitation is only prospective in application. (Donner to Huddle, Louisa County Attorney, 6-16-87) #87-6-1(L)

June 16, 1987

The Honorable Roger A. Huddle
Louisa County Attorney
Weaver Building
Wapello, Iowa 52653

Dear Mr. Huddle:

You have asked for an Attorney General's opinion regarding the continuation of a county's Unified Law Enforcement (ULE) District and levy. Specifically, you asked "is the Public Safety Fund of the Louisa County ULE District authorized only for five years from the referendum of January, 1982, or does the legislative amendment [in 1983] to Section 28E.22 authorize that fund to continue until there is a referendum to terminate pursuant to section 28E.28?" We conclude that the levy as authorized in 1982 does terminate after five years.

You state that the most recent levy was authorized by an election conducted in 1982, in which the issue was phrased, in accordance with Iowa Code Section 28E.22 (1981), as follows:

> Shall an annual levy, the amount of which shall not exceed a rate of $1.50 per thousand dollars of assessed value of taxable property in the Unified Law Enforcement District be authorized for providing additional monies needed for Unified Law Enforcement in the district <u>for a period not exceeding five years</u>? [Emphasis added.]

As you also noted, the language which restricted the levy to a five year period was stricken in 1983, and new language was added (in new section 28E.28) discontinuing the levy only after a referendum to discontinue succeeds, with the referendum obtainable only after receipt of a petition requesting a referendum signed by at least fifteen percent of the eligible voters of the district. 1983 Iowa Acts, chapter 79.

The 1983 amendment was not intended to apply to existing ULE levies. 1983 Iowa Acts, chapter 79, which eliminated the five-year restriction, makes no express provision for its application to existing authorized levies. If the legislature had intended to impact existing levies by removing the five year limitation which had been approved, the statute would have imposed a new duty and obligation on a district's taxpayers, and would therefore have been a retroactive law. Walker State Bank v. Chipokas, 228 N.W.2d 49 (Iowa 1975). However, the Court disfavors implied retroactivity and, in the absence of an express provision of retroactive application, the Court presumes that only prospective application was intended. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985); McKinley v. Waterloo R. Co., 368 N.W.2d 131 (Iowa 1985). With no intent shown to the contrary, we opine that the elimination of the five year limitation applies only to referendums on levies for ULE Districts held after the effective date of the amendment, July 1, 1983.

If the 1983 amendment was construed to have retroactive application, there may be constitutional impediments. The authority for a special tax for the purpose of a Unified Law Enforcement District comes solely from the specific statutory provisions of Iowa Code Sections 28E.21, et seq. (1987). This taxing authority is analogous to the hotel-motel tax which municipalities are permitted to impose, specifically authorized by Iowa Code Chapter 422A. The hotel-motel tax and the effect of subsequent amendments to that statute were tested in Fleur de Lis Motor Inns, Inc. v. Bair, 301 N.W.2d 685 (Iowa 1981). Chapter 422A was originally enacted in 1978 but was amended in 1979. The City of Des Moines had, by public referendum, approved the imposition of the hotel-motel tax prior to the 1979 amendments. In Fleur de Lis, the plaintiffs sought declaratory judgment against imposition of the tax, arguing that the 1979 amendments nullified the prior approval of the tax.

Unlike the present case, the Court in Fleur de Lis did not find legislative intent to be an issue. The Court's examination was primarily directed at "whether the General Assembly had the power to impose the amendments on municipalities which had already adopted the tax." Id. at 687. [Emphasis original.]

Upon the general taxing authority of the General Assembly, the Fleur de Lis court held that modification or repeal of a tax imposed by the public was constitutional unless the exercise of power cuts across a constitutional limitation. The plaintiffs urged that since the subsequent amendments were forced upon municipalities which had already approved the tax, those municipalities were being unconstitutionally discriminated against as a class. In concluding that "the General Assembly had the power to make the amendments applicable to all municipalities without new elections", Id. at 689, and that the uniformity

clause of the constitution had not been violated, the Court noted four circumstances justifying its conclusions. First, the 1979 amendments to Chapter 422A were "essentially curative". Second, the amendments were "general in nature and do not single out certain entities or classes; all municipalities are subject to the amendments." Third, the amendments "do not increase the substantive burdens of the municipalities which have imposed the tax" - the tax rate had not been altered, and it could still only be raised by a public referendum. Fourth, "the municipalities which previously opted to impose the tax can opt out of it." 301 N.W.2d 685 at 689.

In contrast, the circumstances surrounding the 1983 amendment to Chapter 28E are quite dissimilar. The amendment was not curative or necessary to make the statute workable. Although the tax rate was not altered, by increasing the length of the tax indefinitely and thereby imposing a new duty and obligation on a district's taxpayers, there was an "increase in the substantive burden" of the districts which have imposed the levy. Also, notably, the original statute under which the ULE levy was approved did not provide for a referendum to discontinue, as had already existed in the case of Chapter 422A. There was no option or expectation of a "reverse referendum" to terminate the levy before the end of the five year period. In Fleur de Lis, unlike the present case, there was no interference with the substantive legal conditions to which the people consented. See, State v. Des Moines, 103 Iowa 76, 72 N.W. 639 (Iowa 1897) (a tax can be levied only in substantive conformity with the terms of the powers conferred by election, and the consent of the people applies only to substantive legal conditions existing at the time of the election). See also, 64 C.J.S. Municipal Corporations, § 1988(e) at page 666. In addition to the actual impact of extending the taxpayers' liability, further evidence that the five year limitation for the ULE authorization was a substantive legal condition is the fact that the five year limitation was specifically included on the referendum ballot.

Because there was no express legislative intent as to the retroactive application of the 1983 amendment, there is an ambiguity in the interpretation of the law thereby requiring the application of rules of statutory construction. If the 1983 amendment were construed to be retroactive, the Court would be faced with the constitutional questions discussed above. However, in the construction of statutes, the Court, when forced with two possible constructions, one of which may render the statute unconstitutional, will adopt the construction which will render the law valid. Iowa National Industrial Loan Co. v. Iowa Department of Revenue, 224 N.W.2d 437 (Iowa 1974). Also, taxation statutes are strictly construed against the taxing authority and all doubts are resolved in favor of tax payers. Northern National Gas Co. v. Forst, 205 N.W.2d 692 (Iowa 1973).

We therefore conclude that the 1983 amendment applies only prospectively and that the amendment removing the five year limitation on the authorization of a ULE levy is not applicable to counties, such as Louisa County, which authorized the ULE District prior to the 1983 amendment.

Sincerely,

Lynette A F Donner

LYNETTE A. F. DONNER
Assistant Attorney General

STATE EMPLOYEES: Professional Licensing Boards. Ch. 7E; §§ 7E.1(2)(d), 7E.2(2), 7E.2(5). Ch. 135; §§ 135.11A 135.31; ch. 147; § 147.103; ch. 258A; § 258A.6(4). 1986 Iowa Acts, ch. 1245. (Pottorff to Vanderpool, Executive Director, Iowa Board of Medical Examiners; Johnson, Executive Secretary, Iowa Board of Pharmacy Examiners; Mowery, Executive Director, Iowa Board of Nursing; Price, Executive Director, Iowa Board of Dental Examiners, 7-24-87) #87-7-3(L)

July 24, 1987

William S. Vanderpool
Executive Director
Iowa Board of Medical Examiners
Executive Hills West
L O C A L

Norman C. Johnson
Executive Secretary
Iowa Board of Pharmacy Examiners
Executive Hills East
L O C A L

Ann E. Mowery
Executive Director
Iowa Board of Nursing
Executive Hills East
L O C A L

Constance L. Price
Executive Director
Iowa Board of Dental Examiners
Executive Hills West
L O C A L

Dear Executive Officers:

The Board of Medical Examiners, Board of Pharmacy Examiners, Board of Nursing and Board of Dental Examiners have joined in requesting an opinion of our office regarding common personnel issues which arise under the reorganization of state government enacted under Senate File 2175 in 1986. See 1986 Iowa Acts, ch. 1245. You point out that these four boards are "located within" the Department of Public Health. Iowa Code § 135.31 (1987). These four boards, however, are expressly exempt from the general prohibition that "[e]ach board of examiners . . . may not employ its own support staff for administrative and clerical duties." Iowa Code § 135.11A (1987). In light of these provisions, you inquire whether individuals who were employees of the boards before reorganization are still employees of the boards or are now employees of the Department of Public Health.

In an effort to clarify the specific issues for which employee status is significant, you met with Deputy Attorney

General Elizabeth Osenbaugh and me. Based on our conversation, it is our understanding that you specifically are interested in whether individuals who were employees of the boards prior to reorganization are still employees of the boards or are now employees of the Department of Public Health for purposes of hiring, firing, promotion, transfer and discipline. In our opinion, individuals who were employees of the boards prior to reorganization remain employees of the boards for the purposes of hiring, firing, promotion, transfer and discipline.

Several sections of the statutes reorganizing state government affect the relationship between the Department of Public Health and the four boards. One goal of reorganizing the executive branch of state government was to "integrate" each agency into one of the "departments" of the executive branch "as closely as the goals of administrative integration and responsiveness to the legislature and citizenry permit." Iowa Code § 7E.1(2)(d) (1987). A "department," in turn, is the principal administrative unit of the executive branch. Iowa Code § 7E.2(2) (1987). Integration of each state agency into a department, however, is limited by the following terms:

> Any commission, board, or other unit attached under this section to a department or independent agency, or a specified division of one, shall be a distinct unit of that department, independent agency, or specified division. Any commission, board, or other unit so attached shall exercise its powers, duties, and functions as may be prescribed by law, including rulemaking, licensing and regulation, and operational planning within the area of program responsibility of the commission, board, or other unit independently of the head of the department or independent agency, but budgeting, program coordination, and related management functions shall be performed under the direction and supervision of the head of the department or independent agency, unless otherwise provided by law.

Iowa Code § 7E.2(5) (1987) (emphasis added). Under this language there is an allocation of powers between the individual commissions and boards and the departments.

Other specific provisions address the relationship of the Department of Public Health to the four boards and the employment of administrative and clerical staff. Section 135.31 "locates" these boards within the Department of Public Health:

> The offices for the state board of medical examiners, the state board of pharmacy examiners, the state board of nursing examiners, and the state board of dental examiners shall be located within the department of public health. The individual boards shall have policymaking and rulemaking authority.

Iowa Code § 135.31 (1987). Section 135.11A provides authority for employment of support staff:

> There shall be a professional licensure division within the department of public health. Each board of examiners specified under chapter 147 or under the administrative authority of the department, except the state board of nursing, state board of medical examiners, state board of dental examiners, and state board of pharmacy examiners, shall receive administrative and clerical support from the division and may not employ its own support staff for administrative and clerical duties.

Iowa Code § 135.11A (1987). Under this language, the four boards are exempt from a general employment prohibition applicable to other examining boards.

Construing these provisions, we are guided by principles of statutory construction. Generally, statutes dealing with the same subject matter are considered together and must be harmonized in light of their common purpose. Metier v. Cooper Transportation Co., Inc., 378 N.W.2d 907, 912 (Iowa 1985). The goal in construing statutes is to ascertain legislative intent. The spirit of the statute as well as the words must be considered. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). Words should be given their usual and ordinary meaning unless defined differently by the legislature or possessed of a peculiar and appropriate meaning in law. American Home Products v. Iowa State Board of Tax Review, 302 N.W.2d 140, 143-44 (Iowa 1981). A sensible, workable, practical and logical

construction should be given and inconvenience or absurdity avoided. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d at 499.

Applying these principles, we believe the statutes in issue vest hiring, firing, promotion, transfer and discipline of employees within each of the four state boards. Although "integration" of each state agency into a department of state government is a stated goal of the 1986 reorganization, integration is not absolute but is to be pursued only "as closely as the goals of administrative integration and responsiveness to the legislature and citizenry permit." Iowa Code § 7E.1(2)(d) (1987). Any board attached to a department, moreover, "shall exercise its powers, duties, and functions as may be prescribed by law." Conversely, the departments to which they are attached exercise "budgeting, program coordination, and related management functions . . . unless otherwise provided by law." Iowa Code § 7E.2(5) (1987).

At first blush, allocation of "other management functions" to the department may support the view that hiring, firing, promotion, transfer and discipline of board employees are vested with the Department of Public Health. This allocation, however, is limited by the phrase "unless otherwise provided by law." The law, in fact, otherwise provides.

Section 135.11A expressly exempts the four boards from a prohibition applicable to other examining boards. Each board of examiners specified under chapter 147, or under the administrative authority of the department, receives their administrative and clerical support from the professional licensure division of the Department of Public Health. Iowa Code § 135.11A (1987). These licensing boards are prohibited from employing their "own support staff for administrative and clerical duties." Id. The four boards, however, are expressly exempt from this prohibition. Consequently, the four boards are authorized to employ their own support staff for administrative and clerical duties.

Use of the term "employ" in § 135.11A implies the functions of hiring, firing, promotion, transfer and discipline. The employment relationship ordinarily is construed to confer these personnel functions upon the employer. See, generally, Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 431-34 (Iowa 1979). Authorization to employ support staff, therefore, would include hiring, firing, promotion, transfer and discipline.

This construction of the reorganization statutes contained in chapter 7E and chapter 135 is consistent with other provisions of law. The Department of Personnel vests hiring, firing, promotion, transfer and discipline decisions in the "appointing authority." See, generally, e.g., 581 Iowa Admin. Code chs. 1, 7-12. The "appointing authority," in turn, is defined as the "chairperson or person in charge of any agency of the state government including, but not limited to, boards, bureaus, commissions, and departments . . . ." Iowa Code § 19A.2(5) (1987) (emphasis added). The four boards, therefore, fall within the definition of those entities specifically empowered by the Department of Personnel to hire, fire, promote, transfer and discipline.

Resolution of the question of whether the four boards hire, fire, promote, transfer or discipline their own employees does not necessarily resolve other practical personnel questions which may arise during these processes. The relationship between the Department of Public Health and these boards may recur with respect to such issues as the scope of the employing unit for collective bargaining purposes or the formulation of affirmative action plans. You may, of course, contact our office for informal advice when such issues arise.

In summary, it is our opinion that individuals who were employees of the Board of Medical Examiners, Board of Pharmacy Examiners, Board of Nursing and Board of Dental Examiners before reorganization are still employees of these boards for purposes of hiring, firing, promotion, transfer and discipline.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Assistant Attorney General

JFP:mlr

COUNTIES AND COUNTY OFFICERS: Conflict of Interest; County Assessor; Board of Review. Iowa Code § 441.31, 441.33; 441.37 (1987). The spouse of the assessor should not serve on the board of review because of the potential for a conflict of interest. (Weeg to Wibe, Cherokee County Attorney, 7-28-87) #87-7-2(L)

July 28, 1987

Mr. John A. Wibe
Cherokee County Attorney
P.O. Box 100
Cherokee, Iowa 51012

Dear Mr. Wibe:

You have requested an opinion of the Attorney General on the question of whether a "conflict of interest" or "incompatible situation" exists when the county assessor is married to a member of the board of review.

In a prior opinion of this office, we have discussed the distinction between "conflict of interest" and "incompatibility of office." See 1982 Op.Att'yGen. 220. Under this opinion, the incompatibility doctrine is relevant only when a person holds two public offices. Because your question involves two persons holding separate public offices, this doctrine is inapplicable in the present case.

In this same opinion, we defined a conflict of interest as existing "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. at 221. See also Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). In prior opinions, we have held that mere familial relationship is insufficient to create a conflict of interest. See 1984 Op.Att'yGen. 78 (a prohibited interest does not exist per se when treasurer's child purchases property at a tax sale, but is one factor to consider); 1980 Op.Att'yGen. 300 (mere familial relationship does not create conflict of interest); 1972 Op.Att'yGen. 338 (no prohibited interest when wife of city councilman submits bid to city for urban renewal property). See also 1966 Op.Att'yGen. 38. We have stated that where the courts have held such conflicts to exist, they have found either an actual financial or beneficial interest, or conduct which was outrageous or unjustly favorable to the family member in the award of a contract. 1980 Op.Att'yGen. at 303.

While these opinions did not find a prohibited interest under the facts in question, they did suggest that the familial relationship is one factor of many in determining whether a prohibited interest exists. See 1984 Op.Att'yGen. 78. Further, none of these opinions concerned a spousal relationship between a county assessor and a member of the board of review, or adjudicatory proceedings in general.

Iowa Code § 441.31 (1987) provides that the board of review serves to review all assessments made by the assessor. Section 441.37 provides that property owners or aggrieved taxpayers who are dissatisfied with the owner's or taxpayer's assessment may file a protest against such assessment with the board of review. Section 441.33 attempts to keep the board of review and position of county assessor distinct and separate by providing that the clerk appointed for the board may not be the assessor or any member of the assessor's staff. Thus, the board of review performs adjudicatory functions in hearing protests from decisions of the assessor. We believe the duties of the two positions in question and the adjudicatory nature of the proceedings before the board of review are significant facts suggesting a conflict of interest does exist.

We have found one state court decision with facts similar to those in the case before us. In Connecticut, the Supreme Court addressed the issue of whether a spouse can sit on a board which reviews cases in which the other spouse is a party in Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774 (1948). There the court held that public policy cannot tolerate the spouse of a property owner who had applied for a change in zoning being on the town zoning commission. Id. at 778. The court took into account the motives which influence and control human action. No imputation of dishonorable or dishonest conduct was involved. The single issue framed by the court was whether the husband's public duty as a member of the zoning commission so conflicted with his private interest in his wife's application that the fairness and impartiality of the proceedings were called into question.[1] The court further stated that:

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[1]In Low the spouse had a personal interest in the outcome of the proceeding. Here the assessor's interest is official, not personal. This reduces the likelihood of bias. However, institutional, as well as personal, interests can result in an improper conflict of interest. See Wilson v. Iowa City, 165 N.W.2d 813, 821-824 (Iowa 1969).

> His status forbids the public officer from placing himself in a position where his private interest conflicts with his public duty. The good faith of the officials is of no moment because it is the policy of the law to keep him so far from temptation as to insure the exercise of unselfish public interest. He must not be permitted to place himself in a position in which personal interest may conflict with his public duty.

Id. at 777.

Related to the question of conflict of interest is the issue of constitutional due process. A fair trial before an impartial tribunal is a basic requirement of due process. See Withrow v. Larkin, _____ U.S. _____ (19). This principle was recently discussed by the United States Supreme Court in Aetna Life Insurance Co. v. Lavoie, 475 U.S. _____, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In Aetna, a justice in the Alabama Supreme Court participated in, indeed authored, an opinion involving an issue that was almost identical to one the justice was currently litigating himself in a private lawsuit. The issue was relatively new and there was little Alabama authority on point. Furthermore, the justice received a substantial settlement from his lawsuit. The Supreme Court held that this justice essentially acted as a judge in his own case, and that his interest was "direct, personal, substantial, and pecuniary." (Citations omitted). The Court's concluding statement is of particular significance in the present case:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in [Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927),[2] In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955); and Ward v. Village of Monneville, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972)]. We make clear that we are not required to decide

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[2]We note that in Tumey v. Ohio, supra, the Court recognized that not all questions of judicial qualification rise to a constitutional level. "Thus, matter of kinship, personal bias, State policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." [citations omitted] 273 U.S. at 523. (emphasis added)

> whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation . . . to the average [judge] . . . [to] leave him not to hold the balance nice, clear and true." Ward, supra, at 60, 34 L.Ed.2d 267, 93 S.Ct. 80, 61 Ohio Ops 2d 292. The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Murchison, 349 U.S. at 136, 99 L.Ed. 942, 75 S.Ct. 623 (citation omitted).

Thus, the potential for a possible conflict was the basis for the Court's disqualification of the justice on due process grounds.[3] The Court based its finding of potential interest on a "direct, personal, substantial, and pecuniary" standard. In a concurring opinion, Justice Brennan discussed this standard, stating:

> I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation.

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[3]See also Stahl v. Board of Supervisors of Ringgold County, 187 Iowa 1342, 175 N.W. 772 (1920). In Stahl, the Iowa Supreme Court upheld the disqualification of a member of the board who owned property in which the board voted to establish a drainage ditch. The Court stated:

> Constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights. [citations omitted] . . . [It] is not material that evil results actually follow the influence brought to bear. . . . [The] courts are concerned not with what is actually accomplished, but with the tendency of improper influences. . . .

Id. at 1352-1353, 175 N.W. at 776.

> Nonpecuniary interests, for example, have been found to require refusal as a matter of due process.

