STATE OFFICERS AND DEPARTMENTS; PUBLIC FUNDS: Reduction of community college appropriations. Iowa Code §§ 8.2(5), 286A.1 (1991); 1992 Iowa Acts, 2nd Extraordinary Sess., ch. 1001, §§ 501, 506 (S.F. 2393); 1992 Iowa Acts, ch. 1246, § 1(10) (H.F. 2465). The Department of Management is not required to exempt appropriations to the Department of Education for funding community colleges from the proportionate reduction of general fund appropriations for general administration to state departments and agencies contained in Senate File 2393. (Osenbaugh to Arnould, Speaker of the House, 1-6-93) #93-1-1(L)

January 6, 1993

The Honorable Robert C. Arnould
Speaker of the House
House of Representatives
State Capitol
L O C A L

Dear Representative Arnould:

We have received your request for an opinion concerning the applicability to community colleges of Senate File 2393, § 506, which provides for reversion of travel and equipment budgets.

As part of the budget compromise enacted at the extraordinary session of the General Assembly on June 25, 1992, the legislature reduced the previously enacted general administration budgets of most state agencies and departments by five percent. Senate File 2393, § 501(1). Section 501(2) of the Act reduced appropriations to certain agencies by less than five percent. Some agencies, however, were exempted from the reductions by section 501(3). Section 506, in turn, provided for a cut of six million dollars in out-of-state travel and equipment purchases by proportionally reducing the allotment of general fund moneys for general administration to those agencies for which the general administration appropriations were reduced by less than five percent in section 501. You question whether community colleges are subject to this proportional reduction in travel and equipment monies.

Section 506 states:

> REVERSION OF GENERAL FUND MONEYS. For those departments and agencies for which the general administration moneys appropriated from the general fund of the state were reduced by less than five percent in section 501 of this Act, the director of the department of management shall reduce the allotment of general fund moneys for general administration proportionally to achieve a

> savings in out-of-state travel and equipment purchases of $6,000,000 for the fiscal year beginning July 1, 1992.

Funding for community colleges was contained in several appropriations which were reduced by less than five percent by section 501(2). House File 2465, §§ 1(10), 3(1). House File 2465, section 1(10), appropriated ninety million dollars to the Department of Education to be allocated to merged areas for "general state financial aid" in lieu of personal property tax replacement payments, for vocational education, to purchase instructional equipment, and for salary increases. The appropriation clearly contemplated expenditures for equipment, among other uses.

The applicability of section 506 depends on whether these monies for community colleges were "general administration moneys" appropriated to "departments and agencies." A merged area is a "body politic as a school corporation." Iowa Code § 280A.16 (1991). It is not an agency of the State. Stanley v. Southwestern Community College, 184 N.W.2d 29, 33 (Iowa 1971). Nor is the word "department" likely to encompass a school corporation, such as a merged area or community college. For example, Iowa Code section 8.2(5) defines the term "department" to mean an institution or agency of state government. However, funding for community colleges is subject to the appropriation process. Iowa Code § 286A.1 (1991). The appropriations were actually made to the Department of Education, which is an agency of the State and a department under the meaning of the budget laws. House File 2465, §§ 1(10), 3(1). The director of the Department of Education has statutory authority to "[a]dminister, allocate, and disburse federal or state funds available to pay a portion of the operating costs of area vocational schools or area community colleges." Iowa Code § 280A.25(5) (1991).

Having concluded that the appropriations in question are made to a state agency, the Department of Education, it is nonetheless necessary to determine whether the appropriations are "general administration monies." The term "general administration" is specifically used in some appropriation bills referenced in section 501. For example, in House File 2465, § 1(1), monies are appropriated to the Department of Education for "general administration." Section 8(1) of the same bill appropriated money to the College Student Aid Commission for "general administration." However, it does not appear that the legislature intended section 506 to encompass only appropriations specifically earmarked as "general administration" as few of the appropriations in question contain that rubric. That construction would not provide adequate funds to permit

proportionate reduction to achieve a savings of six million in out-of-state travel and equipment purchases.[1]

The Department of Management has applied the pro rata reduction to that portion of an appropriation intended for equipment and out-of-state travel as shown in budget documents where the appropriation was reduced by less than five percent by section 501 of the Act. This approach uses the phrase "general administration" generically and focuses on the intent to "achieve a savings in out-of-state travel and equipment purchases." The Department of Management lists a total of $12,277,367 in out-of-state travel and equipment expenditures contemplated by the appropriations referenced in section 501. In effect then, these budgeted expenditures were halved by application of section 506.