89 L.Ed.2d at 838.

In concluding, the Aetna Court cautioned that it sought only to demarcate the outer boundaries of judicial disqualification required by the due process clause. The Court maintained that Congress and the States remain free to impose more rigorous standards for disqualification. 89 L.Ed.2d at 837.

In addition to the due process concerns discussed above, we note that Canon 3C of the Iowa Code of Judicial Conduct provides in relevant part as follows:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
>
> * * *
>
> (I) is a party to the proceeding, or an officer, director, or trustee of a party
> . . . .
>
> * * *

In any situation in which impartiality might reasonably become an issue, a judge should ordinarily disqualify himself. Citizens First National Bank v. Hoyt, 297 N.W.2d 329 (Iowa 1980).[4] Members of boards which exercise adjudicatory functions

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[4]In Hoyt, the district court judge was related to the defendant's attorneys by affinity in the third degree and consanguinity in the fourth degree, respectively. The Iowa Supreme Court held that, if not for the exceptional circumstances presented in that specific case, the decision maker would have been obligated to recuse himself under the Iowa Code of Judicial Conduct. 297 N.W.2d at 334.

should be guided by the rationale of that canon. See Anstey v. Iowa State Commerce Commission, 292 N.W.2d 380, 390 (Iowa 1980) (agency personnel charged with making decisions of great import should be guided by the rationale of Canon 3C); and, Stahl, supra (board members exercising adjudicatory functions should be disinterested).

The assessor or her spouse may claim that since review is de novo in the district court, any unfairness can be corrected there. The United States Supreme Court has held otherwise. See Ward v. Monroeville, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972). Although appeal from the board of review would be de novo in the district court, this procedural safeguard does not guarantee a fair proceeding before the board of review. Those protesting assessments are entitled to unbiased and detached decision makers in the first instance.

We believe this situation presents a very close question. However, given the legal principles discussed above, be they raised in the context of conflict of interest, due process, or judicial disqualification, we conclude that the spouse of the assessor should not serve on the board of review because of the potential for a conflict of interest. In our view, the clash of interests need not be financial, nor is it required that the person sought or gained an advantage. It is the potential for a conflict of interest which the law seeks to avoid. In sum, members of boards which exercise adjudicatory functions should be free from the potential for conflict that could occur in a situation such as the present one. Conflicts can generally be avoided by recusal in particular cases. Here, however, the primary function of the board of review is to review the actions of the assessor, and therefore recusal is not a practical alternative.

Sincerely,

Theresa O'Connell Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

by EMO

TOW:mlr

COURTS; GOVERNOR: Budget. Iowa Code § 602.1301(2)(b). Iowa Code § 602.1301(2)(b) requires the governor to submit to the legislature the Supreme Court's estimate of total expenditure requirements of the Judicial Department in the proposed budget without change. (Osenbaugh to O'Brien, State Court Administrator, 7-22-87) #87-7-1(L)

July 22, 1987

Mr. William J. O'Brien
State Court Administrator
State Capitol
L O C A L

Dear Mr. O'Brien:

You have requested an opinion concerning Iowa Code § 602.1301(2)(b) (1987). This section states:

> Before December 1, the supreme court shall submit to the director of management an estimate of the total expenditure requirements of the judicial department. The director of management shall submit this estimate received from the supreme court to the governor for inclusion without change in the governor's proposed budget for the succeeding fiscal year. The estimate shall also be submitted to the chairpersons of the committees on appropriations.

The second sentence, which requires the Director of Management to submit an estimate by the Supreme Court of the total expenditure requirements of the Judicial Department for inclusion without change in the Governor's proposed budget, was added as part of the state reorganization act in 1986. See 1986 Iowa Acts ch. 1245, § 121.

Your question requires construction of this second sentence. You ask whether it is a violation of this statute for the Governor to submit a proposed budget which changes the estimated total expenditures requirement of the Judicial Department as submitted by the Supreme Court.

We believe this section clearly requires the Governor to include the estimate prepared by the Supreme Court in the

proposed budget. When the language of a statute is clear and plain, there is no room for construction and the statute should be applied according to its terms. Hinders v. City of Ames, 329 N.W.2d 654, 655 (Iowa 1983). The terms unambiguously require inclusion of the estimate prepared by the Supreme Court without change. The purpose of § 602.1301(2)(b) is to provide a balanced budget package for the legislature to consider while at the same time avoiding undue intrusion into the operations of the judicial branch of government.

It may be arguable that § 602.1301(2)(b) merely prohibits the Director of Management from changing the estimate before submission to the Governor. We reject this argument for several reasons. First, a prohibition applicable only to the Director of Management would serve little or no purpose. Second, the location of the phrase "without change" in the sentence indicates that the estimate is to be included in the Governor's proposed budget without change. Had the legislature simply intended to prohibit the Director of Management from changing the estimate as submitted to the Governor it could have more simply stated that the Director of Management shall submit this estimate without change to the Governor. Third, the procedures governing the preparation of the budget in chapter 8 of the Iowa Code refer to the proposal submitted to the Governor as the "tentative budget." See Iowa Code §§ 8.25-8.26 (1987). Finally, it would appear that the purpose of this section is similar to that provided in a comparable federal statute. See 31 U.S.C.A. § 1105(b) (1983) ("Estimated expenditures and proposed appropriations for the legislative branch and the judicial branch to be included in each budget under subsection (a)(5) of this section shall be submitted to the President before October 16 of each year and included in the budget by the President without change.").

The Governor has various statutory duties with respect to the budget under chapter 8. However, the power to appropriate money is essentially a legislative function. Welden v. Ray, 229 N.W.2d 706, 709 (Iowa 1975); 1980 Op.Att'yGen. 786, 788. Section 602.1301(2)(b) specifically governs the submission of the budget for the judicial branch and therefore controls over any provisions in chapter 8 which would suggest that the Governor would determine expenditure needs. While the Governor has a strong interest in proposing a balanced budget, the judicial branch is an equal branch with expertise regarding its own needs and the legislative branch needs a procedure to appropriate funds for all three branches.

We are aware that the General Assembly passed an amendment to § 602.1301(2)(b) in the 1987 session. House File 671 amended the second sentence by adding the following underlined language:

"The director of management shall submit this estimate received from the supreme court to the governor for inclusion, without any change by the governor, the director of management, or any other person in the executive branch, in the governor's proposed budget for the succeeding fiscal year." House File 671, 72nd G.A., First Session § 311. This change would emphasize that the budget was to be submitted to the legislature with the Supreme Court's estimate contained therein. The Governor, however, item vetoed this language and stated in his veto message that the legislation would seriously restrict the Governor's ability to provide for a balanced budget in recommendations to the General Assembly. See Letter from The Honorable Terry E. Branstad, Governor, to The Honorable Elaine Baxter, Secretary of State, June 9, 1987, transmitting H.F. 671. The item veto of the amendment, however, would not affect the continuing existence of the statute as previously adopted.

It is therefore our conclusion that Iowa Code § 602.1301(2)(b) requires the Governor to submit to the legislature the Supreme Court's estimate of total expenditure requirements of the Judicial Department in the proposed budget without change.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:mlr

COUNTY RECORDERS: Claimant's Book; Affidavit of Possession; Iowa Code §§ 331.603(4), 331.607(10), 614.17, 614.18, 614.34, and 614.35 (1987). Section 331.603(4) allows the "claimant's book" to be combined with other indices maintained by the county recorder; however as a practical matter it may be necessary to maintain a separate claimant's book since it is indexed by real estate description rather than by name of the claimant. Affidavits of possession are not "claims" required to be indexed in the claimant's book under section 614.18 or 614.35. (Ovrom to Priebe, State Senator, 8-20-87) #87-8-4(L)

August 20, 1987

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

Dear Senator Priebe:

You have asked our opinion concerning the claimant's book kept by county recorders under Iowa Code Section 331.607(10).

You first ask whether a separate claimant's book (§ 331.607(10)) must be maintained in those counties which maintain a single index system as provided by section 331.603(4). We do not think it is mandated by law to be a separate book, but as a practical matter it may be necessary since the claimant's book must be indexed by real estate description.

Section 331.607(10) states that the county recorder shall keep a "claimant's book in which notices of title interests in land are indexed as provided in 614.35." Section 614.35 provides that claims against real estate under the 40 year marketable title act are to be indexed in two ways: 1) under the grantee indexes of deeds in the names of the claimants appearing in such notices, and 2) under the description of the real estate involved "in a book set apart for that purpose to be known as the 'claimant's book.'" Section 614.18 also allows claims against real estate which arose prior to 1970 to be made, and recorders must index such claims in a claimant's book under the description of the real estate. Iowa Code § 614.18 (1987).

Section 331.603(4), however, allows the recorder, in lieu of maintaining separate index books as required by law, to maintain a combined index. This provision was enacted in 1975, subsequent to the other sections cited above. 1975 Iowa Acts, ch. 190, § 1. This combined index must contain the same data and information required to be kept in the separate books. Iowa Code § 331.603(4). Reading these provisions together, it appears the

recorder could combine the claimant's book with other indices he or she is required to maintain. However since the claimant's book indexes claims by real estate description, it is probably impractical to combine it with an alphabetical index of names. We have been advised by several county recorders that they have relatively few claims filed under 614.34 or 614.17 and 614.18, so a separate claimant's book, indexed by real estate description, would not seem to be difficult to maintain.

You also ask whether an affidavit of possession made under section 614.17 is a "claim" which must be indexed in the claimant's book as provided in section 614.35. We do not think an affidavit of possession is a "claim," and furthermore 614.35 refers only to the claims made under 614.34, so the answer to that question is no. However sections 614.17 and 614.18 additionally create the opportunity to file claims, and section 614.18 requires such claims to be indexed in a claimant's book.

The first paragraph of section 614.17 provides that claims against real estate arising prior to January 1, 1970, must be filed by the claimant within one year after July 1, 1980, in order to be maintained against the record title holder in possession. Section 614.18 requires such claims to be indexed under the real estate description in a "claimant's book," as noted above.

The third paragraph of section 614.17 establishes an entirely separate document -- the affidavit of possession -- for owners in possession of the real estate. This affidavit allows persons to establish a presumption of possession and ownership. See Iowa Title Standard 10.1 (1974).

We believe the affidavit of possession is distinct from the claim in real estate under the first paragraph of sections 614.17 and 614.18 and the claim under 614.34. Those sections specifically refer to "claims," while the affidavit of possession does not. It is not a claim against the record title holder, but rather is made by the owner to create a record of his or her possession. We therefore do not think it needs to be indexed in the claimant's book under section 614.18 or 614.35.

Sincerely,

ELIZA OVROM
Assistant Attorney General

EO:rcp

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Economic Development. Iowa Code Sections 4.1(36), 4.8, 15.108(4)(a), 28.107, 28.108 (1987); 1985 Iowa Acts, chapter 252 § 48, 1986 Iowa Acts, chapter 1245 § 808. The discretionary provisions of § 28.107 and the mandatory provisions of § 15.108(4)(a), concerning the creation of an Iowa export trading company, are irreconcilable. Under § 4.8, the mandatory provisions of § 15.108(4)(a) control as the statute latest in date of enactment, and therefore the creation by the Department of Economic Development of the Iowa export trading company is mandatory. (Benton to Thoms, 8-20-87) #87-8-3(L)

August 20, 1987

Mr. Allan T. Thoms, Director
Iowa Development of Economic Development
LOCAL

Dear Mr. Thoms:

In your letter of July 1, 1987 you requested an opinion from this office concerning two statutes relating to the establishment of an Iowa export trading company. Your letter asks whether, under Iowa Code sections 15.108(4)(a) and 28.107, the establishment of the trading company is permissive or mandatory.

The legislature in 1985 Iowa Acts, Chapter 252 § 48, first made reference to the creation of an Iowa export trading company to "enhance Iowa's agricultural exports", and to "take advantage of the Export Trading Company Act of 1982, Pub.L. No. 97-290." As codified at § 28.107, the legislature provided that:

> There may be incorporated under Chapter 496A a corporation which shall be known as the Iowa export trading company. If incorporated, this corporation shall be established by the director of the Iowa department of economic development. (Emphasis added.)

The legislature went on to provide in § 28.108(1) that the purposes of the company are to "assist agricultural exports", "expand existing markets", and "develop new markets".

In 1986, the General Assembly again made reference to the export trading company, but in different terms. The legislature provided in 1986 Iowa Acts, chapter 1245, § 808, codified at § 15.108(4)(a), that:

> The department [Economic Development] has the following areas of primary responsibility:

> (4) Exporting. To promote and aid in the marketing and sale of Iowa industrial and agricultural products and services outside of the state. To carry out this responsibility the department shall:
>
> (a) Establish and carry out the purposes of the Iowa export trading company as provided in section 28.106 to 28.108. (Emphasis supplied.)

As your letter notes, the 1986 bill was part of the legislation which reorganized state government and established the powers and duties of the Department of Economic Development. Your question as to whether the establishment of the trading company is permissive or mandatory is prompted by the discrepancy in language between the 1985 and 1986 enactments; that is, § 28.107 uses the term "may" while § 15.108(4)(a) contains the term "shall" in reference to the establishment of the company.

One of the first principles of statutory construction is that statutes pertaining to the same subject matter must be read together and harmonized, if possible. Egan v. Naylor, 28 N.W.2d 915, 918 (Iowa 1973). However, the legislature's choice of words in this case has not left any room to harmonize these provisions. In § 28.107 the legislature provided that there "may" be incorporated a corporation known as the Iowa export trading company. Under Iowa Code Section 4.1(36)(c) the word "may" confers a power. The verb "may" usually is employed as implying permissive or discretionary rather than mandatory action or conduct. John Deere Tractor Works v. Derifield, 252 Iowa 1389, 1392, 110 N.W.2d 560 (1961). The use of the term "may" indicates that the incorporation of the export trading company is discretionary with the department. This is underscored by the language in the next sentence which uses the phrase "If incorporated . . .", implying that the incorporation of the company is not a certainty. The use of the word "shall" elsewhere in § 28.107 seems intended to cover the circumstances in which the department exercises its discretion to incorporate the company, that is, if the company is incorporated, it "shall be know as the Iowa export trading company."

By contrast, under § 4.1(36)(a), the term "shall" imposes a duty. The word "shall" appearing in statutes has generally been construed as mandatory. Wisdom v. Board of Supervisors of Polk County, 236 Iowa 669, 679, 19 N.W.2d 602 (1945). In delineating the department's areas of primary responsibility, the General Assembly provided in § 15.108(4)(a) that the department "shall" establish and carry out the purpose of the company as provided in sections 28.106 through 28.108. The use of the word "shall" Mr.

indicates that the legislature intended that the department establish the company through the mechanism set forth in § 28.107, that is, by incorporating the company under Chapter 496A. Under traditional principles of statutory construction, §§ 28.107 and 15.108(4)(a) are irreconcilable.

Iowa Code section 4.8 provides principles to determine which of two irreconcilable statutes prevails. That section states:

> If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.

Under this statute § 15.108(4)(a), as the statute latest in date of enactment, prevails over the contradictory language of § 28.107. Consequently, it is mandatory that the Iowa export trading company be established through the procedures of §§ 28.106 through 28.108. The conclusion also seems consistent with the probable intent of the General Assembly. We can assume that the legislature knew in 1986 that the department had not yet exercised its discretion to incorporate the company, and therefore chose to make its creation mandatory. The fact that § 15.108(4)(a) refers to §§ 28.106 through 28.108 underscores this point. It seems clear that the legislature intended both to require that the department establish the company and that it intended the department to utilize the statutes already in place to accomplish this end.

We conclude that the establishment of an Iowa export trading company is mandatory for the Iowa Department of Economic Development.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

TDB:bac

REVENUE; DELINQUENT PROPERTY TAX; COUNTIES AND COUNTY OFFICERS; TREASURER; ASSESSOR: Costs of Tax Sale Publications. Iowa Code §§ 446.9(2); 446.15; 446.29 (1987). A ten dollar fee for tax sale publication costs should be charged per assessment roll, regardless of the amount of property included in that assessment roll. (Weeg to Van Maanen, State Representative, 8-20-87) #87-8-2(L) Clarified 1-19-88.

January 19, 1988

The Honorable Harold Van Maanen
State Representative
Rural Route 5
Oskaloosa, Iowa 52577

Dear Representative Van Maanen:

You have requested an opinion of the Attorney General on questions regarding the cost of tax sale publications. In a letter dated July 1, 1987, we declined to issue an opinion in response to your request because we had previously resolved those questions in a letter of informal advice to Senator Berl Priebe and Representative David Osterberg, dated April 13, 1987. Since our July 1st letter, it has come to our attention that questions still remain as to how, as a practical matter, our informal advice should be implemented. For this reason, we will withdraw our previous denial of your request and issue this opinion.

Your specific question involves interpretation of Iowa Code § 446.9(2) (1987), and how the ten dollar fee imposed by that section should be assessed. Chapter 446 governs tax sales in general § 446.9(2) specifically provides:

> Publication of the time and place of the annual tax sale shall be made once by the treasurer in an official newspaper in the county at least one week, but not more than three weeks, before the day of sale. The publication shall contain the description of the real estate to be sold that is clear, concise, and sufficient to distinguish the real estate to be sold from all other parcels. All items offered for sale pursuant to section 446.18 may be indicated by an "s" or by an asterisk. The publication shall also contain the name of the person in whose name the real estate to be sold is taxed, the amount of delinquent taxes, both regular and special, for which the real estate is liable for each year, the amount of the penalty, interest, and ten dollars representing costs,

> all to be incorporated as a single sum. The publication shall contain a statement that, after the sale, if the real estate is not redeemed within the period provided in chapter 447, the right to redeem expires and a deed may be issued. (emphasis added).

This ten dollar fee "representing costs" appears to cover the costs incurred by the treasurer, regardless of the amount of property described therein. (Section 446.10 separately provides for the costs of publication.) Section 446.9(2) does not specify the amount of land that may be included in the publication, but does require the publication to specify the name of the person in whose name the real estate to be sold is taxed, as well as a description of the real estate to be sold. The publication is also to include the amount of taxes owed, the penalty, interest, and ten dollars representing costs. Because the ten dollar fee is included in the publication along with the total of other amounts owed, it appears this fee is intended to be assessed for each publication regardless of the amount of property described in that publication. This conclusion is further supported by the fact there is no language in the statute that expressly or impliedly provides for assessing a fee based on a certain amount of property. Compare § 331.507(2).[1]

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[1] Section 331.507(2) provides:

> 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 of the district court. However, the fee shall not exceed fifty dollars of a transfer of property which is described in one instrument of transfer.
>
> (1) For the purposes of this paragraph, a parcel of real estate includes:
> (a) For real estate located outside of the corporate limits of a city, all contiguous land lying within a numbered section.
> (b) For real estate located within the corporate limits of a city, all contiguous land lying within a platted block or subdivision.
> (2) Within a numbered section, platted block, or subdivision, land separated only by a public street, alley, or highway remains contiguous.

(emphasis added). See Op.Att'yGen. #84-10-7(L).

A question then arises as to how to determine the amount of property that may be included within one publication. Section 446.9(2) is silent on this question. We have previously provided informal advice to county treasurers that the publication of sale should be consistent with what tracts or parcels of land will be sold. Section 446.15 requires the treasurer to "offer for sale, separately, each tract or parcel of real estate advertised for sale . . ." (emphasis added). Section 446.29 later provides that, following the sale: "not more than one parcel or description shall be entered upon each certificate of purchase." Thus, if the parcels are assessed separately, the tax sale must be consistent with the assessment and only one such parcel should appear on the tax sale certificate. See 1940 Op.Att'yGen. 209; 1920 Op.Att'yGen. 367. However, where the property is assessed as one unit, that entire unit may be offered at the tax sale. See Blondel v. Verlinden, 238 Iowa 429, 26 N.W.2d 342 (1947) (valid tax sale when three contiguous city lots with four homes on them were listed, assessed, advertised, and sold at the tax sale as one tract). Accordingly, the amount of property to be included in a section 446.9(2) publication depends entirely on how the assessor has assessed the property.

It is our understanding that all property assessed as one unit is included on one assessment roll.* The auditor then uses the information on that assessment roll to compute the amount of tax due and certifies that amount to the treasurer for collection. It is also our understanding that all property included on a single assessment roll is taxed as one unit. Thus, the ten dollar fee under § 446.9(2) should be assessed per assessment roll, i.e., for all property included within one assessment roll. If the property is assessed and taxed as one unit, we believe only one ten dollar fee should be charged, regardless of how much or how little property is included on a single assessment roll.

By way of example, the assessor may assess a 160-acre farm, and in order to better valuate the property, breaks that farm

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* The following clarification was added on January 19, 1988: We note that our use of the term "assessment roll" is not intended to refer to a single page of a document, but is intended instead to refer to a single assessment. Several separately assessed units of property may be included on one page, or an assessment of a single unit of property may stand alone on a single page. We do not opine on these varying practices, but simply note that they exist.

down into four 40-acre segments. The assessment roll thus contains a separate description and assessment for each 40-acre segment. However, the total amount of property on that assessment roll is 160 acres, and the total amount of the assessed value is based on that 160 acres. That assessment roll is then transferred to the auditor's office. The auditor then determines a single tax for the entire property and certifies that amount to the treasurer. The taxpayer must then pay the entire amount of tax due or the taxes will be delinquent. The taxpayer cannot split the tax payment by paying, for example, 50% of the tax due for 80 acres of the property to avoid delinquency. In this case, because there is only one assessment roll, only one ten dollar fee would be charged under § 446.9(2) if the taxes were delinquent.

As a further example, the assessor may separately assess two separate but adjoining lots owned by a municipal homeowner, even though the homeowner may consider that property to be a single unit. In this case, a separate assessment roll would exist for each lot, and two separate taxes would be assessed: The homeowner could pay one without paying the other, and the tax on one lot could be delinquent without the other being affected. Here, if taxes on both lots were delinquent, two separate ten dollar fees would be charged under § 446.9(2) because there are two separate assessment rolls.*

In conclusion, it is our opinion that a ten dollar fee for tax sale publication costs should be charged per assessment roll,

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* The following clarification was added on January 19, 1988: We are aware that the manner in which documents containing assessments are kept vary in format from county to county, and that treasurers' practices with regard to property tax collection also are not uniform. Keeping this in mind, we set forth the following statements of general applicability. If the property in question is assessed as a single unit, is taxed as a single unit, and may only be sold at a tax sale as a single unit, then only one ten dollar fee may be charged against that property under § 446.9(2). This is the case even though, for assessment purposes, the property may be broken down into several segments before the final assessment is totalled. However, if the segments of property are separately assessed, and the taxpayer has the choice of paying taxes on some segments but not others, and those segments would be sold separately at a tax sale, then a separate ten dollar fee would be charged against each segment of property.

regardless of the amount of property included in that assessment roll.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW:sg

ENVIRONMENTAL PROTECTION: Household hazardous waste sales permit fees. U.S. Const. amend. XIV, § 1; House File 631, 72nd G.A., First Session, § 507, Iowa Code Supp. § _____ (1987). The term "gross retail sales" as used in § 507 of H.F. 631 means gross retail sales of household hazardous materials only and not gross retail sales of an applicant's entire business. (Sarcone to Harbor, State Representative, 8-13-87) #87-8-1(L)

August 13, 1987

The Honorable William H. Harbor
State Representative
Henderson, Iowa 51541

Dear Representative Harbor:

You have requested an opinion of the Attorney General regarding section 507 of House File 631, the groundwater protection act. Section 507 is part of new chapter 455F created by the act dealing with household hazardous materials and requires retailers and certain manufacturers or distributors as defined in § 501 of the act to have a permit to sell or offer for sale household hazardous materials. The permit fee is graduated, with set maximum fees, based on gross retail sales. The Department of Revenue and Finance has responsibility to administer the permit process. You note that the Department of Revenue and Finance has taken the position that in determining permit fees the term "gross retail sales" as used in §§ 507(1) and (2) of House File 631 means gross retail sales of a permit applicant's business. In light of this you ask the following questions:

1. For purposes of § 507(1), does the term "gross retail sales" refer to gross retail sales of the entire business or does it refer just to gross sales of household hazardous materials made by that business?

2. Section 507(2) provides for a $100 fee for manufacturers or distributors who sell products on a person-to-person basis, primarily in the customer's home (known as the Avon amendment). However there is an additional $100 for each additional $3 million of gross retail sales. Again, does this refer to total gross sales or total gross sales only of the household hazardous materials sold?

In our opinion the term "gross retail sales" as used in §§ 507(1) and (2) of House File 631 refers only to gross retail sales of household hazardous materials and not to gross retail sales of an applicant's entire business.

Section 507 of H.F. 631 is the funding mechanism for the household hazardous waste account within the groundwater protection fund created by § 111.2(e) of the act. This provision is an integral part of the overall legislative plan to protect groundwater by educating Iowans regarding the hazardous nature, proper use and proper disposal methods of certain household products. Preamble to H.F. 631, § 502. Section 507 of House File 631 provides as follows:

> 1. A retailer offering for sale or selling a household hazardous material shall have a valid permit for each place of business owned or operated by the retailer for this activity. All permits provided for in this division shall expire on June 30 of each year. Every retailer shall submit an annual application by July 1 of each year and a fee of ten dollars based upon gross retail sales of up to fifty thousand dollars, twenty-five dollars based upon gross retail sales of fifty thousand dollars to three million dollars, and one hundred dollars based upon gross retail sales of three million dollars or more to the department of revenue and finance for a permit upon a form prescribed by the director of revenue and finance. Permits are nonrefundable, are based upon an annual operating period, and are not prorated. A person in violation of this section shall be subject to permit revocation upon notice and hearing. The department shall remit the fees collected to the household hazardous waste account of the groundwater protection fund. A person distributing general use pesticides labeled for agricultural or lawn and garden use with gross annual pesticide sales of less than ten thousand dollars is subject to the requirements and fee payment prescribed by this section.
>
> 2. A manufacturer or distributor of household hazardous materials, which authorizes retailers as independent contractors to sell the products of the manufacturer or distributor on a person-to-person basis

> primarily in the customer's home, may obtain a single household hazardous materials permit on behalf of its authorized retailers in the state, in lieu of individual permits for each retailer, and pay a fee based upon the manufacturer's or distributor's gross retail sales in the state according to the fee schedule and requirements of subsection 1. However, a manufacturer or distributor which has gross retail sales of three million dollars or more in the state shall pay an additional permit fee of one hundred dollars for each subsequent increment of three million dollars of gross retail sales in the state, up to a maximum permit fee of three thousand dollars.

Fees generated by § 507 of H.F. 631 are used to fund Toxic Cleanup Days throughout the state (§ 508), provide grants to city, county or service organizations for recycling and reclamation events (§ 512), fund a Department of Natural Resources public information and education program regarding proper use and disposal of household hazardous materials (§ 509), fund a one-time pilot project run by the Department of Transportation to collect and dispose of used motor oil from residences in one urban and one rural county in the state (§ 511), provide limited assistance to the department of public health to carry out new functions pursuant to §§ 202 and 203 of H.F. 631, and provide funds to the Department of Revenue and Finance to administer the permit program. Clearly, the interpretation of the term "gross retail sales" as used in §§ 507(1) and (2) of H.F. 631 will not only affect the fee paid by retailers, manufacturers, and distributors required to have a permit but will also affect the amount of funds available to carry out the programs funded by the household hazardous waste account.

In interpreting a statute we are guided by well established principles of statutory construction to achieve the ultimate goal which is determining legislative intent. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983); LeMars Mutual Insurance Co. of Iowa v. Bonnecroy, 304 N.W.2d 422, 424 (Iowa 1981). The language used in the statute, the objects to be accomplished and the evils sought to be remedied must be considered, and a reasonable construction must be placed on the statute to best effectuate its purpose. LeMars Mutual Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d at 424. A cardinal principle of statutory construction is that the intent of the legislature must be determined from the statutes read as a whole and not from any one section or portion taken piecemeal. Durant-Wilton Motors Inc. v. Tiffin Fire Assn, 164 N.W.2d 829, 831 (Iowa 1969); Iowa Natural Resources Council v. Van Zee, 158 N.W.2d 111, 114 (Iowa

1968). However, rules of statutory construction are to be resorted to only when the terms of the statute are ambiguous. LeMars Mutual Ins. Co. of Iowa v. Bonnecroy, 304 N.W.2d at 424. Initially we must determine if the term "gross retail sales" as used in § 507 of H.F. 631 is ambiguous.

In examining § 507(1) it is apparent that a permit is required of all retailers for the specific activity of selling or offering for sale a household hazardous material. Instead of setting a fixed fee for selling or offering for sale household hazardous materials, the legislature chose to impose a graduated fee from $10 to $100 on each place of business operated by a retailer engaged in this activity based on gross retail sales. The same fee schedule applies to manufacturers or distributors of such materials who authorize retailers as independent contractors to sell their products on a person-to-person basis primarily in the customer's home. However, for each increment of three million dollars of gross retail sales in the state, the fee increases to a maximum of three thousand dollars. Monies generated are specifically earmarked for the household hazardous waste account to carry out the policy directives set forth in § 111.2(e) and § 502 of H.F. 631. The term "gross retail sales" is not defined in either § 507 or § 501 (definitional section of Chapter 455F) or in any other provisions of House File 631. One reasonably could read this term to mean either gross retail sales of household hazardous materials or gross retail sales of the applicant's entire business. It simply is not clear from the language used by the legislature what the term "gross retail sales" was intended to mean. Because we believe an ambiguity exists, we must resort to rules of statutory construction to determine legislative intent. Willis v. City of Des Moines, 357 N.W.2d 567, 570 (Iowa 1984).

Applying the principles of statutory construction and construing the term "gross retail sales" as used in § 507 of H.F. 631 together with the stated legislative intent of H.F. 631 to improve and protect groundwater quality, it is our opinion that the term "gross retail sales" means gross retail sales of household hazardous materials only. We reach this result based on the limited activity for which a permit is required under §§ 507(1) and (2) and the specific programs funded by the fees collected and deposited in the household hazardous waste account (§ 111.2(e) of H.F. 631). This construction also avoids an interpretation of the statute which might render it unconstitutional. Willis v. City of Des Moines, 357 N.W.d 567, 572 (Iowa 1984). First, we believe the language of § 507 itself supports construing the term "gross retail sales" to mean only gross retail sales of household hazardous materials. The word "retailer" is expressly limited in the first sentence of § 507(1), as well as by § 501(5), to a person "offering for sale or selling a household hazardous material." The third sentence

of § 507(1) imposes the permit fee on such a "retailer" based upon the amount of "gross retail sales." Since "retailer" is limited to a person who sells household hazardous materials, it is reasonable to conclude that the term "gross retail sales," used in the same sentence, is correspondingly limited.

If we were to adopt the position taken by the Department of Revenue and Finance, we believe serious equal protection questions would arise. Because fundamental rights or suspect classifications are not involved, the test to determine if a statute is unconstitutional on equal protection grounds is whether a rational basis exists between the classification and state interest involved. Miller v. Boone County Hospital, 394 N.W.2d 776 (Iowa 1986); Veach v. Iowa Department of Transportation, 374 N.W.2d 248 (Iowa 1985). We are mindful that statutes are accorded a strong presumption of constitutionality and that a party challenging a statute on equal protection grounds has a heavy burden of showing the absence of the rational basis for the challenged classification. Miller v. Boone County Hospital, 394 N.W.2d at 781. Nonetheless, tying the amount of the fee to total retail sales could result in a substantial constitutional question. This problem can best be illustrated by two examples of businesses which sell or offer for sale household hazardous materials along with other nonhazardous materials.

An automobile dealership with a service department may have substantial gross retail sales of which only a small percentage is attributed to the sale of motor oil which is listed as a household hazardous material under § 501(8) of H.F. 631. Similarly a grocery store may have substantial gross retail sales of which a relatively small percentage would include waxes, polishes, etc. which are listed as household hazardous materials under § 501(8) of H.F. 631. In each instance there does not appear to be any rational basis to impose a fee based on gross retail sales of automobiles, food or other nonhazardous materials. Miller v. Boone County Hospital, 394 N.W.2d at 780-781. In § 507 of H.F. 631, the legislature chose to regulate by permit and fees the sale or offering for sale of household hazardous materials as a means of accomplishing the ultimate goal of H.F. 631 which is to prevent groundwater contamination and if necessary restore it to a potable state. § 104, H.F. 631. Imposing a fee on gross retail sales of items other than household hazardous materials does not appear to be rationally related to this laudable goal. When there are two possible constructions of an enactment, the one which will not render the enactment unconstitutional should be adopted. Willis v. City of Des Moines, 357 N.W.2d at 572.

We therefore conclude that the term "gross retail sales" as used in §§ 507(1) and (2) of House File 631 means gross retail

sales of household hazardous materials only and not gross retail sales of an applicant's entire business.

Very truly yours,

John P. Sarcone

JOHN P. SARCONE
Assistant Attorney General

JPS:rcp

CITIES; COUNTIES; CRIMINAL LAW: Iowa Code §§ 331.655 and 602.8105(1)(j) (1987). Peace officer can be required to serve a criminal prosecution document without advance payment. Peace officer does not have to wait until the completion of a prosecution to collect fees for such service. (Halligan to Metcalf, Black Hawk County Attorney, 9-8-87) #87-9-1(L)

September 8, 1987

Mr. James W. 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 following two questions: (1) whether a peace officer can be required to serve a criminal prosecution document without advance payment and (2) whether a peace officer can require payment prior to completion of the criminal prosecution. This response is in two corresponding parts.

I.

You have informed us that Black Hawk County is experiencing a problem with the service of criminal prosecution documents such as subpoenas and warrants in Iowa counties other than Black Hawk. Apparently some of the counties are refusing to serve the documents until they are paid in advance. The Black Hawk County Auditor refuses to do so, claiming the costs cannot be paid until they are collected from the defendant. As you pointed out, this deadlock has the potential for causing an unreasonable delay or complete failure of service of crucial documents in a criminal prosecution.

This opinion is the first time our office has addressed the issue of prepayment in the criminal setting. In 1934, our office advised that in the serving of original notices in civil cases, the sheriff has a right to demand and collect fees and mileage in advance. Op. Atty. Gen., 1934, p. 296. In doing so, we turned to Section 5191 of the 1934 Code. Paragraph 10 of Section 5191, as amended by Section 6 of Chapter 90, Acts of the Forty-fifth General Assembly provided, in part:

> Provided, however, that in the serving of original notices in civil cases the Sheriff shall be allowed mileage at the rate of five cents per mile in each action wherein such original notices are served, and he may refuse to serve original notices in civil cases until the statutory fees and mileage for service have been paid.

This language is essentially the same as § 331.655(1)(j) of the 1987 Code, the section upon which we are now relying.

The last sentence of Iowa Code § 331.655(1)(j) (1987) provides: "[t]he sheriff may refuse to serve original notices in civil cases until the fees and estimated mileage for service have been paid" (emphasis added). It is a basic principle of statutory construction that the express mention of a specific thing or things in a statute is an implied exclusion of other things not mentioned. In re Wilson's Estate, 202 N.W.2d 41 (Iowa 1972). The reference to original notices in civil cases is the only exception specified by the Iowa Code wherein the sheriff may demand prepayment prior to service. The failure of § 331.655(1)(j) to expressly require prepayment except for service of original notices indicates that the legislature did not intend to require prepayment for the service of prosecutory documents in criminal cases.

In summary, we conclude that prepayment may only be demanded when serving original notices in civil cases. In answer to your question, it is our opinion that a peace officer can be required to serve a criminal prosecution document without advance payment.

II.

In response to your related question concerning whether a peace officer may require payment prior to the completion of the criminal prosecution, it is our opinion that the officer may do so.

We begin the explanation of our conclusion by turning to Iowa Code § 331.655 (1987). According to this section, the

sheriff clearly has a right to collect fees for the service of various criminal prosecution documents. See, for example, §§ 331.655(1)(b) and 331.655(1)(c). It is also apparent from § 331.655 that the sheriff's right to collect fees is in no way contingent upon the outcome of the case. The right is absolute and consequently, there is no practical reason for waiting until the completion of the prosecution to pay the sheriff.

Additional insight is provided by § 602.8105(1)(j) of the Iowa Code (1987). It is our opinion that this section indicates that fees must be paid prior to disposition of the case. The pertinent portion reads:

> . . . [w]hen judgment is rendered against the defendant, costs collected from the defendant shall be paid to the county or city which has the duty to prosecute the criminal action to the extent necessary for reimbursement for fees paid.

(emphasis added). Thus, "reimbursement" occurs at the time judgment is actually rendered against the defendant. The term "reimbursement" clearly indicates that at the time of judgment, payment has already been made by the county or city.

Finally, in the absence of any sound policy reasons to the contrary, it is our opinion that the sheriff does not have to wait until the completion of a prosecution to collect the fees to which he or she is entitled.

Sincerely,

Julie Ann Halligan

JULIE ANN HALLIGAN
Assistant Attorney General

JAH/skb

CITIES; COUNTIES; LAW ENFORCEMENT: Cities' duty to provide law enforcement; Iowa Code §§ 372.4, 372.5(4), 372.8(2)(d), and 372.14(2) (1987): Iowa Code ch. 372 imposes a responsibility upon all cities to provide police protection either by, at a minimum, appointing a police chief or town marshal, or by contracting with the county or another city for such protection. The chief or marshal must meet the requirements of the Iowa Law Enforcement Academy for certification as a law enforcement officer, and be so certified as provided by the rules of the academy. (Hayward to Noonan, 10-21-87) #87-10-4(L)

October 21, 1987

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

Dear Mr. Noonan:

You have asked this office for an opinion on whether cities in Iowa are required to provide a level of law enforcement protection. In particular you ask the following:

1. Are incorporated cities required to have a marshal or chief of police and/or department of public safety providing professional law enforcement?

2. If so, must at least one such employee be certified as a law enforcement officer by the Iowa Law Enforcement Academy.

It is our opinion that each city in the State of Iowa, which has not entered into an intergovernmental agreement for municipal law enforcement protection with another city or the county, must engage at least one officer to serve as town marshal or police chief who either has been, or will be, certified as a law enforcement officer in the time and manner prescribed by the Iowa Law Enforcement Academy.

The municipal home rule provision in the Iowa Constitution, art. III, § 38A, on one hand gives cities a broad field in which to determine what they will do and how they will do it. Nonetheless the legislature has retained authority to define that field. Article III, § 38A, provides:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.
>
> The rule or proposition that a municipal corporation possess and can exercise only those powers granted in express words, is not a part of the law of this state.

Thus, cities are generally free to do as they wish unless contrary to state law. See, Kunkle Water & Elec. v. City of Prescott, 347 N.W.2d 648 (Iowa 1984). Therefore, unless the general assembly has mandated municipal corporations to provide local police protection, they have no legal duty to do so.

We believe that the legislature has mandated cities to provide for local police protection. With regard to the mayor council form of government the requirement is clear and unambiguous. Iowa Code § 372.4 (1987) (last unnumbered paragraph) provides in pertinent part:

> The mayor . . . shall appoint the marshal or chief of police except where an inter-governmental agreement makes other provisions for police protection or as otherwise provided in section 400.13.

(Iowa Code § 400.13 (1987) provides for appointment of police and fire chiefs under civil service.) See, 86 Op.Att'yGen. 120. Legislative intent is generally derived from what a statute says, not what it could have said, and where, as here, the language is clear and unambiguous, there is no room for exercises in statutory construction. See, State v. Rich, 305 N.W.2d 739 (Iowa 1981); State v. Sunclades, 305 N.W.2d 491 (Iowa 1981).

The statute pertaining to other forms of city government are not plain and unambiguous on this point. Iowa Code § 372.5(4) (1987) requires cities with a commission form of government to have a department of public safety. Iowa Code § 372.8(2)(d) (1987) requires cities with a city manager form of government to have the manager "take active control of the

police" department. In cities governed by a home rule charter, the charter must grant the mayor the powers and duties prescribed by the city code of Iowa, which, according to Iowa Code § 362.1 (1987),includes Iowa Code chapters 364, 368, 372, 376, 380, 384, 388, and 392 (1987). Iowa Code § 372.14(2) (1987) gives the mayor certain authority over the police in emergencies.

While the mandate for a police authority in these provisions is not as clear as that in § 372.4 for mayor-council cities, we believe that the same requirements are imposed upon cities with other forms of government. Statutes relating to the same subject matter should be considered in light of their common purpose. State v. Rich, 305 N.W.2d 739 (Iowa 1981). Statutes should be construed to avoid strained, impractical or absurd results. Welp v. Iowa Dep't of Revenue, 333 N.W.2d 481 (Iowa 1983). The legislature clearly intends that cities provide police protection in some manner. It would make no sense to conclude that the legislature intended to impose such a duty on some, but not all cities. It would be particularly absurd to construe the statute to impose such a responsibility on the many smaller communities with a mayor-council form of government, and then not to do so in regard to the larger towns with other forms of government.

All regular law enforcement officers must be certified by the Iowa Law Enforcement Academy. We have already issued an opinion stating that because a regular peace officer force is a condition precedent to the establishment of a reserve officer force, a peace officer who is the sole member of a force must be academy certified. 1982 Op. Att'y Gen. 278.