We are required to give a statute a reasonable construction that will accomplish the statute's purpose. Conoco v. Department of Revenue & Finance, 477 N.W.2d 377, 379 (Iowa 1991). The express intent of this section was to achieve a savings of six million dollars in out-of-state travel and equipment purchases through proportionate reduction of general administration monies from those agencies whose appropriations were cut less drastically than others. This result can not be achieved by construing the term "general administration" narrowly. We find nothing in the bill which requires the Department of Management to exempt the equipment and out-of-state budget of community colleges from the effect of this reduction.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

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[1]The appropriations specifically for "general administration" or "administration" generally refer to a division of the agency in question. Of the appropriations listed in subsections 501(2) and 501(3), appropriations specifically for "general administration" or "administration" would total only about 5 million dollars -- $1,030,809 to Revenue and Finance Administration, $333,000 to College Aid "general administration," $2,014,344 to Corrections "general administration," $1,495,217 to Public Health "Administration and Support Division," and $212,022 to Human Rights Central Administration Division. (The Department of Human Services' appropriation for "general administration" was not exempted from the five percent reduction.)

INCOMPATIBILITY; GENERAL ASSEMBLY: Simultaneous service in general assembly and on local school board. Iowa Const. art. III, §§ 1, 21, 22; Iowa Code §§ 257.1, 279.8, 279.32 (1991). Membership in the general assembly and on a local school board is not unconstitutional under Iowa Constitution article III, sections 1, 21, or 22. Simultaneous service in the two offices is not incompatible when the school board office is not an office of profit, the legislature does not directly control the amount of money allocated to an individual school district, and there is no overlap in the functions of the two offices as to make membership in both offices "repugnant." 1960 Op.Att'yGen. 172 is therefore overruled. (Doland to Arnould, Speaker of the House, 1-8-93) #93-1-2(L)

January 8, 1993

The Honorable Robert Arnould
Speaker of the House
House of Representatives
State Capitol
Des Moines, Iowa 50319

Dear Speaker Arnould:

You have requested an opinion from this office as to whether a member of the general assembly can also serve as a member of a local school board. You state that a recently elected representative who is to be sworn in as a member of the 75th General Assembly on January 11, 1993, was elected as a member of a local school board in September, 1992. You state that questions have arisen concerning whether the holding of these two offices is compatible. We conclude for the reasons stated in this opinion that these offices are not incompatible.

There are three separate provisions of article III of the Iowa Constitution that come into play when the compatibility question involves a member of the general assembly. Section 1 provides for separation of the powers of government:

> Section 1. Departments of Government
>
> The powers of the government of Iowa shall be divided into three separate departments - the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Under this language a member of the legislative department is prohibited from exercising powers belonging to the executive or judicial branch. Article III, section 21 of the Iowa Constitution provides:

> **Section 21. Members not appointed to office.**
>
> No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Article III, section 22, provides:

> **Section 22. Disqualification.**
>
> No person holding any lucrative office under the United States or this state, or any other power, shall be eligible to hold a seat in the general assembly; but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or a postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

It does not appear that any of the above constitutional provisions are applicable to your question. Membership on a local school board and in the general assembly does not involve an overlap of the executive, judicial or legislative function as prohibited in section 1 of the Iowa Constitution. In addition, board members do not receive compensation. Iowa Code section 279.32 (1991). Membership on a school board is therefore neither a "civil office of profit" or a "lucrative office" such that a question under sections 21 or 22 would arise.

In addition to reviewing the aforementioned constitutional provisions, we have reviewed the common law authority concerning compatibility. The authoritative case in this regard is State v. White, 133 N.W.2d 903, 905 (Iowa 1965):

> . . . the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power' or where the duties of the two offices 'are inherently inconsistent and repugnant.'

A prior Attorney General's opinion held that this language precluded a person from holding membership in both the general assembly and a local school board. 1960 Op.Att'yGen. 172. That

opinion in turn cited Weza v. Auditor General, et al., 298 N.W. 368 (Michigan 1941), for the finding that a county school commissioner was "subordinate" to a member of the legislature and the two offices were therefore incompatible. See also 1966 Op.Att'yGen. 304, 307. Although the fundamental test of incompatibility enunciated in these prior opinions and Weza remain unchanged, our view regarding "revisory power" or "subordination" has changed and therefore calls for a different conclusion than that reached in those prior opinions. The prior opinions simply concluded that because school districts were created by the legislature, they were subject to its "revisory" power and were "subordinate" to the legislature. Membership in both was therefore found to be incompatible. A review of recent opinions convinces us that this per se finding of incompatibility whenever membership in the office of general assembly is at issue with an office of its own creation is not an appropriate test.

The current approach to compatibility questions is enunciated in 1982 Op.Att'yGen. 16. There we stated that the "common law view of incompatibility should be construed narrowly and applied cautiously." See also 1982 Op.Att'yGen. 220. We have held, for example, that concurrent service on a soil conservation district and in the general assembly is not incompatible. 1974 Op.Att'yGen. 545. We stated in that opinion that though the general assembly could review and amend the soil conservation statutes at any time, it had the power to do so with any entity under its territorial jurisdiction and that this was not the "revisory" power prohibited in White. Similarly, in 1970 Op.Att'yGen 763, we held that the duties of a member of the Mississippi River Parkway Commission and the duties of a member of the general assembly did not disclose any conflict or inconsistency sufficient to make the two offices repugnant.

These opinions, in combination with our cautious approach in finding incompatibility, convince us that there should not be a per se finding of incompatibility whenever there is a question concerning membership in the legislature and an office of its creation when not an office of profit. Instead, we will first determine whether a constitutional question arises under the aforementioned provisions. If no constitutional question arises, the proper test is to compare the respective duties of the two offices in question and examine how the duties relate and whether they are incompatible. 1982 Op.Att'yGen. 220, 221.

Here, the function of a school board of directors is to make rules for its own government and for the officers, employees, teachers and pupils and the property of the local school corporation. Iowa Code § 279.8 (1991). There does not appear to be an overlap in the functions of this office and membership in the legislature as to make dual membership "repugnant" as prohibited in White. Nor is there any power or duty performed by

a school board that is subject to automatic review by, or that may be appealed to, the legislature for "revision" as prohibited by 1982 Op.Att'yGen. 16. While the general assembly does control the appropriations to local school districts, these funds are distributed by specific formulas set out in Iowa Code chapter 257, and the legislature does not directly control the amount of money allocated to an individual school district.

An examination of compatibility of offices also brings into question the distinct concept of conflict of interest. A conflict of interest is generally defined as existing "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. It is not possible, and we will not attempt, in this opinion to anticipate all circumstances in which a conflict might arise for an individual serving both as a local school board member and a member of the legislature. Conflicts can be avoided, however, by the "officer's awareness and cautious exercise of the need to abstain from discussion and voting when a conflict or potential for conflict exists". Op.Att'yGen. #92-9-1 (Scase to Halvorson and Ferguson).

We believe that our more recent analysis of the law leads to the conclusion that simultaneous service in the general assembly and on a local school board is not incompatible. Therefore, 1960 Op.Att'yGen. 172 is overruled.

Sincerely,

Karen Doland

KAREN DOLAND
Assistant Attorney General

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GIFTS; STATE OFFICERS AND EMPLOYEES: Officials and lobbyists defined. Iowa Code §§ 68B.2(10), 68B.2(14) (1991). Persons who serve on state advisory bodies which have no final decision-making authority do not become "officials" by virtue of that service. Nor do they become "lobbyists" simply because they serve on a state advisory committee which is created to make recommendations for legislative or executive action. (Osenbaugh to Atchison, Director, Dept. of Public Health, 1-14-93) #93-1-3(L)

January 14, 1993

Christopher G. Atchison
Director
Department of Public Health
Lucas State Office Building
L O C A L

Dear Mr. Atchison:

You have requested our opinion concerning the applicability of the government ethics law, Iowa Code chapter 68B, to advisory committee panels within the Department of Public Health. The ethics law applies to state "officials" and "employees."

Advisory Committees

Iowa Code section 68B.2(14), as amended, defines "official" as follows:

> "Official" means an officer of the state of Iowa receiving a salary or per diem whether elected or appointed or whether serving full-time or part-time but does not include officers or employees of political subdivisions of the state. "Official" includes but is not limited to supervisory personnel, members and employees of the governor's office, members of other statewide elected offices, and members of state agencies and does not include members of the general assembly, legislative employees, or officers or employees of the judicial branch of government who are not members or employees of the office of attorney general.

A recent Attorney General's opinion interpreted this section as including members of state boards and commissions. Op.Att'yGen. # 92-9-3 (Krogmeier and Pottorff to Branstad). As to other multi-member panels in state government, the opinion

applied the common law test of "office." The opinion cites the five factors considered at common law -- two of which are that "a portion of the sovereign power of government must be delegated to that position" and "the duties must be performed independently and without control of a superior power other than the law." (p. 3.) The opinion recognized that the critical factor in applying this test to members of state panels is whether the person exercises governmental authority. The opinion stated:

> Although the terms "committees" or "councils" do not appear literally in the definition of agency, we believe persons appointed to these bodies would also be officers "of the state of Iowa" within the scope of the definition <u>to the extent that these persons exercise governmental authority</u>.

(Emphasis added.)

A purely advisory committee would not meet this test. Thus, in the absence of rulemaking, adjudicatory, granting, or other final decision-making authority, an advisory committee has not been delegated a portion of the sovereign power of government.

The terms "committee" or "council" may result in some confusion. Those terms are specially defined in Iowa Code section 7E.4 in such a way as to indicate that the bodies would make only recommendations or act in an advisory capacity. Persons whose sole functions were those listed in the definitions of "committee" or "council" under section 7E.4 would not fit the common law definition of "officer" applied in the prior opinion. However, these terms have not always been used consistently throughout the Code. However, the test is whether the unit has some sovereign power which is not subject to review by another entity, and not the name of the unit.

Nor would we conclude that members of a purely advisory panel would be "members of state agencies." As noted in the prior opinion, the second sentence of the definition of "official" includes some persons who would not fit the common law definition of "officer." For example, supervisory personnel, who are expressly included in the second sentence, would not be "officers" at common law.