For these reasons, we construe Iowa Code ch. 372 (1987) as imposing a responsibility on all cities to provide police protection either by appointing, at a minimum, a chief of police or marshal, or by contracting with the county or with another city for such protection. The chief or marshal must meet the requirements set for the Iowa Law Enforcement Academy for certification as a law enforcement officer, and be so certified as provided by the rules of the academy.

Respectfully yours,

GARY L. HAYWARD
Assistant Attorney General
Public Safety Division

GLH:mjs

TAXATION: Sales Tax On Fuel Used To Heat Greenhouses. Iowa Code § 422.42(3) (1987) as amended by House File 626, 72nd G.A., First Session, § 7 (Iowa 1987). Greenhouse operators do not qualify for the sales tax processing exemption under Iowa Code § 422.42(3) as amended by H.F. 626, § 7 upon fuel used to heat greenhouses. (Kuehn to Poncy, State Representative, 10-21-81) #87-10-3(1)

October 21, 1987

The Honorable Charles N. Poncy
State Representative
653 N. Court Street
Ottumwa, Iowa 52501

Dear Representative Poncy:

You have requested an opinion of the Attorney General concerning whether greenhouse operators qualify for the sales tax processing exemption under Iowa Code § 422.42(3) upon fuel (natural gas) used to heat greenhouses. The sales tax law was enacted in 1934 with a processing exemption. 1933-34 Iowa Acts, Extraordinary Session, ch. 82, § 37(c). Section 37(c) stated:

> SEC. 37. Definitions. The following words, terms, and phrases, when used in this division, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:
>
> * * *
>
> c. "Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property and the sale of gas, electricity, water, and communication service to retail consumers or users.[1]

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[1]Even though the processing exemption is contained in the definitions section [(Iowa Code § 422.42(3)] instead of in the exemptions section (Iowa Code § 422.45), the processing exemption is an exemption statute. North Star Steel v. Iowa Department of Revenue, 380 N.W.2d 677, 680 (Iowa 1986).

In Kennedy v. State Board of Assessment and Review, 224 Iowa 405, 276 N.W. 205 (1937), the Iowa Supreme Court concluded that growing crops (plants) was not an activity which could be included as being part of processing under the processing exemption. Citing to Kennedy, the Attorney General opined that fuel used to heat greenhouses was not exempt under the processing exemption. See 1940 Op.Att'yGen. 356.

Since Kennedy was decided and the 1940 Attorney General Opinion was issued, the processing exemption has been amended many times. The question is whether the sales tax processing exemption statute [Iowa Code § 422.42(3)] has been amended so as to include fuel (natural gas) used to heat greenhouses.

Iowa Code § 422.42(3) (1987) as amended by House File 626, 72nd G.A., First Session, § 7 (Iowa 1987) states:

> 3. "Retail sale" or "sale at retail" means the sale to a consumer or to any person for any purpose, other than for processing, . . . does not include electricity, steam, or any taxable service when purchased and used in the processing of tangible personal property intended to be sold ultimately at retail. When used by a manufacturer of food products, electricity, steam, and other taxable services are sold for processing when used to produce marketable food products for human consumption, including but not limited to, treatment of material to change its form, context, or condition, in order to produce the food product, maintenance of quality or integrity of the food product, changing or maintenance of temperature levels necessary to avoid spoilage or to hold the food product in marketable condition, maintenance of environmental conditions necessary for the safe or efficient use of machinery and material used to produce the food product, sanitation and quality control activities, formation of packaging, placement into shipping containers, and movement of the material or food product until shipment from the building of manufacture. Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that the property will, by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal

> property intended to be sold ultimately at retail, or will be consumed as fuel in creating heat, power, or steam for processing including grain drying, or for providing heat or cooling for livestock buildings, or for generating electric current, or in implements of husbandry engaged in agricultural production, or the property is a chemical, solvent, sorbent, or reagent, which is directly used and is consumed, dissipated, or depleted, in processing personal property which is intended to be sold ultimately at retail, and which may not become a component or integral part of the finished product. . . .

If fuel used to heat greenhouses could qualify for the sales tax processing exemption, it must be under the part of § 422.43(3) which states:

> [O]r will be consumed as fuel in creating heat, power, or steam for processing including . . . or in implements of husbandry engaged in agricultural production. . . .

(Emphasis supplied).

Webster's Ninth New Collegiate Dictionary 65, 588 (1985) defines "husbandry, agriculture and agricultural" as follows:

> husbandry . . . the cultivation or production of plants and animals: AGRICULTURE b: the scientific control and management of a branch of farming and esp. of domestic animals.
>
> agricultural . . . of relating to, used in, or concerned with agriculture. . . .
>
> agriculture . . . the science or art of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation of these products for man's use and their disposal (as by marketing): FARMING . . . .

(Emphasis supplied).

The definitions of "husbandry" and "agriculture" are limited to activities pertaining to farming and, therefore, would exclude greenhouse operators. The Iowa Department of Revenue and Finance has taken this position in its rule defining "agricultural

production". The rule is based upon a Linn County District Court decision which limited the meaning of agriculture production under Iowa Code § 422.42(3) to farming activities so as to exclude the activities of greenhouse operators from qualifying for the sales tax processing exemption. 701 Iowa Admin. Code § 17.9(3)(a) states:

> "Agricultural production" is limited to what would ordinarily be considered a farming operation undertaken for profit. The term refers to the raising of crops or livestock for market on an acreage. See Bezdek's Inc. v. Iowa Department of Revenue (LA 11854) Linn Cty. Dist. Ct., May 14, 1984. . . . The following are excluded from the meaning of "agricultural production": commercial greenhouses; . . . .[2]

(Emphasis supplied).

Webster's Ninth New Collegiate Dictionary 604 (1985) defines "implement" as follows:

> implement . . .a tool or utensil forming part of equipment for work . . . syn. IMPLEMENT, TOOL, INSTRUMENT, APPLIANCE, UTENSIL mean a relatively simple device for performing work. IMPLEMENT may apply to anything necessary to perform a task; TOOL suggests an implement

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[2]At the time Bezdek's Inc. v. Iowa Department of Revenue was decided by the Linn County District Court, Iowa Code § 422.42(3) (1983) in pertinent part stated:

> Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property shall by means of fabrication, compounding, manufacturing, or germination become an integral part of other tangible personal property intended to be sold ultimately at retail, or shall be consumed as fuel in creating heat, power, or steam for processing including grain drying or for generating electric current, or consumed in implements of husbandry engaged in agricultural production. . . .

(Emphasis supplied).

> adapted to facilitate a definite kind or stage of work and suggests the need of skill more strongly than IMPLEMENT; INSTRUMENT suggests a device capable of delicate or precise work; APPLIANCE refers to a tool or instrument utilizing a power source and suggests portability or temporary attachment; UTENSIL applies to a device used in domestic work or some routine unskilled activity.

The definition of "implements" is not broad enough to include greenhouse buildings as a building is not an "implement."

In addition, when the legislature exempted fuel used to heat buildings from sales tax, it expressly said so.[3] The express mention of this exemption implies the exclusion of heating of other types of buildings from the scope of the exemption. See Dotson v. City of Ames, 251 Iowa 467, 471-472, 101 N.W.2d 711, 714 (1960); 2A Sands, Sutherland Statutory Construction, Intrinsic Aids § 47.23, at 194 (4th ed. 1984). In other words, since the legislature specifically included fuel used to create heat for livestock buildings as exempt from sales tax under the processing exemption, the legislature did not intend to exempt fuel used to heat other types of buildings (including greenhouse buildings) from the sales tax.

Finally, the long established rule of statutory construction that tax exemption statutes are strictly construed supports the conclusion that fuel used to heat greenhouses is not within the scope of the processing exemption in § 422.42(3). The rule is discussed in Linwood Stone Products Company v. State Department of Revenue, 175 N.W.2d 393, 396 (Iowa 1970) as follows:

> Taxation, of course, is the rule, not the exception, and tax exemptions are strictly construed against the taxpayer, with doubts resolved against exemptions.

Based upon the foregoing, it is the opinion of the Attorney General that greenhouse operators do not qualify for the sales

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[3]Iowa Code § 422.42(3) states that the sales tax processing exemption applies to fuel used "[F]or providing heat . . . for livestock buildings . . . or in implements of husbandry engaged in agricultural production. . . ." (Emphasis supplied).

tax processing exemption under Iowa Code § 422.42(3) (1987), as amended by H.F. 626, § 7 upon fuel (natural gas) used to heat greenhouses.

Very truly,

Gerald A. Kuehn
Assistant Attorney General

GAK:cmh

COUNTIES AND COUNTY OFFICERS: Secondary Road Assessment Districts. Iowa Code §§ 311.6, 311.7 and 311.11. The Board of Supervisors and the developer of a subdivision cannot, by agreement, waive the procedural rights of future property owners concerning the establishment of a secondary road assessment district or the assessment of the costs of road improvements pursuant to § 311.6 of The Code. The Board of Supervisors cannot agree to approve a proposal for the creation of a secondary road assessment district prior to the filing of a petition and the holding of the hearing required by § 311.11 of The Code. (Krogmeier to Brown, Buena Vista County Attorney, 10-12-87) #87-10-1(L)

October 12, 1987

Mr. Ted Brown
Buena Vista County Attorney
601 Cayuga Street
Storm Lake, IA 50588

Dear Mr. Brown:

We are in receipt of your letter requesting an Attorney General's Opinion concerning certain provisions of Iowa Code chapter 311. The question posed in your letter, on behalf of the Buena Vista County Board of Supervisors, is as follows:

> Would chapter 311 of the Code of Iowa allow a county to enter into an agreement with the developer of a rural subdivision whereby the developer would agree that he and subsequent owners of any lots in said development could be assessed for 100% of the cost of any street improvements if the developer or 75% of the subsequent owners of the lots in the development petitioned the county for construction of hard surfacing of the streets pursuant to section 311.6 of the Code of Iowa?

In order to satisfactorily answer your question, two issues must be resolved. The first is whether the Board of Supervisors can commit the county to such an agreement. The second is whether the procedural rights of the future property owners can be waived.

The information you present in your letter contemplates that the Board of Supervisors would enter into an agreement with the current developer of the property to allow him to plat the subdivision and develop it without meeting the current local subdivision regulations requiring paving of streets. (It is assumed that the local subdivision regulations contain a

provision or can be amended to contain a provision allowing platting without prior paving of streets.) It is then contemplated that the agreement would provide that at such time as the developer or 75% of subsequent lot owners petitioned the Board of Supervisors for paving of the streets in the subdivision, that the county would agree to do so and assess 100% of the costs against the lots within the subdivision. The developer would, for himself and on behalf of the future lot owners, agree to waive all notice and other legal formalities.

Both Iowa Code sections 311.6 and 311.7 contain certain requirements concerning the assessment of costs for road improvements. These provisions establish a procedure by which property owners may petition the County Board of Supervisors for the creation of a secondary road assessment district or for the payment of private funds for the improvement of a secondary road. It is important to note that sections 311.6 and 311.7 provide for differing means by which secondary roads may be improved with cost participation by private individuals.

Section 311.6 and the other sections in chapter 311 are concerned with the establishment of special assessment districts and the improvements of secondary roads in such districts. A petition under section 311.6 is to describe the road or roads proposed to be improved, the nature of the proposed improvement, the percentage of the estimated cost of improving the road that is proposed to be assessed against the property in the district, and the lands proposed to be included in the district. The petition shall be signed by a minimum of 50% of the owners of land within the proposed district or 50% of the owners of land within the proposed district who reside within the county.

Section 311.7 relates to improvements on secondary roads by petition and the payment of at least 50% of the costs thereof by private funds, whether through the mechanism of establishment of a special assessment district or by direct payment in advance of the improvement by the adjacent land owners. Section 311.7 requires that a petition be filed by the owners of not less than 75% of the lands adjacent to or abutting upon the proposed improved road and that the petition request the assessment or payment of not less than 50% of the cost of the proposed improvement by the adjacent land owners.

Thus, the specific provisions of a petition under sections 311.6 or 311.7 are different and distinct. Petitions under section 311.7 do not require the establishment of a special assessment district. Where, as in the question you pose, the statutorily required percentage of property owners petitions for the creation of a special assessment district, the additional

provisions of chapter 311 require that a specific procedure be followed. Section 311.8 requires a county engineer's report be prepared. Section 311.11 describes a hearing and notice for the establishment of a secondary road assessment district and the apportionment of not less than 50% of the estimated cost of the proposed improvement. Various other provisions within chapter 311 relate to the type of project and the collection and levying of any assessments that may be made for such a project. (See §§ 311.9; .10; .16; .17; .18)

For any petition filed for the improvement of secondary roads by either private funds or the establishment of a secondary road assessment district, the Board of Supervisors retains discretion to accept or reject the improvements proposed in the petition. § 311.15. See also 1976 Op.Att'yGen. 810, 811. In these matters as in other matters, the county Board of Supervisors has broad discretion in the exercise of its power to conduct county affairs. Iowa Code § 331.362(3); Sorenson v. Andrews, 221 Iowa 44, 264 N.W. 562 (1936). However, the Board of Supervisors cannot waive the statutory requirements of chapter 311 concerning the procedure by which a special assessment is made. § 331.301(5). Should the current Board of Supervisors agree to waive the notice and hearing requirements in the event of a future petition under section 311.6, such a special assessment district or the levy based upon the special assessment district may be subject to attack. Beh v. City of West Des Moines, 131 N.W.2d 488, 257 Iowa 211 (1964). The Iowa Supreme Court has held that the failure to follow the assessment procedure for levying a special assessment voids the assessment. Voogd v. Joint Drainage District #3-11, Kossuth and Winnebago Counties, 188 N.W.2d 387 (Iowa 1971). In Voogd, the court declared unenforceable the assessments made without notice and hearing to the affected property owners. Id. at page 393. Also relevant is Thompson v. Joint Drainage District #3-11, 143 N.W.2d 326, 259 Iowa 462 (1966). In Thompson, the court found that the failure to provide a hearing and to give notice as required by statute voided a drainage district assessment.

The right to a hearing and notice for special assessments has been repeatedly recognized by the Iowa Supreme Court. See Beh v. City of West Des Moines, 257 Iowa 211, 131 N.W.2d 488 (1964); Lytle v. Sioux City, 198 Iowa 848, 200 N.W. 416 (1924); Secondary Road Assessment District Number Eleven of Clay County, 213 Iowa 988, 238 N.W. 66 (1931); Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962). Failure to give notice and an opportunity for hearing has been held to void special assessment proceedings. Roznos v. Town of Slater, Id. The Iowa Supreme Court has held that the giving of notice is jurisdictional for purposes of notifying landowners of the establishment of a road and the security for payment of the expenses thereof under a

prior statutory notice provision. Swift v. Board of Supervisors of Davis County, 170 N.W. 754, 185 Iowa 501; Chicago & N.W.Ry.Co. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927). See also Hayes, Special Assessment for Public Improvements in Iowa, Part III, 14 Drake L.Rev. 3, 28 (1964). In the establishment of secondary road assessment districts, the Supreme Court has held that the notice requirement of The Code must be strictly adhered to. Secondary Road Assessment District Number Eleven of Clay County, 213 Iowa at 993, 238 N.W. at 69.

The notice and hearing requirements of chapter 311 are statutory procedural rights. A waiver of either a statutory or constitutionally protected right must be a voluntary and intentional act done with an actual knowledge of the existence of the right and the meaning of the rights involved, and with full understanding of the direct consequences of the waiver. State v. Jones, 238 N.W.2d 790 (Iowa 1976); Cedar Rapids Community School District v. Parr, 227 N.W.2d 486 (Iowa 1975). Notice and hearing requirements with respect to special assessments do have due process implications. Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1908). To the extent that these procedures may arguably be constitutionally required, the courts would indulge every reasonable presumption against waiver of constitutional rights. Interest of Thompson, 241 N.W.2d 2 (Iowa 1976). We therefore conclude that the statutory procedural rights of future property owners cannot be waived by either the developer of the proposed subdivision or by the county.

It is further important to note that the Board of Supervisors cannot agree to exercise its discretion to approve or disapprove a special assessment petition prior to the time that such a petition is submitted and the procedural requirements of chapter 311 are met. The current Board of Supervisors would be proposing to exercise its discretion on behalf of a future Board that may be presented with such a petition. The general rule in Iowa is that, absent an express statutory provision to the contrary, a local governmental body may not bind its successors in matters that are essentially legislative or governmental, in nature. 1983 Op.Atty.Gen. 56, #83-6-4; Sampson v. City of Cedar Falls, 231 N.W.2d 609 (Iowa 1975); 63 C.J.S. Municipal Corporations § 987 at 550. It is obvious that chapter 311 calls for the exercise of discretion by the Board after the petition has been received and after the public hearing. In our view, the approval of a petition under either § 311.6 or § 311.7 would be considered to be an exercise of a discretionary governmental function. Thus, the current board of supervisors may not bind a future board to approve such a petition.

Therefore, we conclude that should the county Board of Supervisors enter into the proposed agreement, the agreement would be unenforceable against the county. We also conclude that the Board of Supervisors and the developer cannot, by agreement, waive the procedural rights of the future property owners who would be affected by the proposed special assessment.

Sincerely yours,

CHARLES J. KROGMEIER
Special Assistant Attorney General

CJK:rh

COUNTIES AND COUNTY OFFICERS: County Compensation Board. Iowa Code chapter 331, § 331.905 (1987). The spouse or relative of a county official whose salary is reviewed by the county compensation board may have a pecuniary interest or the potential to be influenced. If so, a conflict of interest exists and these individuals should not be selected to serve on the county compensation board. Employees of the federal government are not prohibited from serving on the county compensation board. Persons serving as unpaid commissioners, board members or other elected or appointed officials in county, city or township government are prohibited from serving on the county compensation board since the statute specifically prohibits them from serving. (Skinner to Scieszinski, Monroe County Attorney, 11-30-87) #87-11-10(L)

November 30, 1987

Ms. Annette 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 the eligibility of certain persons to serve on the county compensation board pursuant to the enactment of Senate File 504, 1987 Iowa Legislative Service 5, page 245 (West), amending Iowa Code § 331.905 (1987). Specifically, your questions are as follows:

1. Whether a spouse or other relative (by consanguinity or affinity) of a county official is eligible to serve on the county compensation board.

2. Whether an officer or employee of the federal government or a political subdivision is eligible to serve.

3. Whether a person serving as an unpaid commissioner, board member, or other unpaid elected or appointed official in county, city, or township government is eligible to serve.

Senate File 504 § 33 amends Iowa Code § 331.905, subsections 1, 2, 3 (1987) by striking the subsections and inserting in lieu thereof the following:

> 1. There is created in each county a county compensation board which shall be composed of seven members who are residents of the county. The members of the county compensation board shall be selected as follows:
>
> a. Two members shall be appointed by the board of supervisors.
>
> b. One member shall be appointed by each of the following county officers: the county auditor, county attorney, county recorder, county treasurer, and county sheriff.
>
> 2. The members of the county compensation board shall be appointed to four-year, staggered terms of office. The members of the county compensation board shall not be officers or employees of the state or a political subdivision of the state. A term shall be effective on the first of July of the year of appointment and a vacancy shall be filled for the unexpired term in the same manner as the original appointment.

Before the amendment, Iowa Code § 331.905(2) limited the categories of individuals to be selected to serve on the county compensation board as follows:

> A member of the county compensation board . . . shall not be an employee or officer of the state government or a political sub-division of the state, or related within the third degree of consanguinity to a state or local governmental employee or officer.

Iowa Code § 331.905(3), before the amendment, provided for the ineligibility of a person to serve

> . . . if a member of the board who is also an elective public officer ceases to hold the elective office under which the officer originally qualified for membership or of a member of the board who is selected under subsection 1, paragraphs "c", "d", or "e", [1]

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[1] Members representing the general public selected by 1) supervisors, 2) school district board representatives, and 3) representatives of incorporated cities within the county.

> becomes an employee or officer of a state government or a political subdivision of a state or is related within the third degree of consanguinity to a state or local governmental employee or officer".

The provisions of subsections 2 and 3 were changed by the 1987 amendment. The sections prohibiting relatives of officers or of employees of the state or political subdivisions of the state have been eliminated and as it now stands the statute is silent as to limitations of consanguinity. In this instance, the amendment specifically replaces portions of Iowa Code § 331.905 without ambiguity. To the degree that the amended provisions replace previous provisions, it must be concluded that the elimination of the consanguinity limitations and employee limitations was intentional.