The term "member of state agencies" is not easy to define. As used in Iowa Code section 17A.2(1), the members of a multimember agency are the members of the governing body of the

agency.[1] However, section 68B.2(14) uses the phrase "members . . . of the governor's office," which clearly has no multimember governing body. Although the opinion mentions an advisory council in passing in the discussion of this term, it is our view that the controlling test is the standard set forth on page 3 -- a member of a state committee or council is an "official" only if that body has decision-making authority, and not if the body is purely advisory.

Lobbyists Defined

You also ask whether the members of advisory committees could be lobbyists even if they are not "officials." The third definition of lobbyist applies only to governmental "officials" or "employees" who represent the official position of their agencies and seek to influence legislative or executive action. Iowa Code § 68B.2(10)(3). That definition would not apply to a person who is neither a governmental "official," nor an "employee." Of course, such a person could be a lobbyist if the individual engaged in activities included in the other definitions of "lobbyist" under Iowa Code section 68B.2(10).

You ask whether an advisory board member is a "lobbyist" if the sole activity is to participate on a board established by the General Assembly to get input on a particular issue. All three definitions of "lobbyist" connote activity designed to influence legislative or executive action on behalf of a third party. See Op.Att'yGen. # 92-12-4 (Osenbaugh to Wise). It does not include advice sought by the legislature or executive decision-maker for its own benefit. Filing a legislatively mandated report, even though it contains recommendations for legislation, would not fit the definition of lobbying.

You further ask whether persons you appoint to ad hoc committees so that you can benefit from their insight must

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[1]Section 17A.2(1) states:

> "Agency" means each board, commission, department, officer or other administrative office or unit of the state. "Agency" does not mean the general assembly, the judicial department or any of its components, the office of consumer advocate, the governor or a political subdivision of the state or its offices and units. Unless provided otherwise by statute, no less than two-thirds of the members eligible to vote of a multimember agency constitute a quorum authorized to act in the name of the agency.

register as lobbyists if individuals "belong to but do not officially represent" organizations which seek to influence governmental action. In order for a person to become a lobbyist because of action on behalf of an organization other than government, the person must either be paid compensation to seek to influence legislative or executive action or "represent on a regular basis" an organization which has lobbying as its purpose. Iowa Code section 68B.2(10)(a)(1), (2). The statute requires that the organization designate that individual to speak on its behalf. Op.Att'yGen. # 92-12-4. Further, if the individual's sole activity is to respond to your request for information and advice, it would not appear that the person would be seeking to influence governmental action and would therefore not be a lobbyist.

Conclusion

In conclusion, persons who serve on state advisory committees, which bodies have no final decision-making authority, are not "officials" by virtue of that service. Nor are advisory committee members "lobbyists" simply because the members serve on a state advisory committee created to make recommendations for legislative or executive action.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:cw

GENERAL ASSEMBLY; CONSTITUTION; STATE OFFICERS: Simultaneous service in general assembly and on Iowa Sister States board of directors. Iowa Const. art. III, §§ 1, 21, 22; Iowa Code § 18B.3 (1991). Service on the Iowa Sister States board of directors by members of the general assembly does not violate the separation of powers doctrine under Iowa Constitution Article III, section 1 when the function of the board is to simply research and recommend official exchanges between Iowa and other countries concerning new subject areas in business, media, science, culture, agriculture and sports. (Doland to Connors, State Representative, 1-27-93) 93-1-5(L)

January 27, 1993

The Honorable John H. Connors
State Representative
House of Representatives
State Capitol
Des Moines, Iowa 50319

Dear Representative Connors:

You have requested an opinion as to whether legislators can serve as voting members of the Iowa Sister States board and whether service on the board by legislators creates a conflict of interest.

Your question first raises a constitutional question under the separation of powers doctrine. Article III, section 1 of the Iowa constitution states:

> The powers of the government shall be divided into three separate departments---the Legislative, the Executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

We have previously held that this provision prohibits legislators from appointment to the Alcoholism Commission and the Capitol Planning Commission. 1976 Op.Att'yGen. 6. We have also held that this section prohibits legislators from serving on a Statewide Health Coordinating Council. 1978 Op.Att'yGen. 251. The rationale for the prohibition in each of these opinions was that it would be unconstitutional for a legislator to be a member of an agency that was performing executive functions. The legislature is to make laws while the executive branch is to administer and enforce them. "If members of the Legislature may be appointed as members of Boards which exercise functions within the executive-administrative department of government, the door is then open for the Legislature to enter and assume complete

control thereof." 1976 Op.Att'yGen. 6, 14, quoting State v. Bailey, 150 S.E.2d 449 (1966).

These previous opinions however, have reserved the question of the applicability of the constitutional prohibition against the overlap of executive and legislative functions when the agency does not actually perform executive functions. "If a commission's only duty is to make recommendations, or to ascertain facts ancillary to legislation and with the lawmaking power, service by legislators on commissions for that purpose alone may not violate separation of powers". 1976 Op.Att'yGen. at 358. "If for example, the commission's only duty is to make recommendations, to whatever department of government, it is very doubtful that it has any sovereign power." 1976 Op.Att'yGen. at 12, citing Parker v. Riley, 115 P.2d 873 (1941).