The statute itself does not prevent the appointment of spouses, relatives or federal employees. However, to render a complete opinion, we believe a discussion is necessary as to whether a conflict of interest or incompatibility of offices may exist if a person in the categories you list is selected to serve on the county compensation board. In a previous Attorney General's opinion, we recognized the importance of differentiating between the concepts of "incompatibility of offices" and "conflict of interest."[2] Your second question concerns the concept of incompatibility of offices while your first question concerns the concept of conflict of interest.

We turn first to your question concerning a spouse or other relative of an elected official serving on the county compensation board and use a conflict of interest analysis.

Iowa statutes contain prohibitions against employing or contracting with certain individuals thereby preventing conflicts of interests. Chapter 71, the nepotism statute, limits the power of an elected official to appoint a person related by consanguinity or affinity within the third degree to positions as deputy or clerk in that official's office. Sections 362.5 and 362.6 as applied to city governmental officials in financial dealings limit actions which may entail a conflict of interest. Chapter 68B and sections 722.1 and 722.2, as amended by Senate File 480, apply to all public officers and employees and

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[2] In a 1981 opinion, these two concepts with contrasts of the cases of State v. White, 257 Iowa 606, 133 N.W. 2d 903, (1965), and Wilson v. Iowa City, 165 N.W. 2d 813 (Iowa 1969), were discussed extensively. 1982 Op.Att'yGen. 220.

immediate family members in the acceptance of gifts.

Section 403.16 has been interpreted to prohibit any personal interest on the part of public officials in urban renewal projects. Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). In a discussion of the general rule of law concerning conflicts of interest, the court stated:

> We doubt if any rule of law has more longevity than that which condemns conflict between public and private interests of governmental officials and employees nor any which has been more consistently and rigidly applied. * * * These rules, whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage. It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid. (emphasis in original)

165 N.W.2d 813 at 822.

More recently, the court has referred to the potential for conflict of interest in Borlin v. Civil Service Commission of the City of Council Bluffs, 338 N.W.2d 146 (Iowa 1983).[3] The court referred to the difficulty in attempting "practically to serve himself in a transaction in which his duty called him to serve another." 338 N.W.2d 146 at 150.

Prior opinions of this office have construed the phrase "direct or indirect interest" where a statute prohibits employment or contracts when there is a familial relationship. For instance, we have concluded that a "direct or indirect" interest did exist when a spouse of a city officer entered into a business transaction with the city, but that this interest was not prohibited by the particular statute at issue so long as a statutory exception applied. 1980 Op.Att'y Gen. 580; 1976

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[3] The facts of this case relate to a police officer who sought to carry on a private business as a voice stress analyst. The court upheld a local civil service commission order that a conflict existed.

Op.Att'y Gen. 551; 1973 Op.Att'y Gen. 127. These opinions are examples of factual patterns which establish that a spousal relationship was sufficient to establish a direct or indirect interest.

We have held previously that a mere familial relationship does not create a per se conflict of interest at common law, but that there may be specific facts in a particular situation by which a familial relationship results in a conflict of interest. See, e.g., 1984 Op.Att'y Gen. 78; 1972 Op.Att'y Gen. 338; 1960 Op.Att'y Gen. 38; 1980 Op.Att'y Gen. 300. The latter opinion analyzed cases in other states and found "where courts have held such conflicts to exist they have found an actual financial or beneficial interest or conduct which was outrageous or unjustly favorable to the family member. . . ."

Although technically Iowa Code § 331.905 as amended has eliminated the prohibition upon spouses and relatives of elected officials serving on the county compensation board, principles in case law lead us to conclude some prohibitions may still exist. The compensation board is a separately created board with the primary function to review salaries. Presumably, as in other county commissions, the individuals selected are so selected to serve the public good and to protect the public trust. Iowa case law supports the concept that public servants are to avoid conflict of interests in pecuniary matters and in matters where their judgment may be influenced. We believe the responsibilities of the compensation board are such that if a spouse of a county officer serves on the county compensation board the factors creating a conflict of interest are likely present. The compensation board member's task of reviewing and recommending salaries of county officers may involve the board member's own pecuniary interests if a board member is also the spouse of a county officer. While not prohibited by statute, common law principles should be applied in the factual context to determine whether a spouse should be prohibited from serving.

In light of the earlier opinions from this office, we are also reluctant to apply a per se rule to other relatives of county officers because of the possibility that in some circumstances the factual situation may be such as to clearly establish that no prohibited interest exists. Each situation should be evaluated on its specific facts to determine if a relative may have a pecuniary interest or the potential to be influenced to take action inconsistent with the good of the public. If it is determined factually that this is the case, a conflict of interest exists and spouses and relatives should not be selected to serve on the county compensation board.

We turn now to the question whether an officer or employee of the federal government is eligible to serve on the county compensation board. The recent amendment to Iowa Code § 331.905 states that the board is required to: 1) review the compensation paid to comparable officers in other counties of this state, other states, private enterprise, and the federal government; 2) consider setting the sheriff's salary so that it is comparable to salaries paid to professional law enforcement administrators and command officers of the Iowa highway safety patrol, the division of criminal investigation of the department of public safety and city police agencies in this state; 3) prepare a compensation schedule for elective co-officers for the succeeding fiscal year; and 4) submit its recommended compensation schedule to the board of supervisors for inclusion in the county budget.

Although the board of supervisors has authority to determine the final compensation schedule the compensation board is the body which first reviews the salaries of the county officers. The only statutory limitation on the composition of the board is that its members "shall not be officers or employees of the state or a political subdivision of the state." The prohibition applies to state officers and employees, not to federal officers or employees. The doctrine of incompatibility of offices only applies to situations where an individual holds two public offices, and does not apply to employees. See 1982 Op.Att'yGen. 220. Neither section 331.905 as amended nor the doctrine of incompatibility would bar a federal employee from serving on the compensation board.

Your third question, whether a person serving as an unpaid commissioner, board member, or other unpaid elected or appointed official in county, city, or township government is eligible to serve, is answered by the amendment to Iowa Code § 331.905. The only stated limitation concerning eligibility to serve on the compensation board is that its members shall not be "officers or employees of the state or a political subdivision of the state." "Political subdivision of the state" is defined as "city, county, township or school district." Iowa Code 25B.3 (1) (1987). By relying on the plain language of the amendment, we conclude that any person serving as an unpaid commissioner, board member, or other elected or appointed official in a political subdivision of the state such as a county, city, or township government is precluded by statute from serving on the county compensation board.

To summarize, we conclude that the spouse or a relative of an elected official whose salary is reviewed by the county compensation board may have a pecuniary interest or the potential to be influenced. If so, a conflict of interest exists and these individuals should not be selected to serve on the county

compensation board. Employees of the federal government are not prohibited from serving on the county compensation board. Persons serving as unpaid commissioners, board members, or other unpaid elected or appointed officials in county, city or township government are prohibited from serving on the county compensation board since the statute specifically prohibits them from serving.

Sincerely,

KATHY MACE SKINNER
Assistant Attorney General

KMS:sg

INSURANCE; COUNTIES. Iowa Code section 520.1 (1987). An Iowa county may exchange reciprocal or inter-insurance contracts with a county of another state. (Haskins to Arnould, State Representative, 11-25-87) #87-11-9(L)

November 25, 1987

The Honorable Bob Arnould
State Representative
715 North Pine
Davenport, Iowa 52804

Dear Representative Arnould:

You have requested the opinion of this office as to whether an Iowa county may exchange reciprocal or inter-insurance contracts pursuant to Iowa Code ch. 520 (1987) with counties of other states.

Iowa Code section 520.1 (1987) authorizes the exchange of reciprocal or inter-insurance contracts between or among certain defined entities. Iowa Code ch. 520 provides for the structuring and regulation of the association thereby created. Section 520.1 states:

> Individuals, partnerships, and corporations, and cities, counties, townships, school districts and any other units of local government of this state, hereby designated subscribers, are hereby authorized to exchange reciprocal or interinsurance contracts with each other, and with individuals, partnerships, and corporations of other states, territories, districts, and countries, providing insurance among themselves from any loss which may be insured against under the law, except life insurance.

[Emphasis added].

Clearly, section 520.1 allows Iowa counties (or cities, etc.) to exchange reciprocal or inter-insurance countracts with other Iowa counties, cities, townships, etc.[1] In addition, Iowa counties are allowed to exchange such contracts with "individuals, partnerships, and corporations" of other states, territories, districts, and countries.

The issue is whether a county of another state is a "corporation" of another state. Although a county may not be a "municipal corporation", see 1978 O.A.G. 219, 220, this office has concluded that a county is "necessarily a political corporation" within the meaning of the Iowa Constitution. See Op. Att'y Gen. #87-1-10, at 2n.1. There is therefore no reason that a county would not generically be considered as a "corporation" for purposes of section 520.1 and thus a county of another state would be a proper party with which a county of this state could exchange reciprocal or inter-insurance contracts.

This construction of section 520.1 is the sensible and practical one. It would be ironic indeed if a county of this state could exchange contracts with private entities of other states but not with other counties of those states (whose risk characteristics are more similar than those of private entities).

Hence, it is our opinion that an Iowa county may exchange reciprocal or inter-insurance contracts with a county of another state.

Sincerely,

Fred M. Haskins

FRED M. HASKINS
Assistant Attorney General

FMH/dh

1. The legislature amended section 520.1 following an opinion of this office to the contrary under a prior version of this section. See 1978 Iowa Acts, ch. 1030, section 10; 1978 O.A.G. 219.

ENGINEERING AND LAND SURVEYING EXAMINING BOARD; ARCHITECTURAL EXAMINING BOARD: Engineers' exemption from ch. 118. Iowa Code Chapter 114 (1987), § 114.1; Iowa Code Chapter 118 (1987), § 118.17; House File 587, 72d G.A., 1st Sess. There is no reference in House File 587 which expressly alters the engineer exemption nor is there any indication that section 118.17 has been impliedly amended. The provisions in section 118.17, which exempt engineers from the "Registered Architects" statute, stand. Professional Engineers are therefore exempt from the requirements of Chapter 118 as amended. (Skinner to Pulley and Kalleen, 11-25-87) #87-11-7(L)

November 25, 1987

Mr. Frank L. Pulley, Chair
Iowa Engineering and Land Surveying Examining Board
L O C A L

Ms. Lois Kalleen, Executive Secretary
Architectural Examining Board
1918 S. E. Hulsizer Ave.
Ankeny, Iowa 50021

Dear Mr. Pulley and Ms. Kalleen:

You have each requested an opinion of the Attorney General concerning the applicability of House File 587, 72nd G.A., 1st Session, as it amends Iowa Code ch. 118 (1987), concerning registered architects. Specifically, your question is as follows:

> Does H.F. 587, as it amends Iowa Code ch. 118 (1987), change the exemption for professional engineers from the provisions of chapter 118?

Iowa Code § 118.17 (1987) states the relevant exemptions from chapter 118 as follows:

> The provisions of this chapter shall not apply to: 1. professional engineers registered under chapter 114 . . . [1] (emphasis added).

House File 587 amends several sections of chapter 118, but section 118.17 is not one of those amended. Section 10 of the amendment does include one express statement concerning engineering services, but this reference is within a list of factors which must be met for a corporation, partnership, sole proprietorship, or other business entity to practice architecture in Iowa and does not modify or address the exclusion provisions of section 118.17. There are no references within the amendment which expressly state that the exclusion for engineers has been changed by the legislature.

We then ask whether the provisions concerning engineers in chapter 118 have been impliedly amended by H.F. 587. Based on the case law which has addressed the issue of "amendment by implication," we do not believe the legislature intended any such amendment. The Iowa Supreme Court has long acknowledged the presumption against amendment of statutes by implication. See Caterpillar Davenport Employees Credit Union v. Huston, 292 N.W.2d 393, 396 (Iowa 1980); Lemon v. City of Muscatine, 272 N.W.2d 429, 431-21 (Iowa 1978); State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978). The presumption against implicit amendments is so great that the legislature will not be found to have changed a law unless the intent to amend is clear and unmistakable. Peters v. Iowa Employment Security Comm'n., 235 N.W.2d 306, 309 (Iowa 1975). Absent clear and unmistakable legislative

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[1] Iowa Code Chapter 114 (1987), concerning professional engineers and land surveyors, states that no person shall practice professional engineering or land surveying in the state unless that person is a registered professional engineer or a registered land surveyor as provided in this chapter, except as permitted by section 114.26 (an employee of a corporation, professional engineer or land surveyor working for the United States government, or a professional engineer or land surveyor working as an assistant to a professional engineer or land surveyor registered under this chapter.)

intent, a finding of implied amendment constitutes a usurpation of legislative authority. State v. Rauhauser, 272 N.W.2d at 435.[2]

If it is found that statutes enacted in different sessions of the legislature are irreconcilable, the principles of statutory construction must be applied. In this instance, there are no inconsistent provisions within H.F. 587 which might suggest the repeal of chapter 118 nor is the amendment irreconcilable with section 118.17. These statutes are not inconsistent and further statutory construction is unnecessary.

In summary, there is no reference in H.F. 587 which expressly alters the engineer exemption nor is there any indication that section 118.17 has been impliedly amended. The provisions in section 118.17, which exempt engineers from the "Registered Architects" statute, stand. Professional Engineers are therefore exempt from the requirements of chapter 118 as amended.

Sincerely,

Kathy Mace Skinner by EMO

KATHY MACE SKINNER
Assistant Attorney General

KMS:sg

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[2] In a recent opinion, the issue of amendment by implication was addressed as it relates to a criminal statute requiring complaints to be sworn under oath. In that opinion, as here, no amendment by implication was found. Op.Att'yGen. #87-11-1.

PUBLIC EMPLOYEES: Veterans Preference. Iowa Code §§ 70.1, 70.6, 70.8, 400.11 (1987). The provisions of Iowa Code chapter 70, the Iowa Veteran's Preference Law, apply to both permanent part-time and temporary or seasonal positions of a public employer. Rigid compliance with Chapter 70 is not however required in emergency situations where the notice and selection requirements of Chapter 70 cannot realistically be satisfied. (Dorff to Beine, Cedar County Attorney, 11-23-87) #87-11-6(L)

November 23, 1987

Mr. Lee W. Beine
Cedar County Attorney
P.O. Box 270
419 Cedar Street
Tipton, Iowa 52772

Dear Mr. Beine:

You have requested an opinion of the Attorney General concerning the applicability of Iowa Code chapter 70, the Iowa Veteran's Preference Law, to certain types of employment. Specifically, you ask:

1. Do the provisions of Chapter 70 apply to permanent part-time positions of a public employer;

2. Do the provisions of Chapter 70 apply to temporary or seasonal positions of a public employer; and

3. If the provisions of Chapter 70 do apply to temporary or seasonal positions of a public employer, does an exception to their application exist in "emergency situations" where additional temporary help is required but insufficient time exists to comply with notice and selection requirements.

The answers to your questions are not readily apparent upon initial inspection of Chapter 70. A closer look at the history of the act, and veterans' preference statutes in general, is therefore warranted.

The Iowa Veterans' Preference Law has its origin in the Soldiers' Preference Law, which became law in Iowa on March 24, 1904. See Geyer v. Triplett, 237 Iowa 664, 669, 22 N.W.2d 329, 332 (1946). Although the act in its present form has not recently been construed by the Iowa courts, the Iowa Supreme Court has previously expressed the view that "the spirit and purpose of the Soldiers' Preference Act was to reward those who served their country in time of need." Id.; see also Tusant v. City of Des Moines, 231 Iowa 116, 300 N.W. 690 (1941); Babcock v. City of Des Moines, 180 Iowa 1120, 162 N.W. 763 (1917). To that end, the Iowa courts have consistently held that "the soldiers' preference statute should be given a liberal construction," Geyer, 237 Iowa at 699, 22 N.W.2d at 332, such that "when within reason possible, . . . its evident purpose [may] be accomplished." Babcock, 180 Iowa at 1123, 162 N.W. at 764. See Tusant, 231 Iowa 116, 300 N.W. 690; Herman v. Sturgeon, 228 Iowa 829, 838, 293 N.W. 488, 492 (1940); Dickey v. King, 220 Iowa 1322, 1325, 263 N.W. 823, 824 (1935). This construction comports favorably with that given similar statutes in other jurisdictions. See generally 67 C.J.S. Officers § 37 at p. 301 (1978) ("The purpose of such provisions is to reward those who have served their country, to aid in the rehabilitation and readjustment of veterans, and to induce persons to join the armed forces; these provisions are in recognition of the fact that such experience will make veterans better public servants.").

With this background in mind, a closer look at Chapter 70 itself is warranted.

Iowa Code § 70.1(1) (1987) provides:

> **70.1 Appointments and employment -- applications.**
>
> 1. In every public department and upon all public works in the state, and of the counties, cities, and school corporations thereof, honorably discharged persons 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 on May 7, 1975, both dates inclusive, who are citizens and residents of this state are entitled to preference in appointment and employment over other applicants of no greater qualifications. The preference in appointment and employment for

> employees of cities under a municipal civil service is the same as provided in section 400.10. For the purposes of this section service in World War II means service in the armed forces of the United States between December 7, 1941, and December 31, 1946, both dates inclusive.

The language of section 70.1(1) is broad, and contains no indication of a legislative intent to restrict its application to permanent full-time public positions or otherwise. Statutory exceptions to the apparent all-in-inclusive coverage of section 701.1(1) are, however, contained elsewhere in Chapter 70. Specifically, Iowa Code § 70.8 (1987) provides:

> Nothing in this chapter shall be construed to apply to the position of private secretary, or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer.

Consistent with section 70.8 and its statutory precursors, the Iowa courts have taken the position that "[p]reference statutes such as ours generally, though not always, apply to minor or subordinate offices or employment." Krohn v. Judicial Magistrate Appointing Com'n, 239 N.W.2d 562, 563 (Iowa 1976); see Klatt v. Akers, 232 Iowa 1312, 5 N.W.2d 605 (1943); Bowman v. Overturff, 229 Iowa 329, 294 N.W. 568 (1940). This view likewise comports favorably with the construction given similar statutes by other jurisdictions. See 77 Am.Jur.2d, Veterans, § 122, p. 1038 (1975); Annot., 58 A.L.R.2d 960 (1958); see also 4 McQuillin, The Law of Municipal Corporations, § 12.248, p. 386 (3rd rev. 3d. 1983).

With this background in mind, your first question is whether the provisions of Chapter 70 apply to permanent part-time positions of public employers. We are of the opinion that they do, so long as the positions do not fall within the category of "private secretary or deputy of any official or department," or place the employee in a position where he or she holds a "strictly confidential relation to the appointing officer." See Iowa Code § 70.8. In reaching this conclusion, we have attempted to give the act a liberal construction, see Geyer, 237 Iowa at 699, 22 N.W.2d at 332, and impart such meaning to it as we believe the legislature intended. The act itself is devoid of any indication that the legislature did not intend it to apply to permanent part-time positions. Nor are we aware of any reported cases in other jurisdictions with veterans' preference statutes similar to ours in which such statutes have been held wholly inapplicable to permanent part-time public positions. Finally, we are unable to

discern any compelling reasons why the legislature would want to exclude permanent part-time public positions from coverage under Chapter 70. It is therefore our opinion that the provisions of Chapter 70 do apply to permanent part-time positions of public employers unless otherwise exempted from application by section 70.8.

You next ask whether the provisions of Chapter 70 apply to temporary or seasonal positions of a public employer. As a general rule, veterans' preference acts in other jurisdictions have been construed as not applicable to temporary employment by a non-civil service public employer, to per diem employment, or where the services to be performed are of a general character and such as may be from time to time directed by a superior without being in any manner indicated by the special nature of the employment. See Crnkovich v. Independent School Dist. No. 701, Hibbing, 273 Minn. 518, 142 N.W.2d 284, 286 (1966); McManus v. Genesee County Road Com'n, 319 Mich. 653, 30 N.W.2d 387 (1948); Barringer v. Miele, 6 N.J. 139, 77 A.2d 895 (1951); see generally, 77 Am.Jur.2d Veterans § 124, p. 1040 (1975); 67 C.J.S. Officers § 141, p. 528 (1978); Annot., 58 A.L.R.2d 960, 980 (1958). To our knowledge, however, this construction has only been invoked as a basis for denying relief to veterans dismissed from temporary or seasonal positions. See e.g. Crnkovich, 273 Minn. 518, 142 N.W.2d at 286-87; McManus, 319 Mich. 653, 30 N.W.2d at 388-89; Barringer, 6 N.J. 139, 77 A.2d at 897-98. Consistent with this view, the Iowa Supreme Court has held or recognized on several occasions that upon the expiration of a definite term for which an honorably discharged veteran was employed, the veteran was not entitled to the protection of the veterans' statute concerning removals.[1] See Durst v. Gaza

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[1]Iowa Code § 70.6 governs removal of honorably discharged veterans and provides,

> **70.6 Removal -- certiorari -- judicial review.**
>
> No person holding public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is herein granted, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari or at such person's election, to judicial review in accordance with the terms

Consolidated School, 228 Iowa 463, 292 N.W. 73 (1940); Sorenson v. Andrews, 221 Iowa 44, 264 N.W. 562 (1936); King v. Ottumwa, 148 Iowa 411, 126 N.W. 943 (1910); Kitterman v. Wapello County, 137 Iowa 275, 115 N.W. 13 (1908).