You have stated that the function of the Iowa Sister States is to "facilitate exchanges of people between Iowa and any other country with whom a sister state agreement has been signed." You state that these exchanges are usually between various public or private organizations and are designed to foster exchanges in new subject areas like business, media, science, culture, agriculture, and sports. You state that Iowa Sister States is a private nonprofit corporation that requests state funding through the Iowa Department of Economic Development's annual budget and through INTERNET. Iowa Code section 18B.3 states that the mission of INTERNET is to conduct long-range research quantifying product and geographical opportunities for Iowa producers in the marketplace. It states that INTERNET shall recommend a coordinated international trade policy designed to substantially increase Iowa's global trade benefits.

The above indicates that the board does not have the power to contract in the state's name or the responsibility to determine how appropriations are spent as was prohibited in 1976 Op.Att'yGen. 6, 12. See also 1978 Op.Att'yGen. 251 (Legislators prohibited from appointment to Statewide Health Coordinating Council when Council has the power to set appropriations for the agency and determine how the appropriations are spent.) It appears from the facts you have presented therefore, that the function of the Iowa Sisters States is simply research and recommendation. Therefore, as long as the board performs only this function, the separation of powers doctrine would not prohibit legislators from serving on this board. See 1976 Op.Att'yGen. 356 (Members of the general assembly may constitutionally serve on the Police Communications Review Committee when committee's only function is to review proposed changes of communications operating procedure of the department).

Two other sections of the Iowa constitution come into play when questions arise concerning dual membership in offices by

legislators. Article III, section 21 provides that no legislator shall, during the time for which he shall have been elected, be appointed to any civil office of profit of this state, which was created or the emoluments of which were increased during such term. Article III, section 22 provides that no one holding any lucrative office under the United States or this state, or any other power, can hold a seat in the general assembly. You have stated that board members do not receive compensation or other expenses for their services. It appears, therefore, that the Iowa Sister States board is neither a "civil office of profit" nor a "lucrative office." These constitutional provisions are therefore inapplicable to the question posed. 1978 Op.Att'yGen. 251, 252.

You question whether service on the Iowa Sister States board by a legislator creates a conflict of interest, "especially if the legislator or other state official may impact on the Iowa Sister State's corporation's budget." Conflict of interest questions develop "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." 1982 Op.Att'yGen. 220, 221. While the potential for a conflict of interest certainly may arise when a legislator serves in these two capacities, we are unable to address this question at this time. In order to address a conflict of interest question we must look to how a particular office holder is carrying out his or her official duties in a given fact situation. An allegation of conflict of interest can only be decided by sifting though the facts surrounding the particular actions taken by the office holder. Id. Therefore, without more information about the particular office holder and the actions taken, we are unable to address this question as presented in your inquiry. We have in the past, however, noted that conflicts could be avoided by the officer's awareness, and cautious exercise, of the need to abstain from discussion and voting when a conflict or potential for conflict exists. Op.Att'yGen. #92-9-1 (Scase to Halvorson and Ferguson), Op.Att'yGen. #93-1-2 (Doland to Arnould, Speaker of the House).

You also ask whether the Iowa Sister States can provide board members who are also state officials with a meal at no cost to the legislator. This is essentially a gift law question under Iowa Code chapter 68B. Chapter 68B applies when there is a "rendering of anything of value" from a donor "in return for which legal consideration of equal or greater value is not given and received." If, therefore, your service on the board is "legal consideration of equal or greater value" then the benefit you receive in the form of meals, chapter 68B would not apply. You must show, however, that the benefits are those regularly and customarily provided to board members in return for this service and that the value of the benefits is not greater than the value of the services performed by board members.

We conclude that legislators may constitutionally serve as members of the Iowa Sisters States board when the function of that Board is to simply research and recommend official exchanges between Iowa and other countries concerning new subject areas in business, media, science, culture, agriculture and sports.

Sincerely,

Karen Doland

KAREN DOLAND
Assistant Attorney General

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MUNICIPALITIES: Municipal Housing Projects. Pre-application Hearing. Iowa Code §§ 403A.4, 403A.20 and 403A.28 (1991). A pre-application hearing is not contemplated by Iowa Code section 403A.28 in requiring a public hearing prior to "undertaking" a housing project. A public hearing, however, must be held prior to the performance or execution of a housing project, or binding contract to do so, including the execution of any contract for financial assistance with the federal government. (Walding to Doderer, State Representative, 1-27-93) #93-1-6(L)

January 27, 1993

The Honorable Minnette Doderer
State Representative
State Capitol
L O C A L

Dear Representative Doderer:

I am writing in response to your request for an opinion of the Attorney General, made on behalf of the City of Iowa City, regarding Iowa's Municipal Housing Law, Iowa Code chapter 403A (1991). Specifically, the issue you have posed is whether a pre-application hearing is contemplated by Iowa Code section 403A.28 (1991) in requiring a public hearing prior to "undertaking" a housing project.