The question you pose, however, raises an issue not addressed in the foregoing cases: whether a veteran is entitled to preference in appointment to a temporary or seasonal public position, as opposed to protection against removal. This question appears to be one of first impression. Our starting point is therefore the statute itself.

We begin our analysis by again noting that the language of section 70.1(1) is broad, with no indication the legislature intended to exclude it from applying to temporary or seasonal positions. We also note again that the Iowa courts have consistently held that the statute should be give a "liberal construction." See Geyer, 237 Iowa at 699, 22 N.W.2d at 332; Tusant, 231 Iowa 116, 300 N.W. 690; Herman, 228 Iowa at 838, 293 N.W. at 492; Dickey, 220 Iowa at 1325, 263 N.W. at 824. Finally, we are again unable to discern any compelling reasons why the legislature would not intend Chapter 70 to apply to temporary or seasonal positions.

Although Chapter 70 lacks any specific provisions for temporary or seasonal positions, we believe the legislature likely intended it to apply to such positions. A contrary interpretation would in our opinion be inharmonious with the spirit of the act and the liberal construction accorded it by the Iowa courts. We are reluctant to so interpret Chapter 70 in the absence of clear authority for doing so. Rather, we strive to give statutes a liberal and reasonable construction that will accomplish the legislature's purpose. See Olds v. Olds, 356 N.W.2d 571, 574 (Iowa 1984). It is therefore our opinion that the provisions of Chapter 70 do apply to temporary or seasonal positions of a public employer, subject again to the qualification that the positions not fall within the category of "private secretary or deputy of any official or department," or place the employee in a position where he or she holds a "strictly confidential relation to the appointing officer." See Iowa Code § 70.8 (1987).

We believe our opinion concerning your second question finds further support in portions of Iowa Code Chapter 400, the Iowa Civil Service Law. Chapter 400 and Chapter 70 contain several similar provisions, and reference to Chapter 400 is made in

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of the Iowa administrative procedure Act if that is otherwise applicable to their case.

sections 70.1(1) and (4). Section 400.10 contains a preference for veterans similar to that found in section 70.1(1). Section 400.11 states in pertinent part that "[p]reference for temporary service in civil service positions shall be given those on . . . [certified eligible] lists." Accord Op.Att'yGen. #79-6-3(L) ("Preference shall be given to those on eligibility lists for temporary services.") While Chapter 70 lacks similar provision for temporary appointments, we believe that when read in conjunction with Chapter 400, Chapter 70 reflects a legislative intent that veterans also be given preference in appointment and employment to temporary or seasonal positions of a public employer. In reaching this conclusion, we invoke two rules of statutory construction. First, statutes should be given a liberal and reasonable construction that will accomplish the legislature's purpose. See Olds, 356 N.W.2d at 574. Second, statutes relating to the same subject matter must be considered in light of their common purpose and, in interpreting a statute, other pertinent statutes should be considered. State v. Rich, 305 N.W.2d 739, 745 (Iowa 1981). It seems clear that the "common purpose" underlying Chapter 70 and the relevant portions of Chapter 400 is to encourage public employers to hire veterans whenever possible. This consideration, in our opinion, further supports our view that the legislature intended that veterans be given preference in appointment or employment to temporary or seasonal positions of a public employer, unless otherwise exempted by section 70.8.

Finally, you ask whether an exception to application of Chapter 70 to temporary or seasonal positions would exist in "'emergency situations' where additional temporary help is required but insufficient time exists to comply with notice and selection requirements." The requirements you refer to are apparently those contained in section 70.1(3), which provides:

> 3. In all jobs of political subdivisions of the state which are to be filled by competitive examination or by appointment, public notice of the application deadline to fill a job shall be posted at least ten days before the deadline in the same manner as notices of meetings are posted under section 21.4.

Your letter contemplates no specific examples of "emergency situations" you feel might prevent a public employer's compliance with Chapter 70. Nor does Chapter 70 contain provisions for exempting compliance with the statute in such situations. We note, however, that an "emergency" is by definition "an unforseen combination of circumstances or the resulting state that calls

for immediate action." See Webster's Third New International Dictionary 741 (1967).

With these considerations in mind, we note that the goal in construing any statute is to ascertain legislative intent. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). The spirit of a statute must be considered as well as its words so that a sensible, workable, practical and logical construction is accorded, and inconvenience or absurdity avoided. Id. A legislative enactment presumes a reasonable result is intended. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907, 913 (Iowa 1985).

Although Chapter 70 contains no express provisions exempting its application in "emergency situations," it seems only reasonable the legislature did not intend the statute to be applied so rigidly as to hinder a public employer's prompt response to such situations. An emergency is by definition a situation calling for "immediate action." See Webster's Third New International Dictionary at 741. We can well envision emergencies, particularly those involving such natural disasters as floods or tornados, where compliance with the notice and selection requirements of Chapter 70 would be unrealistic. We doubt the legislature intended Chapter 70 to be applied so inflexibly as to negate a timely and appropriate response to such instances. If a public body has authority to employ temporary emergency help, it would be unreasonable to construe Chapter 70 as precluding the "immediate action" required for appropriate response to the emergency. Indeed, in an earlier analysis of the legislative intent underlying the statutory predecessor to Chapter 70, the Iowa Supreme Court noted that "in clothing the board of supervisors with the necessary powers to conduct county affairs, which are of very large moment, a wide discretion should be vested." See Sorenson v. Andrews, 221 Iowa at 51-52, 264 N.W. at 565-66 (preference law does not impinge upon authority of supervisors to appoint employee for fixed term). It is therefore our opinion that the notice and selection requirements of Chapter 70 need not be complied with in situations where the result would be impairment of a prompt and appropriate response to an emergency situation.

By the same token, however, public employers may not improperly circumvent Chapter 70 by claiming exemption on account of emergency. Such action would in our opinion entitle an aggrieved individual to maintain either "an action of mandamus to right the wrong" or "an action for judicial review in accordance with the terms of the Iowa administrative procedure Act . . . ." See Iowa Code § 70.4 (1987). It is therefore presumed that noncompliance with Chapter 70 would occur only in exceptional circumstances. Although not required to do so under Chapter 70,

public employers may wish to consider keeping temporary appointment lists like those required in Chapter 400, for use in emergency situations, with preference in appointment to such lists given to veterans.

In summary, it is our opinion the provisions of Chapter 70 apply to both permanent part-time positions and temporary or seasonal positions of a public employer. An exception to the notice requirements of chapter 70 could be found in those rare, true emergency situations where the notice and selection requirements of Chapter 70 cannot realistically be satisfied. We caution that this opinion is based solely on our interpretation of Chapter 70. Other statutes may also be relevant to the questions you pose depending upon the public employer involved.[2] See e.g., Iowa Code § 19A.9(21) (governing veterans' preference in state employment); Iowa Code § 400.10 (governing veterans' preference in municipal employment).

Sincerely,

DAVID L. DORFF
Assistant Attorney General

DLD:mlr

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[2]Chapter 70 is a "general statute." Peters v. Iowa Employment Security Commission, 248 N.W.2d 92, 96 (Iowa 1976). "It is . . . well settled law that when a general and a special statute are in conflict and cannot be reconciled the special one prevails." Id. As a special and later enacted statute, Chapter 400, for example, takes precedence over Chapter 70. See Devine v. City of Des Moines, 366 N.W.2d 580, 583 (Iowa 1985).

INDIGENT OBSTETRIC PROGRAM; DEPARTMENT OF HEALTH. Iowa Code Chapters 255, 255A. The legislation does not address whether Chapter 255A must be used before using Ch. 255 for providing indigent obstetric care at the University of Iowa Hospital. The Department of Health therefore has authority to reasonably resolve this question in any manner not inconsistent with the statute. The department's rule providing that a county's quota is used when an individual is certified for local delivery is reasonable; however, there is no specific statutory language which would prohibit the department from promulgating rules which would allow for the reversion of a quota. (McGuire to Hammond, 11-18-87) #87-11-5(L)

November 18, 1987

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

Dear Representative Hammond:

You have requested an Attorney General's opinion concerning the Obstetrical and Newborn Indigent Patient Care Program, S.F. 511, § 435 (new Code Ch. 255A). The questions you raise stem from the existence of Iowa Code Ch. 255, Medical and Surgical Treatment of Indigent Persons, which also pertains to obstetrical patients.

In talking with you to further clarify your questions, you stated that your concern was which program, Ch. 255 or Ch. 255A, paid for the care of an individual who chose to receive obstetrical care at University of Iowa Hospitals. To that end, you stated that only the last two questions posed in your request need be answered.

An initial brief description of the two programs may be helpful. Iowa Code Ch. 255, also known as the state papers program, provides for medical treatment of indigent persons, including obstetrical patients. Under this program, the county may direct an indigent person in need of medical care to University of Iowa Hospitals for treatment at state expense. Iowa Code §§ 255.8, 255.26.

Each county has a specified quota of patients who may be treated under Ch. 255, with the exception of obstetrical and orthopedic patients. § 255.16. An unlimited number of obstetrical and orthopedic patients may be treated under this chapter. § 255.16. All patients in this program must receive treatment at University of Iowa Hospitals.

The Obstetrical and Newborn Indigent Patient Care Program was enacted this last session. S.F. 511, § 435 (new Code Ch. 255A). This program was initially established in 1986 as the Indigent Obstetrical Patient Quota. 1986 Acts, Ch. 1246, § 111.

This program was enacted "to provide obstetrical and newborn care to medically indigent individuals in this state, at the appropriate and necessary level, at a licensed hospital or health care facility closest and most available to the residence of the indigent individual." S.F. 511, § 435 (new § 255A.1).

Ninety counties participate in this program and are each given a quota which specifies the maximum number of patients who can be served by this program. § 438 (new § 255A.4). Those individuals eligible for this program may choose the hospital in which they would like to receive their obstetrical care. S.F. 511, § 441 (new § 255A.7).

Residents of nine specified counties (all in close proximity to Iowa City) and residents of counties that have utilized their quota must use the Ch. 255 program to receive obstetrical care. S.F. 511, §§ 436, 438 (new §§ 255A.2, 255A.4). These individuals must receive their care at University Hospitals.

The Department of Health administers this program and is required to adopt administrative rules to implement the program. S.F. 511, § 437 (§ 255A.3). The Department has promulgated rules implementing this program which became effective September 18, 1987, through emergency adoption. See 641 I.A.C. Ch. 75. We will now address your specific questions.

I. If an individual chooses to receive obstetrical services at the University of Iowa Hospitals, does the county or the Department of Public Health, or both acting jointly under Chapter 28E, have the discretion to arrange admission under Chapter 255 in order to reserve quota under Chapter 255A for those individuals who choose to receive obstetrical services closer to home?

The Department did not address this question of utilizing one program over the other in the rules. Additionally, the legislature did not address this question. There is no language in either S.F. 511 or Ch. 255 that specifies whether one program is to be used over the other when a participant chooses to receive treatment at University of Iowa Hospitals.

It is clear that Ch. 255 continues to exist and serve indigent obstetrical patients at University of Iowa Hospitals. See §§ 255.8, 255.16 (as amended by S.F. 511, § 432); S.F. 511, §§ 436, 438. It is also clear that obstetrical patients in the

Ch. 255A program can choose to receive treatment at the University of Iowa Hospitals. S.F. 511, § 441 (new § 255A.7).

There is no indication by the legislature, or the Department by rule, whether one of these programs has priority over the other when serving indigent obstetrical patients at the University of Iowa Hospitals. Because the legislation does not address this issue, we cannot say that Ch. 255A must be utilized before Ch. 255, or vice versa, when a woman chooses to receive treatment at University of Iowa Hospitals. The agency would therefore have authority to resolve this issue in a reasonable manner not inconsistent with the statute. See, e.g., Sommers v. Iowa Civil Rights Com'n, 337 N.W.2d 470, 475 (Iowa 1983); Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911, 913 (Iowa 1979).

In interpreting statutes, we cannot read into the law what has not been expressed therein. Iowa Bankers v. Iowa Credit Union Dept., 335 N.W.2d 439, 443-444 (Iowa 1983). Statutes must be interpreted by what the legislature said, not what it should or could have said. State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984).

These statutes do not appear to be ambiguous nor do they appear to be in conflict. Rather, it appears the legislature failed to address this issue. If the legislature intends that one program be utilized over the other in these situations, language to that effect should be enacted.

II. If an individual is certified for local delivery under Chapter 255A, then is advised by her physician that she should go to University Hospitals because of a high risk pregnancy, is there any obstacle in the new legislation which would prohibit a recertification under Chapter 255, with the Department of Public Health then "reverting" that quota to the county for use by another individual under Chapter 255A?

The Department of Health has appeared to address this issue through its rules. According to 641 I.A.C. § 75.5(8), receipt by the Department of a certification form "shall be considered the point in time when the quota has been used." Thus, in your example above, upon the individual being certified, the quota is used.

The Department makes no provision for the reversion of a quota from one individual to another[1]. Therefore, pursuant to the current rules, there is no authority for reverting a quota.

This decision of the Department appears to be consistent with the legislation. An agency's authority to promulgate rules stems from legislation and cannot exceed its legislative mandate. Dunlap Care Center v. Iowa Department of Social Services, 353 N.W.2d 389 (Iowa 1984). Rules which exceed an agency's authority or contravene the statutory provisions are invalid. Id.

S.F. 511 specifically provides that a woman may receive treatment at University of Iowa Hospitals under Ch. 255A. S.F. 511, § 441 (new § 255A.7). Allowing a woman who has been certified to receive treatment at University of Iowa is clearly consistent with the statute.

Additionally, the legislature provided for additional payments to providers if the care rendered justified it. S.F. 511, § 443 (new § 255A.9). See 471 I.A.C. 75.6(8). This additional payment is intended to be utilized for problem or high risk pregnancies.

It is reasonable for the Department of Health to determine that quotas should not be reverted for ease of administration. The Department has an interest in making a final determination of when a quota is used in order to assure orderly process of payments, etc.

While the current rules do not allow for a reversion of a quota, your question asks does the legislation prohibit such a reversion? There is no specific language in S.F. 511 which would

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[1]Provision is made for reassigning unused quotas to other counties. See 641 I.A.C. 75.7. Additionally, the department specified that sick newborns who qualify as 255A quota cases be transferred to the University of Iowa Hospitals where they may receive treatment as a Ch. 255 county quota patient. 641 I.A.C. 75.2(e).

prohibit reverting a quota back to the county for use by another individual.

Sincerely,

Maureen McGuire

Maureen McGuire
Assistant Attorney General

MM/jam

COURTS; CLERK OF THE SUPREME COURT: Judicial Nominating Commission. Iowa Code §§ 46.4, 46.9A, 69.16A, 602.11111(3) (1987); Senate File 148, 72nd G.A., 1st Sess. The Clerk of the Supreme Court has the authority to determine the requirements for eligibility for the elective positions of the judicial nominating commission to the extent necessary to state the eligibility requirements and to give notice as required by statute. The gender balance objective which has been set for all other judicial districts applies to judicial district 5C and the Clerk may determine that certain gender requirements are necessary when stating the requirements for eligibility for election in district 5C. The gender balance requirements, as well as the transition period elements in judicial nominating district 5C, are met by the election of a woman to fill the opening in 1988, and a man and a woman to fill the openings in 1992. (Skinner to Richardson, Iowa Supreme Court Clerk, 11-17-87) #87-11-4(L)

November 17, 1987

R. K. Richardson, Clerk
Iowa Supreme Court
State Capitol
L O C A L

Dear Mr. Richardson:

You have requested an opinion of the Attorney General interpreting Iowa Code chapter 46 (1987), as amended by Senate File 148, as it pertains to the election of district judicial nominating commissioners. Specifically, your question asks what the "requirements for eligibility" are for the elective judicial nominating commissioners in judicial election district 5C.

The Iowa Code sections at issue are not directly in conflict, and each relate to the composition of the group of judicial nominating commissioners. The pertinent provisions to answer your questions follow. Iowa Code section 46.4 (1987), as amended by Senate File 148, section 4, states:

> Commissioners shall be elected to staggered terms of six years each. The elections shall be held in the month of January for terms commencing February 1 of even-numbered years.
>
> For terms commencing February 1, 1988, and every six years thereafter, one elected commissioner in each district shall be a woman and one shall be a man. For terms commencing February 1, 1990, and every six years thereafter, one elected commissioner in each district shall be a woman and one shall be a man. For the term

> commencing February 1, 1992, in the odd-numbered districts the elected commissioner shall be a woman and in the even-numbered districts the elected commissioner shall be a man. For the terms commencing every six years thereafter, the districts shall alternate between women and men elected commissioners.

Judicial election district 5C is generally governed by Iowa Code chapter 46 (1987), but the terms for its elective commissioners are listed in Iowa Code § 602.11111(3) as follows:

> One of those elected shall serve a term ending January 31, 1988, two shall serve terms ending January 31,1990, and two shall serve terms ending January 31, 1992 . . . . At the end of these terms and every six years thereafter elective commissioners shall be elected pursuant to chapter 46. (emphasis added).

Essentially, the problem is that in 1988, § 46.4 requires that one man and one woman be elected but in district 5C only one opening exists. Then in 1992, section 46.4 requires that one woman be elected but in district 5C there are two openings. The gender requirements under § 46.4 do not correspond with the openings in the terms in § 602.11111(3). Further, it is unclear whether the gender requirements established by the legislature apply to § 602.11111(3) which governs judicial district 5C.

Before these questions are answered, it is necessary to analyze the authority of the Clerk of the Supreme Court to determine eligibility requirements of candidates for the judicial nominating commission. In a prior opinion of this office, it was concluded that "the clerk of the supreme court does not possess the statutory authority, either expressed or implied, to determine the eligibility of candidates for or of persons newly-elected to the post of judicial nominating commissioner either on his or her own motion or upon challenge by another party." This opinion was based upon a factual situation in which the Clerk's authority to challenge and review the terms of newly elected commissioners was questioned. The opinion stated that Iowa Code chapter 46 does not authorize the Supreme Court Clerk to determine whether a particular nominee or newly-elected commissioner is qualified to hold the position. It was opined further that the proper procedure to challenge the qualifications of a nominee or commissioner is to seek a determination in the courts. 1982 Op.Att'yGen. 126. The Supreme Court, in Welty v. McMahon, 316 N.W.2d (Iowa 1982), addressed the qualifications of newly elected

commissioners but did not reach the extent of the Clerk's authority to determine eligibility requirements.

Subsequent to the above opinion and case, a new section has been added to Iowa Code ch. 46 (1987) by Senate File 148, section 6, to read as follows:

> At least sixty days prior to the expiration of the term of an elective . . . district judicial nominating commissioner, the clerk of the supreme court shall cause to be mailed to each member of the bar . . . for the district or districts affected, a notice stating . . . the requirements for eligibility to the office for the succeeding term . . . . 1987 Iowa Legislative Service 5, pages 205-06 (West). (emphasis added).

Additionally, when a vacancy occurs in an office of an elective judicial nominating commissioner, the Clerk of the Supreme Court must mail a notice stating the existence of a vacancy and the manner in which the vacancy will be filled. Iowa Code § 46.5 (1987). Senate File 148 amended this section to require, among other things, that the notice state "the requirements for eligibility." 1987 Legislative Service 5, page 205 (West).

Given the specificity of the eligibility requirements in section 46.4 and in § 602.11111(3), the Legislature presumably contemplated that the Clerk of the Supreme Court draw the eligibility requirements from the statutes, and then restate them to the members of the bar when giving notice. No direction is given in the statutes, however, for the incongruity of memberships open on the judicial nominating commission in district 5C in 1988 and again in 1992.

The duties of the Clerk of the Supreme Court are several in the process of the election of judicial nominating commissioners. Iowa Code § 46.8 (1987) requires the Clerk to certify a list of the names, addresses, and years of admission of members of the bar who are eligible to vote for state and district judicial nominating commissioners and provide a copy of the list to the county clerks of district court. Iowa Code § 46.5 (1987) requires the Clerk to cause to be mailed to each member of the bar whose name appears on the certified list prepared pursuant to § 46.8 for the district or districts affected, a notice stating the existence of the vacancy, the requirements for eligibility, and the manner in which the vacancy will be filled. The Clerk must also cause to be mailed a similar notice including the

requirements for eligibility for the office and the proper procedures involved when a term of a commissioner expires. 1987 Iowa Acts, S.F. 148, Section 6. We note the two methods by which one becomes a judicial nominating commissioner: by gubernatorial appointment or by election by members of the bar. The Clerk of the Supreme Court through ministerial acts controls the initial process by which those who are elected to serve on the nominating commission come forward. The Clerk must state the requirements for eligibility to those members of the bar who do the electing.