The genesis of your question was the denial by the United States Department of Housing and Urban Development ("HUD") of the city's application for Family Self-Sufficiency Program funds based upon an interpretation of section 403A.28. In a letter to the mayor of Iowa City, dated July 6, 1992, HUD's Region VII Chief Attorney concluded that "§ 403A.28 required a public hearing to be held prior to the application for funding" from HUD. The letter, however, suggested that an opinion of the State Attorney General be sought. Accordingly, we have been asked to review that section.

As background, the relevant facts are that the federal government issued a Notice of Funding Availability in the federal register on September 30, 1991, with a second notice published therein on January 3, 1992. An invitation to submit an application for program funds was received by Iowa City on January 16, 1992, identifying the available funds for Iowa's metropolitan areas. On February 7, 1992, three days prior to the deadline, Iowa City submitted applications for section 8 (certificates and vouchers) and public housing funds to HUD's regional office in Des Moines by certified mail. Prior to applying, on January 31, 1992, Iowa City published notice of a public hearing scheduled for March 3, 1992. Verification of the publication and hearing was submitted to HUD on March 9, 1992.

On July 1, 1992, and again on July 12, 1992, HUD wrote to the city denying the applications based on the city's failure to hold a public hearing prior to the application deadline of February 10, 1992. The letter from HUD's regional chief attorney was written in response to the city's June 19, 1992, request for reconsideration.

As this is a case of first impression, our review is guided by familiar rules of statutory construction. The polestar of statutory construction is legislative intent. Office of Consumer Advocate v. Iowa State Commerce Comm'n, 376 N.W.2d 274 (Iowa 1985); Doe v. Ray, 251 N.W.2d 406 (Iowa 1977). The goal in construing a statute is to ascertain that intent and give it effect. Spilman v. Board of Directors of Davis County Community School Dist., 253 N.W.2d 593 (Iowa 1977). If fairly possible, unreasonable or absurd consequences should be avoided. Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968). In interpreting a statute, consideration must be given the entire act, and the statute should be given a sensible, practical, workable and logical construction. Barkema v. Clement Auto and Truck, Inc., 449 N.W.2d 348 (Iowa 1989). An interpretation of a statute must begin with the language of the statute. Mallard v. U.S. Dist. Court for Southern Dist. of Iowa, 488 U.S. 19, 109 S. Ct. 278, 102 L. Ed. 2d 186 (1989). Finally, statutory language, unless it would frustrate the intent of the legislature, is to be given its usual and ordinary meaning. State v. Bartusek, 383 N.W.2d 582 (Iowa 1986).

Applying the foregoing principles to the applicable provisions of chapter 403A, we initially examine section 403A.28. That section, in pertinent part, provides:

> The municipal housing agency shall not undertake any low-cost housing project until such time as a public hearing has been called, at which time the agency shall advise the public of the name of the proposed project, its location, the number of living units proposed and their approximate cost.

[emphasis added.] The section clearly requires a public hearing be conducted at some point during the course of a housing project, without which, a municipal housing agency shall not "undertake" a housing project.[1] In determining the timing of a

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[1]A "housing project" is defined to include slum clearance, low-income housing or a combination of the two. Iowa Code § 403A.2(9) (1991). See also McQuillin, Municipal Corporations

hearing, one must construe the meaning of the word "undertake" as used in that section and intended by the legislature.

That term is used in several other sections of chapter 403A. See Iowa Code §§ 403A.2(9), 403A.3(2), 403A.4, 403A.9 and 403A.21. As used in those sections, an undertaking is one of several separate and distinct steps which a municipality[2] may exercise in the course of a housing project. Those steps, as summarized in section 403A.9, include the "financing, planning, undertaking, constructing or operating" of a housing project. In our view, the process to undertake a housing project would include, for instance, compliance with local planning and zoning regulations, section 403A.11, the issuance of bonds, section 403A.12, certification of any bond issuance to the state auditor, section 403A.19, and the exercise of condemnation proceedings, section 403A.20. Further guidance is gained from Black's Law Dictionary 1696 (4th ed. rev. 1968), which defines "undertake" as:

> To take on oneself; to engage in; to enter upon; to take in hand; set about; attempt; as, to undertake a task; a journey; and, specifically, to take upon oneself solemnly or expressly; to lay oneself under obligation or to enter into stipulation; to perform or to execute; to covenant; contract, hence to guarantee; be surety for; promise; to accept or take over as a charge; to accept responsibility for the care of; to engage to look after or attend to; as to undertake a patient or guest. To endeavor to perform, try, to promise, engage, or agree, assume an obligation.

(citations omitted.) (emphasis added.) Moreover, Iowa Code section 403A.4 (1991) provides, in part:

> It is the purpose and intent of this chapter to authorize every municipality to do any and all things necessary or desirable to secure the financial aid or co-operation of the federal government in the undertaking, construction, maintenance or operation of any

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§ 24.563.05 (3rd ed.).

[2]A "municipality," as defined in Iowa Code section 403A.2(1) (1991), includes cities and counties.

> housing project by such municipality. To accomplish this purpose a municipality, notwithstanding the provisions of any other law, may include in any contract for financial assistance with the federal government any provisions, which the federal government may require as conditions to its financial aid of a housing project, not inconsistent with the purposes of this chapter.

Based on that definition and that public policy, we believe section 403A.28 requires a public hearing prior to the performance or execution of a housing project, including the execution of any contract for financial assistance with the federal government.

An application for financial assistance itself, if non-binding, would not be considered as part of the process for "undertaking" a housing project. Although, arguably, the application process is included in either the financing or planning steps, an application precedes any contract for federal financial assistance, let alone any performance or execution of a housing project. Accordingly, a public hearing need not be conducted prior to submitting an application for financial funds.

In summary, a pre-application hearing is not contemplated by Iowa Code section 403A.28 in requiring a public hearing prior to "undertaking" a housing project. A public hearing, however, should be held prior to the performance or execution of a housing project, or binding contract to do so, including the execution of any contract for financial assistance with the federal government.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rd

LICENSES; MUNICIPALITIES: Use of Plumbers Permit. Iowa Const. art. III, § 38A; Iowa Code § 135.15 (1991). A city has the authority to restrict those engaged in the local plumbing trade to persons who satisfy uniform standards which are reasonable and equitable. A licensed master plumber can be prohibited, by ordinance, from allowing an unlicensed contractor to use a permit applied for and issued to the licensed master plumber. (Walding to Jochum, State Representative, 1-27-93) #93-1-7(L)

January 27, 1993

The Honorable Tom Jochum
State Representative
State Capitol
L O C A L

Dear Representative Jochum:

We are in receipt of your request for an opinion of the Attorney General regarding the licensing of plumbers in Iowa municipalities. Specifically, you have asked whether a licensed master plumber can obtain a permit and then allow an unlicensed contractor to use that permit to engage in plumbing activities without a license. Stated alternatively, the issue is whether a municipality can enact an ordinance which prohibits an unlicensed contractor from using a permit applied for and issued to a licensed master plumber.

In the interest of public health, plumbers and plumbing activities have traditionally been regulated, supervised and licensed by states and political subdivisions. McQuillin, Municipal Corporations § 26.127 (3rd ed.). Regarding the purpose of government regulation, McQuillin states:

> Plumbers and plumbing are subject to reasonable municipal regulation under the police power to protect the public health and welfare. Obviously, good plumbing is intimately connected with the prevention of diseases and epidemics, the prevention of water contamination and the prevention of foul-smelling conditions and damage to buildings from leaking water. Accordingly, examination and licensing of plumbers and permits for plumbing may be required.

[Footnotes omitted.] McQuillin, Municipal Corporations § 24.338 (3rd ed.). See also State v. Harrington, 229 Iowa 1092, 1095-96,

296 N.W. 221, 223 (1941). In explaining the examination and licensing of plumbers, McQuillin observes:

> It may be required by municipal corporations with authority to regulate and license plumbers, journeymen plumbers and plumbers' apprentices, that they take and pass an examination for a license or certificate. The purpose of requiring the examination and licensing of plumbers is to protect the public against the hazard to health of work by those not competent to do it.

[Footnotes omitted.] McQuillin, Municipal Corporations § 26.127 (3rd ed.). In addition to requiring registration or certification of plumbers, ordinances may regulate persons working for licensed plumbers, including requiring them to be apprentices. Id. Moreover, McQuillin notes that in regulating plumbers and plumbing, an ordinance "must be reasonable, provide a uniform rule, and avoid unfair discriminations." [Footnotes omitted.] McQuillin, Municipal Corporations § 24.338 (3rd ed.).

In Iowa, the long-standing practice is for cities to have exclusive authority over the examination and licensing of plumbers, while the state has authority to adopt rules and regulations pertaining to plumbing installation.[1] See 1919-20 Op.Att'yGen. 727 (affirmed in 1978 Op.Att'yGen. 511). The basis for that municipal authority would be home rule under Iowa Const. art. III, § 38A. Iowa Code section 135.15 recognizes this authority in requiring "cities licensing plumbers" to remit a portion of the license fee to the state.

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[1]Iowa Code section 135.11(5) authorizes the Iowa Department of Public Health to adopt a "code of rules governing the installation of plumbing in cities." The State Plumbing Code, adopted pursuant to that authority, establishes the minimum standards which a city must follow in regulating the installation of plumbing. See 641 IAC ch. 25. As part of the state building code, similar plumbing rules and regulations have been adopted pursuant to Iowa Code section 104B.1 (1991). 661 IAC 16.400, et seq.; 661 IAC 16.401, et seq. The state regulations, however, do not address the subject of examination and licensing of plumbers, nor the process for obtaining a permit to engage in a plumbing activity.