We conclude that the Clerk of the Supreme Court has implied authority to determine the eligibility requirements for the commissioners in order to state them in the notice. This is not to say that once a commissioner is elected, nor if the qualifications of a nominee are questioned, it is the duty of the Clerk to review the qualifications or to take action to challenge the individual. But the Clerk does have the responsibility to state the requirements of the open positions. To the extent the Clerk must determine the appropriate gender requirements in order to state them in the notice, the Clerk has the implied authority to so determine.[1]

We turn now to your question concerning the requirements for eligibility for the elective judicial nominating commissioners in judicial election district 5C.

Senate File 148, Section 8 includes new gender balance requirements as applied to all appointive board, commissions, committees and councils of the state established by the Code if not otherwise provided by law. The amendment also includes, in Section 4, detailed gender balance requirements for elective district judicial nominating commissioners.[2] It is apparent that the gender balance requirements apply to the judicial nominating

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[1] This conclusion is not contrary to the prior opinion from this office. The 1981 opinion concluded that the Supreme Court Clerk does not have explicit statutory authority to determine whether a particular nominee or newly-elected commissioner is qualified to hold that position, and further that the Clerk does not have implied authority to exercise the discretionary function of deciding whether a particular person is qualified to serve as a judicial nominating commissioner. See 1982 Op.Att'yGen. 126.

The question of the extent of the Clerk's authority was not reached in the case which found that two candidates for the State Judicial Nominating Commission were ineligible for reelection. Welty v. McMahon, 316 N.W.2d 836 (Iowa 1982).

[2] See S.F.148 § 4, page 1, of this opinion.

commissions. We look to the unique provisions which apply to district 5C to ascertain the applicability of gender balance requirements.

The 1987 amendment did not directly amend § 602.11111(3) to provide gender requirements for the terms established in judicial district 5C. It is important to note that § 602.11111 is written to function as a transition section until the provisions of chapter 46 become effective. The lead paragraph states: "The membership of district judicial nominating commissions for judicial election districts 5A and 5C shall be as provided in chapter 46, subject to the following transition provisions" (emphasis added). Once the transition period is complete, the provisions of chapter 46 with the specified gender balance scheme are invoked. The relationship between chapter 46 and § 602.11111 is one which requires that, when possible, effect be given to both. Iowa Code § 4.7 (1987). Such statutes para materia must be construed with reference to each other. Doe v. Ray, 251 N.W.2d 496 (Iowa 1977); State v. Harrison, 325 N.W.2d 770 (Iowa Ct. App. 1982). It is unnecessary to conclude that one statute controls or is more specific than the other since these statutes can both be given effect, resulting in a mechanism which accomplishes the intent to uniformly balance the commissions by gender. Accordingly, we conclude the gender balance requirements in the amendment do apply to the elective positions of the judicial nominating commission in both § 46.4 and the transition requirements of § 602.11111.

The actual determination of the requirements for eligibility for the open positions in district 5C in 1988 and 1992 must be made in order to reconcile the requirements once chapter 46 becomes effective after the transition period, in 1994. In 1988, there is only one commissioner opening in district 5C, while in all other districts of the state there are two. In 1992, there are two openings in district 5C, while the new requirements of chapter 46 provide guidance for only one. The eligibility requirements for district 5C, an odd-numbered district in the transition period with gender balance requirements, must be stated to give effect to two separate statutes, in 1988 and in 1992. Assuming, arguendo, that the 1988 position is filled by a woman, and the 1992 positions are filled by one man and one woman, the entire scheme will be harmonized with chapter 46 by 1994, when the transition period in district 5C ends. In 1994, the statutory scheme explicitly set forth in Senate File 148 would then be carried out in all of the judicial districts, including district 5C. The unique transition requirements for election of judicial nominating commissioners in district 5C, unless modified by the Legislature, would also be implemented.

We therefore conclude that the gender balance requirements in chapter 46 as well as the transition elements of § 602.11111 for district 5C are met by the election of a woman to the opening in 1988 and by a man and a woman in 1992. This composition meets the objective of harmonizing and giving effect to the provisions of both statutes.

In summary, it is our opinion that the Clerk of the Supreme Court has the authority to determine the requirements for eligibility for the elective positions of the judicial nominating commission to the extent necessary to state the eligibility requirements and to give notice as required by statute. We conclude the gender balance objective which has been set for all other judicial districts also applies to judicial district 5C and that the Clerk may determine that certain gender requirements are necessary when stating the requirements for eligibility for election in district 5C. The gender balance requirements, as well as the transition period elements in judicial nominating district 5C, are met by the election of a woman to fill the opening in 1988, and a man and a woman to fill the openings in 1992.

Sincerely,

KATHY MACE SKINNER
Assistant Attorney General

KMS:sg

MUNICIPALITIES: Civil Service: Promotional Examinations. 1986 Iowa Acts, Ch. 1138, § 5; Iowa Code §§ 20.9, 400.8(3), 400.9(3), and 400.28 (1987); Iowa Code § 400.9(3)(1975); and 1978 Op.Att'yGen. 15. The 1986 amendment to § 400.9(3) does not evince a legislative intent to expand the qualified applicants to civil service promotional grades to include employees willing to take voluntary demotions or lateral transfers. An employee with a civil service status, however, continues to be allowed to fill a vacancy in a lower or equivalent grade by entrance examination in the absence of a qualified applicant. Thus, our prior opinion, 1978 Op.Att'yGen. 15, is valid despite the recent legislative revision. As such, a civil service commission lacks the authority to establish procedures for voluntary demotions or lateral transfers, and such procedures would not be a mandatory topic of bargaining nor subject to negotiation. Finally, an employee appointed to a civil service promotional grade holds full civil service rights to the position and is not subject to a probationary period. (Walding to Lind, State Senator, 11-6-87) #87-11-2(L)

November 6, 1987

The Honorable James Lind
State Senator
Waterloo, IA

Dear Senator Lind:

We are in receipt of your request regarding Iowa Code Ch. 400 civil service promotional examinations. Specifically, you pose the following questions:

1. Is the 1977 Attorney General's Opinion [1978 Op.Att'yGen. 15] still valid?

2. Can an employee in a higher classification (Mechanic) or the same classification (Operator II) fill this vacancy through either a voluntary demotion or lateral transfer without retesting or recertification in place of a promotional examination being given?

3. Does the Civil Service Commission have the authority to establish reasonable transfer and voluntary demotion procedures when Chapter 400 does not specifically speak to such procedures?

4. Are these procedures within the sole jurisdiction of the Civil Service Commission, or is it a mandatory topic of bargaining under Chapter 20.9 and subject to negotiations?

5. Can the Civil Service Commission establish a reasonable period of probation or training for an employee appointed to a position from a certified promotional list?

In your letter you note that three job classifications exist in the Waterloo Waste Pollution Control Plant: Operator I, Operator II and Mechanic. In terms of qualification and pay, we are told the Operator I classification is lowest, while the classification of Mechanic is highest. The Operator I and Operator II classifications are assigned to two different locations in the plant: (1) on the first, second and third shift in the general plant, or (2) the Filter Building. An Operator II vacancy exists in the Filter Building. Apparently, an Operator II in the general plant and a Mechanic are interested in the opening.

In 1977, the Attorney General opined that a vacancy in a civil service grade above the lowest grade may only be filled by promotion of subordinates. 1978 Op.Att'yGen. 15. The exception, according to that opinion, is that an employee with civil service status could fill a vacancy in a lower (and presumably equivalent) position by an entrance examination in the absence of a qualified subordinate.

The basis of that opinion was Iowa Code § 400.9(3) (1975). That section provided:

> Hereafter, all vacancies in the civil service grades above the lowest in each shall be filled by promotion of subordinates when such subordinates qualify as eligible, and when so promoted, they shall hold such position with full civil service rights in the position. If, however, a current employer does not pass one of two successive promotional examinations and otherwise qualify for the vacated position, an entrance examination for the vacated position may be used to fill it.

[Emphasis added.] That language was amended by the legislature in 1986. See 1986 Iowa Acts, Ch. 1138, § 5. Iowa Code § 400.9(3) (1987), now reads:

> Vacancies in civil service promotional grades shall be filled by promotion of employees of the city to the extent that the city employees qualify for the positions. When promoted, an employee shall hold full civil service rights in the position. If an employee of the city does not pass one of two successive promotional examinations and otherwise qualify for a vacated position, or if an employee of the city does not apply for

> a vacated position, an entrance examination may be used to fill the vacancy.

In our judgment, the 1986 amendment does not evince a legislative intent to enlarge the qualified applicants to civil service promotional grades to include employees willing to take voluntary demotions or lateral transfers. Thus, our prior opinion is valid despite the recent legislative revision.

Although the term "subordinates" was removed from the statute, § 400.9(3) continues to refer to the "promotion" of civil service employees. The term "promotion" is defined, in part, as "advancement in rank or position." Random House Dictionary, Unabridged Edition, 1971. According to Ballentine's Law Dictionary, 3rd Ed., 1969, "promotion" is defined, in part, as:

> The advancement of an employee from one position in the work to a position of more significance and better compensation. The advancement of a person in civil service to a higher position on the basis of qualifications.

Moreover, McQuillin, Municipal Corporations, § 12.131 (3rd Ed.) (citing Appeal of School Dist. of Pittsburgh, 356 Pa. 282, 52 A.2d 17 (1947), states: "A promotion is, in effect, a surrender of one position and an appointment to a higher grade". And, according to the Iowa Supreme Court:

> An examination of [the civil service] statutes clearly discloses an intent on the part of our legislature to differentiate between appointments and promotions. The terms are not synonymous.
>
> * * *
>
> This means, in the field of civil service, an appointment necessarily precedes promotion and creates the condition upon which a promotion may be effected.

Dennis v. Bennett, 258 Iowa 664, 668, 140 N.W.2d 123, 125-126 (1966). Accordingly, the promotion of a civil service employee is to a higher grade, not a lower or equivalent grade.

A policy favoring the advancement of individuals to higher grades may have the intended effect of encouraging productivity

and work performance. Civil service employees taking voluntary demotions or lateral transfers would take opportunities away from individuals seeking to better their status.

Apparently, the 1986 amendment to § 400.9(3), which was part of an act relating to the general operation of civil service commissions, was an omnibus provision. The language, "or if an employee of the city does not apply for a vacated position", would appear to have been added to provide for use of an entrance examination to fill a vacancy in the absence of any interested applicants, regardless of qualifications. A strict reading of the section without the added language would condition use of an entrance examination on having had an employee apply and fail to qualify. A contrary interpretation of that language, i.e. that the added language permitted city employees seeking a voluntary demotion or lateral transfer to apply for a vacancy in the absence of a qualified individual in a lower grade, fails to provide for any examination for the position. Assuming several individuals applied for a demotion or lateral transfer, there would be no provision in Chapter 400 to distinguish between the candidates. If the legislature had intended, or should it in the future intend, to allow for voluntary demotions or lateral transfers, reference to promotion need only be deleted. Of course, an employee with civil service status continues to be allowed to fill a vacancy in a lower or equivalent grade by entrance examination in the absence of a qualified applicant.[1]

Because our response to the prior questions concludes that voluntary demotions and lateral transfers are not permitted without submission to an entrance examination in the absence of a qualified applicant, your third and fourth questions are moot. Absent a legislative reversal, a civil service commission lacks the authority to establish procedures for voluntary demotions or lateral transfers. Nor would such procedures be a mandatory topic of bargaining under Iowa Code § 20.9 or subject to negotiation.

Finally, the answer to the remaining question is found in § 400.9(3). Unlike an original appointment to a civil service position which is "conditional upon a probationary period of not to exceed six months", see Iowa Code § 400.8(3) (1987), an

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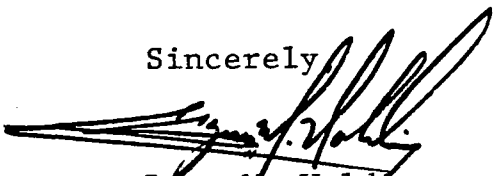
[1]Our opinion is not intended to address the issue of voluntary demotions or laterial transfers in the event of diminution of employees in a classification or grade under civil service which is governed by Iowa Code § 400.28 (1987).

employee appointed to a civil service promotional grade "shall hold full civil service rights to the position." Thus, a civil service commission could not subject a civil service promotional grade employee to a probationary period.

In summary, the 1986 amendment to § 400.9(3) does not evince a legislative intent to expand the qualified applicants to civil service promotional grades to include employees willing to take voluntary demotions or lateral transfers. An employee with a civil service status, however, continues to be allowed to fill a vacancy in a lower or equivalent grade by entrance examination in the absence of a qualified applicant. Thus, our prior opinion, 1978 Op.Att'yGen. 15, is valid despite the recent legislative revision. As such, a civil service commission lacks the authority to establish procedures for voluntary demotions or lateral transfers, and such procedures would not be a mandatory topic of bargaining nor subject to negotiation. Finally, an employee appointed to a civil service promotional grade holds full civil service rights to the position and is not subject to a probationary period.

Sincerely



Lynn M. Walding
Assistant Attorney General

LMW/jam

Department of Justice

THOMAS J. MILLER
ATTORNEY GENERAL

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319

January 14, 1988

Mr. William F. Sueppel
Meardon, Sueppel, Downer & Hayes
122 South Linn Street
Iowa City, IA 52240

RE: Vacancies in Civil Service Promotional Grades, Op. Att'y Gen. #87-11-2(L)

Dear Bill:

I am writing in response to your letter of December 29, 1987, regarding an Attorney General's opinion which I recently authored. The opinion, Op. Att'y Gen. #87-11-2(L), concluded, in part, that vacancies in civil service promotional grades cannot be filled by voluntary demotions or lateral transfers.

A prior opinion, 1978 Op. Att'y Gen. 15, had reached the same result examining a similar version of the applicable statute, Iowa Code § 400.9. That section, as noted in the recent opinion, has been amended since the earlier opinion.

In your letter, you distinguish between "voluntary demotions" and "lateral transfers." Specifically, you question the opinion to the extent that the opinion restricts city officials from permitting civil service employees to change the location or time period in which they work.

The opinion, in referring to lateral transfers, refers to a position which, although it may be equivalent, is in some manner different from that held by the applicant for the vacancy. For instance, a sergeant in the police department could not laterally transfer to a vacancy in the position of sergeant in the fire department even though the two positions may be equivalent.

The opinion, however, was not intended to suggest that a sergeant working an evening shift could not apply for an opening for daytime hours created by a vacancy. In that case, the vacancy created would be in the position of sergeant, not daytime sergeant.

At issue in the opinion was a vacancy for an Operator II in a filter building. You write that, "it does not appear that an operator II in the general plant has a different civil service classification than an operator II in a filter building." According to Senator Lind's opinion request, although it does not appear in the opinion itself, we were told:

> Although the same job classifications are involved in both locations, the job content is significantly different to the point where there is a thirty-day training period if an Operator in the Plant is assigned to work as an Operator in the Filter Building.

Accordingly, the request did not make it clear whether the two positions were the same position or whether the positions were different but equivalent. Thus, the opinion does not directly address whether the operator II in the plant can be assigned to the filter building. Rather, the opinion simply makes two conclusions in this regards: (1) That initially only subordinates may be promoted to fill a vacancy in a civil service promotional grade, and (2) That a civil servant cannot be appointed by promotional examination to an equivalent position. The opinion should not be read to require changes in location and time periods in a position be by promotional examination.

Finally, I would note that in a meeting to review the opinion with several city officials, including Jerry Thompson of Des Moines, I suggested language amending § 400.9 (3) to reverse the opinion. The proposed amendment is as follows:

> Vacancies in civil service promotional grades shall be filled by ~~promotion of~~ employees of the city to the extent that the city employees qualify for the positions. When ~~promoted~~ appointed, an employee shall hold full civil service rights in the position. If an employee of the city does not pass one of two successive examinations and otherwise qualify for a vacated position, or if an employee of the city does not apply for a vacated position, an entrance examination may be used to fill the vacancy.

In addition to amending § 400.9 (3), a section would have to be added to guide city officials in determining who to appoint for a vacancy if there are several applicants from a higher grade, or who to select in the event that there is an applicant for a higher or equivalent grade and several applicants seeking promotion. Obviously, the code does not presently provide any

such guidance. Vacancies in civil service positions are presently filled either by original entrance examination for appointments to original positions and by promotional examination for appointments to a higher grade pursuant to Iowa Code §§ 400.8 and 400.9, respectively.

Hopefully this response will resolve some of your concern regarding civil service appointments addressed in the recent opinion. Of course, legislation may be in order to completely remedy all of the concern cities have regarding appointments to civil service vacancies.

Sincerely,

Lynn M. Walding
Assistant Attorney General

CRIMINAL LAW: Complaints; Certificates under penalty of perjury; Oaths. Iowa Code §§ 622.1, 801.4(11), 804.22, 805.6(4) (1987); Iowa R. Cr. P. 35; Iowa Const. art. I, § 11. The use of unsworn certificates under penalty of perjury, in lieu of sworn complaints under oath, are legally insufficient to commence valid complaints charging simple misdemeanors. (Zbieroski to Martin, Dickinson County Attorney, 11-2-87) #87-11-1

November 2, 1987

Mr. Jon M. Martin
Dickinson County Attorney
Dickinson County Courthouse
Spirit Lake, Iowa 51360

Dear Mr. Martin:

You have requested an attorney general's opinion on whether unsworn certifications under penalty of perjury, pursuant to Iowa Code section 622.1 (1987), may be used to commence valid complaints charging simple misdemeanors, in lieu of sworn statements under oath. You indicate that the manner of bringing misdemeanor complaints varies among Iowa counties.

Some counties, contrary to long standing procedure requiring complaints to be sworn under oath, are using unsworn statements under penalty of perjury. They rely on section 622.1 which provides in part:

> When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by sworn statement written by the person attesting the matter, the person may attest the matter by an unsworn written statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person.

These counties view the use of section 622.1 certifications as a convenient method of assuring the truthfulness of complaints from police officers and citizens at "after hours" times without resort to the sometimes cumbersome procedure of requiring an oath

before one authorized to administer oaths. This view is not without support. Although amendments of prior law ordinarily must be express, section 622.1 may be read as amending by implication prior criminal statutes requiring complaints to be sworn under oath. See Caterpillar Davenport Employees Credit Union v. Huston, 292 N.W.2d 393, 396 (Iowa 1980); State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978); Sutherland Statutory Construction § 22.13 (C. Sands 4th ed. 1985).

Other counties question the legal sufficiency of unsworn certifications in a criminal context. Mindful of the protections afforded by our criminal procedures, there is concern over the lack of legislative intent to implicitly amend special statutes requiring complaints to be sworn under oath or affirmation. Moreover, there is doubt that the general language found in section 622.1 clearly and unmistakably amends special procedural provisions long established under Iowa law. See Iowa Code §§ 4.7, 801.4(11), 804.22, 805.6(4) (1987); Iowa R. Cr. P. 35. For example, Iowa Code section 801.4(11) defines a "complaint" as:

> a statement in writing, under oath or affirmation, made before a magistrate or district court clerk or clerk's deputy as the case may be, of the commission of a public offense, and accusing someone thereof. A complaint shall be substantially in the form provided in the Iowa rules of criminal procedure.

Rule 35 of the Iowa Rules of Criminal Procedure specifically requires that charges for simple misdemeanors be commenced by the filing of subscribed and sworn to complaint.[1]

The question, therefore, is whether those special criminal procedures, requiring complaints to be sworn under oath or affirmation, have been impliedly amended by the general

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[1]Similarly, there is concern that the use of unsworn statements would be problematic in criminal extradition proceedings; since unsworn certifications under section 622.1 would not be legally sufficient to support a demand for extradition in all jurisdictions. See Iowa Code § 820.13 (1987); 18 U.S.C.A. § 3182 (1985) (such documents must be sworn to before a magistrate); Morrison v. Dwyer, 143 Iowa 502, 121 N.W. 1064 (1909); 35 C.J.S. Extradition § 14(2), at 412-13 (1960); Uniform Criminal Extradition Act (U.L.A.) § 3 (1974); see also 2A C.J.S. Affidavits § 30, at 464 (1972) (affidavits under penalty of perjury are improper in federal court).

provisions of section 622.1. Based on established rules of statutory construction, we conclude that section 622.1 certifications are legally insufficient substitutes for sworn criminal complaints.

Due to the lack of clear and unmistakable intent to the contrary and mindful of the effect that such complaints have on the rights and character of individuals, we do not believe the legislature intended to implicitly amend long standing criminal procedures requiring complaints to be sworn under oath. The Iowa Supreme Court has long acknowledged the presumption against amendment of statutes by implication. See Caterpillar Davenport Employees Credit Union v. Huston, 292 N.W.2d 393, 396 (Iowa 1980); Lemon v. City of Muscatine, 272 N.W.2d 429, 431-32 (Iowa 1978); State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978); Sutherland Statutory Construction § 22.13 (C. Sands 4th ed. 1985). The presumption is "simply an aid to ascertaining legislative intent and is never invoked to defeat it." Dan Dugan Transport Co. v. Worth County, 243 N.W.2d 655, 657 (Iowa 1976). However, the presumption against implicit amendments is so great that the legislature will not be found to have changed a law unless the intent to amend is clear and unmistakable. Peters v. Iowa Employment Security Comm'n., 235 N.W.2d 306, 309 (Iowa 1975); Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966). Absent clear and unmistakable legislative intent, a finding of implied amendment constitutes a usurpation of legislative authority. State v. Rauhauser, 272 N.W.2d 432, 435 (Iowa 1978). In determining legislative intent, Iowa courts "assume the legislature knew the existing state of the law and prior judicial interpretations of similar statutory provisions. . . ." Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780, 787 (Iowa 1971).

Furthermore, to opine otherwise would run afoul of another rule of construction found in Iowa Code section 4.7 (1987). Under section 4.7, if there is a conflict between statutory provisions, the special provision prevails as an exception to the general provision. It is our belief that the special provisions of Iowa Code sections 801.4(11), 804.22, 805.6(4) (1987) and Iowa R. Cr. P. 35 prevail as exceptions to the general provisions of section 622.1 under the rule stated in section 4.7. See Lemon v. City of Muscatine, 272 N.W.2d 429, 431-32 (Iowa 1978) (presumption against implicit amendments is stronger where a repeal is claimed of a special statute by a more general one).

Amendments by implication are not only disfavored by the courts in doubtful cases, but also are disfavored when they raise constitutional questions. Sutherland Statutory Construction § 22.13 (C. Sands 4th ed. 1985). Without deciding the issue here, it is questionable whether unsworn criminal complaints

would be permitted under our Constitution. Section 11 of Article I of the Constitution of the State of Iowa provides:

> All offenses less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal. . . . (Emphasis added).

In construing our constitution, the Iowa Supreme Court instructs us to look to the intent of the framers by first examining the words employed and giving them meaning in their natural sense and as commonly understood. Redmond v. Ray, 268 N.W.2d 849, 853 (Iowa 1978). A "complaint" charging a simple misdemeanor under our present law is said to be the equivalent of the term "information" contemplated by our state constitution. State v. Phippen, 244 N.W.2d 574, 575 (Iowa 1976). As earlier mentioned, a "complaint" is defined as "a statement in writing, under oath or affirmation, made before a magistrate or district court clerk or clerk's deputy as the case may be, of the commission of a public offense, and accusing someone thereof." Iowa Code § 801.4 (11) (1987). In Iowa, there appears to be no vital distinction between the term "oath" and the concept of an "affirmation". Iowa Code § 4.1 (12) (1987) ("The word 'oath' includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word 'swear' includes 'affirm'."); See State v. Phippen, 244 N.W.2d 574, 575-76 (Iowa 1976).

It is commonly assumed that a complaint "under oath" connotes something of the notion that the declarant is first sworn, or at least, that the oath is administered by someone. 67 C.J.S. Oaths & Affirmations § 5(b), at 11 (1978). The Iowa legislature has indulged that assumption by creating the office of notary public and empowering other officers to administer oaths and take affirmations. See Iowa Code Chapter 77, §§ 78.1-2, 805.6 (1987); see also Iowa R. Cr. P. 35 (prosecutions must be commenced by filing a subscribed and sworn to complaint with a magistrate or district court clerk or the clerk's deputy); Iowa Code § 804.22 (1987) ("When an arrest is made without a warrant, . . . the grounds on which the arrest was made shall be stated to the magistrate by complaint, subscribed and sworn to by the complainant, or supported by the complaint's affirmation . . . .").

Although no specific form is usually required, to make a valid oath it is generally assumed that it must be given in the

presence of an officer authorized to administer an oath. Cf. State v. Phippen, 244 N.W.2d 574 (Iowa 1976) (jurat was insufficient to prove an oath was actually administered by officials authorized to administer oaths and take affirmations under the Iowa Code); Miller v. Palo Alto Board of Supervisors, 248 Iowa 1132, 1134, 84 N.W.2d 38, 39 (1957) (although no specific form is required some act of each person should characterize the taking and administering of the oath); Dalbey Bros. Lumber Co. v. Crispin, 234 Iowa 151, 12 N.W.2d 277 (1943) (quoting 39 Am. Jur. 499, par. 12, Oath and Affirmation, the court stated: "Hence, to make a valid oath, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath."); see also Youngstown Steel Door Co. v. Kosydar, 33 Ohio App. 2d 277, 294 N.E.2d 676 (1973) ("That an oath is to be administered has been generally assumed.").

This office has previously opined that although "law enforcement officers charging traffic and scheduled violations by uniform citations and complaints need not appear before a magistrate to file 'a subscribed and sworn to complaint,'" such complaints still require verification before one authorized to administer oaths. 1980 Op.Att'yGen. 784.[2]

Thus, the question raised is whether the unsworn certifications under penalty of perjury provided under section 622.1, constitute a complaint under oath as required by Article I, section 11, of our state constitution. It is not our place to

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[2]In an even earlier opinion, this office was asked the following question: "Must the uniform traffic complaint be sworn to when filed, pursuant to [Iowa Code section 762.2 (1973)], or is a uniform traffic complaint exempt from oath by [Iowa Code section 754.1 (1973)]." Our office opined that the uniform traffic citation and complaint need not be sworn to before a magistrate as it was specifically exempted under Iowa Code section 754.1 (1973). 1974 Op.Att'yGen. 232. That opinion was limited to the necessity of filing a sworn complaint before a magistrate and did not opine as to whether an oath could be dispensed with entirely. In this regard it should be noted that the current uniform citation and complaint procedures now instruct the officer to verify such complaints "before the chief officer of the law enforcement agency, or the chief officer's designee, and the chief officer of each law enforcement agency of the state is authorized to designate specific individuals to administer oaths and certify verifications." Iowa Code § 805.6(4) (1987).

decide that constitutional question here.[3] We merely raise the issue to show that it is doubtful the legislature intended to amend by implication those laws requiring criminal complaints to be sworn under oath or affirmation.

Many valuable rights depend upon the veracity of those filing complaints. For instance, the complaint is an essential basis for the issuance of an arrest warrant. See Iowa R. Cr. P. 38 (Immediately upon the filing of a complaint, a warrant of arrest or citation may issue). A formal complaint under oath or affirmation is designed to secure freedom from illegal restraint for trivial causes. 5 Am.Jur. 2d Arrest § 12, at 705-06 (1962).

Requiring a sworn criminal complaint before someone legally empowered to take oaths or affirmations creates an additional protective check on the conscience of those filing criminal complaints. Anything less tends to detract from the seriousness of the step being taken in formally accusing someone of violating the law. Accordingly, we do not believe Iowa courts would uphold implicit amendments of our criminal procedures in doubtful cases or when they raise constitutional questions.

In summary, when all relevant statutes are considered in the light of the foregoing rules of construction, it is our opinion that the filing of a certificate under penalty of perjury under section 622.1, does not implicitly amend Iowa law requiring that a sworn complaint under oath be used to commence prosecutions for simple misdemeanors.

Sincerely,

Mark J. Zbieroski

MARK J. ZBIEROSKI
Assistant Attorney General

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[3]We are aware that New York (and other states) have upheld similar certification statutes as applied to criminal prosecutions. N.Y. Crim. P. Law § 100.30 (McKinney Supp. 1987); People v. Sullivan, 56 N.Y.2d 378, 437 N.E.2d 1130 (1982) (a statement containing a form notice alerting one to possible criminal prosecution is no different from a statement under oath); Cal. Civ. Proc. Code § 2015.5 (West 1985); People v. Salazar, 266 Cal. App. 2d 113, 71 Cal. Rptr. 894 (1968) (use of unsworn complaint is not inconsistent with the provisions of the California Constitution); 34 Op.Cal.Att'yGen. 234. New York's statute was designed to provide a convenient method of assuring the truthfulness of misdemeanor complaints and dispensing with the traditional requirement of swearing to such document. N.Y. Crim. P. Law § 100.30 (McKinney Supp. 1987).

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY: Three day notice to quit. Iowa Code §§ 648.3, 648.4, 562A.27(2), 562B.25(2) (1984). The three-day notice of §§ 562A.27(2) and 562B.25(2) is a distinct and separate notice from the three-day notice to quit of §§ 648.3 and 648.4. The legislature has amended however § 648.3 twice, in 1981 and then in 1984, to make the three-day notice to quit concurrent with the three-day notice for failure to pay rent. Thus, under the current statutes, when a landlord of a mobile home or a mobile park has given a tenant a three-day notice as provided in § 562B.25, this landlord may commence a forcible entry action without giving a three-day notice to quit required by § 648.3. (Phan-Quang to Doyle, State Senator, 12-31-87) #87-12-3(L)

December 31, 1987

The Honorable Donald V. Doyle
State Senator
P. O. Box 941
Sioux City, IA 51102

Dear Senator Doyle:

We are in receipt of your request for an opinion regarding the three-day notice to quit as provided by Iowa Code § 648.3. Your question is:

> When a landlord gives a tenant three-day notice to pay rent as provided in section 648.3, and the tenant is in a mobile home park or is renting land for a mobile home, or is renting a mobile home, is there any reason an additional three-day notice must be given to the tenant before an action can be brought for a forcible entry or detention?

Our answer to your question is "No" for the following reasons.

(I)

A brief overview of the history of the Iowa forcible entry statute is necessary to resolving your question.

The "Forcible Entry or Detention of Real Property" Act codified in chapter 648 of the Iowa Code was originally enacted in 1851. It provides a summary statutory remedy which enables a person entitled to possession of real property to obtain possession of real property when the action is brought to trial. See Reed v. Gaylord, 216 N.W.2d 327 (Iowa 1974); Steel v. Northrup, 168 N.W.2d 785 (Iowa 1969).

The question you have asked, the application of the three-

day notice to quit, deals with section 648.3. The original version follows:

> Notice to quit. Before action can be brought in any except the first of the above claims, three-day notice to quit must be given to the defendant in writing.

Iowa Code § 648.3 (1979).

The three-day notice to quit is not required in actions based on the first grounds listed in section 648.1 where the defendant has entered the real property by force, intimidation or fraud. The written notice to quit of section 648.3 is a necessary condition precedent to the maintenance of an action for forcible entry or detainer but is not the commencement of the action. Van Emmerick v. Vuille, 249 Iowa 911, 88 N.W.2d 47 (Iowa 1958).

When Iowa Code chapter 562A (1979), the Iowa Uniform Residential Landlord and Tenant Act (hereafter the Landlord-Tenant Act), and Iowa Code chapter 562B (1979), the Iowa Mobile Home Parks Residential Landlord and Tenant Act (hereafter the Mobile Home Parks Act), were enacted on January 1, 1979, the "Forcible Entry and Detainer" statute was left intact.

Both new chapters were modeled after the Uniform Residential Landlord and Tenant Act drafted and approved by the National Conference of Commissioners on Uniform State Laws.

The two purposes stated by the Mobile Home Parks Act are essentially the same as the first two purposes of the Landlord-Tenant Act. They are (1) to simplify, clarify and establish the law governing the rental of mobile home spaces and rights and obligations of landlord and tenant and (2) to encourage landlord and tenant to maintain and improve the quality of mobile home living. Iowa Code § 562B.2 (1979).

While the two acts are not duplicative in coverage, both acts may occasionally apply to the same transaction. One example of this dual coverage is the situation where a mobile home park operator rents not only a mobile home space but also a mobile home to the tenant. Because the definition of "dwelling unit" contained in section 562A.6(2) of the Landlord-Tenant Act is broad enough to include a mobile home, that portion of the rental agreement concerning the dwelling unit (mobile home) will be governed by the Landlord-Tenant Act while the portion concerning the mobile home space will be governed by the Mobile Home Parks Act. It should be noted that the Mobile Home Parks Act regulates the rental of mobile home spaces and not the rental of mobile homes. See Lovell II, The Iowa Uniform Residential Landlord and

Tenant Act and The Iowa Mobile Home Parks Residential Landlord and Tenant Act, 31 Drake L. Rev. 253 (1981-1982). See also 1980 Op.Att'yGen. 382.

Therefore, the first part of your question where the tenant "is in a mobile home park or is renting land for mobile home" is governed by the Mobile Home Parks Act and the second part, where the tenant is "renting a mobile home," is governed by the Landlord-Tenant Act.

(II)

As previously noted, Iowa Code section 648.3 (1979), Forcible Entry or Detention of Real Property, was left intact when the Landlord-Tenant Act and the Mobile Home Parks Act were adopted in Iowa. The three-day notice requirements in sections 562A.27(2) and 562B.25(2) upon which your question is based states identically as follows:

> If rent is unpaid when due and the tenant fails to pay rent within three days after written notice by the landlord of nonpayment and the landlord's intention to terminate the rental agreement if rent is not paid within that period of time, the landlord may terminate the rental agreement.

The issue of distinction between the three-day notice to cure of sections 562A.27(2) and 562B.25(2) and the three-day notice to quit of section 648.3 was addressed by this office in 1980 Op.Att'yGen. 279. In that opinion, we stated that the two notices serve different ends and purposes. We noted that the three-day written notice under chapters 562A and 562B is essentially a remedy available to a landlord to terminate a rental agreement upon a tenant's failure to pay rent when due while the three-day written notice under chapter 648 is condition precedent to the commencement of an action for forcible entry or detainer. We then concluded that they are separate and distinct notices. 1980 Op.Att'yGen. 279, 281.

As a result of the combination of the notice to quit of section 648.3 and the notice of right to cure of sections 562A.27(2) and 562B.25(2), the landlord was under a "double notice" requirement before commencing any possession actions. 31 Drake L. Rev. 253 at 265, n. 57. The procedural scenario under the "double notice" legislation then in effect would be as follows: the landlord would first give the tenant a notice of intent to terminate if the rent is not paid within three days. Iowa Code §§ 562A.27(2) and 562B.25(2) (1979). Upon expiration of the notice of intent to terminate, the landlord was then required to serve upon the tenant a three-day notice to quit,

until which time, the landlord was required to accept payment by the tenant. Iowa Code § 648.3 (1979). If the tenant failed to vacate by the expiration of those three days, the landlord could file a petition for forcible entry and detainer, which requires at least a five-day notice to the tenant prior to the hearing. Iowa Code § 648.5 (1979). Considering the fact that the computation of time for notices excludes the date of receipt of the notice, the minimum amount of time required to remove a tenant was fourteen days:

Notice of intent to terminate	4
Notice to quit	4
Notice of forcible entry and detainer hearing	6
Total number of days to remove tenant (minimum)	14

28 Drake L. Rev. 407, 430, n. 148 (1979).

The above scenario described the situation before section 648.3 was amended, first in 1981 and then in 1984.

(III)

Section 648.3 was first amended by the 1981 legislation in House File 154 by adding a provision making the three-day notice to quit given by mobile/manufactured home landlords concurrent with the three-day notice to terminate for failure to pay rent. It was amended a second time in 1984 by Senate File 2119 by adding the three words "or the land" to the 1981 amendment. The second amendment appears to be an attempt to clarify the language of the section as to cover both rental situations governed by the Landlord-Tenant Act as well as the Mobile Home Parks Act. The final version of section 648.3 as it appears now in the Iowa Code is as follows:

> Before action can be brought in any except the first of the above classes, the three-day notice to quit must be given to the defendant in writing. However, a landlord who has given a tenant three-day notice to pay rent and has terminated the tenancy as provided in section 562A.27, subsection 2, or section 562B.25, subsection 2, if the tenant is renting the mobile home or the land from the landlord may commence the action without giving a three-day notice to quit.

With the 1981 amendment of section 648.3, the landlord no longer is required to give both a right to cure notice (under section 562A.27(2) or section 562B.25(2), whichever is applicable) and a notice to quit. Section 648.3, as amended, has

eliminated the "double notice" requirement previously imposed. Now, if the landlord has given the tenant the three-day right to cure notice (required by section 562A.27(2) or section 562B.25(2) as the case may be), and the tenant has failed to cure his rent default, the landlord can terminate the lease and immediately file suit for possession without giving the tenant any additional notice (other than that required as a result of the commencement of the suit). 31 Drake L. Rev. 253 at 265, n. 57.

Therefore, in the opinion of this office, when a landlord renting a mobile home or a mobile home space, or both, has given a tenant a three-day written notice to terminate a rental agreement for non-payment of rent, and the tenant has failed to cure the rent default, the landlord can commence an action for forcible entry or detention without giving the tenant an additional three-day notice to quit.

Sincerely,

Tue Phan-Quang

TUE PHAN-QUANG
Assistant Attorney General

/kz

STATE OFFICERS AND DEPARTMENTS; Professional Licensing and Examining Boards; Board of Dental Examiners. Iowa Code §§ 147.14(4) and 147.18 (1987). Section 147.14(4) does not prevent a dental hygienist member of the board of dental examiners from accepting a faculty position at an area college. Section 147.18 does not prohibit acceptance of this position, provided the board member does not have an ownership interest in that school. (Weeg to Price, Executive Director, Iowa Board of Dental Examiners, 12-23-87) #87-12-2(L)

December 23, 1987

Constance L. Price, Executive Director
Iowa Board of Dental Examiners
Executive Hills West
1209 East Court
Des Moines, Iowa 50319

Dear Ms. Price:

You have requested an opinion of the Attorney General on the question of whether, in view of the prohibitions in Iowa Code sections 147.14(4) and .18 (1987), a dental hygienist member of the Iowa Board of Dental Examiners could accept a faculty position teaching dental hygiene at an area college without jeopardizing her position on the Board.

We first review the statutory provisions relevant to your request. Section 147.14(4) provides in relevant part that "[No] member of the dental faculty of the school of dentistry at the state University of Iowa shall be eligible to be appointed [to the Board of Dental Examiners]." This prohibition does not apply in the present case because the position in question is not a dental faculty position at the University of Iowa.

Section 147.18 next provides:

> No examiner shall be connected in any manner with any wholesale or jobbing house dealing in supplies or have a financial interest in <u>or be an instructor at a proprietary school</u>.

(emphasis added). This section previously provided:

> No examiner shall be an officer or member of the instructional staff of any school in which any profession regulated by this title is taught, or be connected therewith in any manner,
>
> . . . No examiner shall be connected in any manner with any wholesale or jobbing house dealing in supplies.

Iowa Code § 147.18 (1979). This section was amended by 1981 Iowa Acts, ch. 65, § 2 to its present form. The preamble to the amendment read:

> AN ACT to allow instructional staff of a professional school to serve on the licensing board of that profession.

Section 1 of that same Act amended section 147.16 to provide in relevant part:

> Each licensed examiner shall be actively engaged in the practice or the instruction of the examiner's profession . . .

The underlined portion is the new language. Both amendments reflect the legislature's intent, as reflected in the preamble, to allow board members to also serve as instructors at professional schools.

The current remaining limitation is that a board member may not be an instructor at a proprietary school. The term "proprietary" is defined in Black's Law Dictionary (5th Ed.) as "belonging to ownership; belonging or pertaining to a proprietor, relating to a certain owner or proprietor." Thus, the word "proprietary" embodies the concept of ownership. A board member may therefore serve as an instructor at a school in which the board member does not have an ownership interest without violating section 147.18.

While no statutory provision prohibits a dental hygienist Board member from accepting a position at an area college, we do caution that such a Board member should be cautious of situations on which a conflict of interest may arise. For example, such a board member should avoid participating in the grading of any practical licensing examination at which students from his or her school are being examined.

In conclusion, section 147.14(4) does not prevent a dental hygienist member of the board of dental examiners from accepting a faculty position at an area college. Similarly, section 147.18 does not prohibit acceptance of this position, provided the board member does not have an ownership interest in that school.

Sincerely,

THERESA O'CONNELL WEEG
Assistant Attorney General

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