Consistent with a city's home rule and statutory authority, and in the exercise of its police power to protect the public health, it is our view that a city does have the authority to restrict those engaged in the local plumbing trade to persons who satisfy uniform standards which are reasonable and equitable. Conversely, a prohibition against a person engaging in that trade without examination and licensing would be valid. A contrary view would render the entire examination and licensing process ineffective in that licensed master plumbers, rather than the city, would regulate who is qualified to engage in plumbing activities.

The merits of an ordinance imposing a licensing process for local plumbers is reserved to city councils, and is not the proper subject of an Attorney General's opinion. We have, however, reviewed ordinances from the City of Dubuque which were forwarded to us. These ordinances regulating plumbing and plumbing activity suggest that the unauthorized use of a permit is strictly prohibited. In Dubuque, one may not work on a plumbing system, "or cause the same to be done," unless issued a separate plumbing permit. City of Dubuque, Code of Ordinances § 37-2 (§ 20.7(a)). Only a licensed master plumber may obtain a permit. City of Dubuque, Code of Ordinances § 37-2 (§ 20.8(a)).

In the licensing, examination and registration of plumbers, moreover, Dubuque establishes three classifications: master plumbers, journeymen plumbers and apprentices.[2] City of Dubuque, Code of Ordinances § 37-2 (§ 20.13). Except for exemptions for owner-occupants and for plumbing on private sewer or water main systems, the Dubuque ordinances provide:

> [N]o person shall engage in the business of erecting, installing, altering, repairing, relocating, replacing, adding to or maintaining any plumbing equipment or systems

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[2]That classification is consistent with McQuillin's view that:

> Who are "plumbers" within the meaning of license and permit requirements, should be determined so far as possible from the terms and definitions in the applicable law.

[Footnote omitted.] McQuillin, Municipal Corporations § 26.127.10 (3rd ed.).

> within the jurisdiction of the city without first obtaining a master plumber's license.

City of Dubuque, Code of Ordinances § 37-2 (§ 20.13(b)). The local plumbing law also provides:

> Master plumbers shall not employ any person to install, alter, repair, replace, remodel, add to or maintain any plumbing equipment or system unless such person is a licensed master plumber, licensed journeyman plumber, or registered apprentice.

City of Dubuque, Code of Ordinances § 37-2 (§ 20.13(c)).

Within the Dubuque city limits, it appears that the only persons allowed to engage in that trade are licensed master plumbers, as well as journeymen plumbers and registered apprentices in the employ of a licensed master plumber; all other individuals are prohibited from engaging locally in the trade. Advice concerning application of a city ordinance, however, should be directed to the city attorney as an interpretation of local ordinances is not the function of an Attorney General opinion.

In summary, a city has the authority to restrict those engaged in the local plumbing trade to persons who satisfy uniform standards which are reasonable and equitable. A licensed master plumber can be prohibited, by ordinance, from allowing an unlicensed contractor to use a permit applied for and issued to the licensed master plumber.

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rd

COUNTIES; CITIES: County board of health; private sewage disposal facilities. Iowa Const. art. III, § 39A; Iowa Code §§ 137.2(1), 137.2(2), 137.2(6), 137.5, 137.7(4), 331.301(1), 331.301(2) 331.301(4), 455B.172(2), 455B.172(3), 455B.172(4), 455B.172(5) (1991). A county does not have authority to unilaterally delegate its responsibility for private sewage disposal facilities under Iowa Code §§ 455B.172(3) and (4) to a city with a population under twenty-five thousand for facilities located within the city's corporate limits. (Sheridan to Daggett, State Representative, 1-27-93) #93-1-8(L)

January 27, 1993

The Honorable Horace Daggett
State Representative
State Capitol
LOCAL

Dear Representative Daggett:

You have requested our opinion on whether a county may unilaterally delegate its responsibility for the regulation of private sewage disposal facilities located within the corporate limits of a city to the city and, if so, whether the city assumes or accepts liability for facilities which are not in compliance with state minimum standards. Your questions are prompted by the adoption of an ordinance by Union County which purports to grant exclusive jurisdiction of such disposal facilities located within the corporate limits of Creston, Iowa, to the city.[1]

Counties have home rule power to enact ordinances "not inconsistent with the laws of the general assembly." Iowa Const. art. III, § 39A; Iowa Code § 331.301(1). An exercise of power by a county is not inconsistent with state law "unless it is irreconcilable with the state law." Iowa Code § 331.301(4). A county may enact an ordinance on a matter which is the subject of statute if the ordinance and statute can be harmonized and reconciled. Kent v. Polk County Bd. of Supervisors, 391 N.W.2d 220, 223 (Iowa 1986). A duty of a county must be performed by or under the direction of the board of supervisors except as otherwise provided by law. Iowa Code § 331.301(2); see Kent, 391 N.W.2d at 223 (county had authority to designate county health board advisory committee to hear appeals under the ordinance).

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[1]This opinion does not involve a situation where a county and city have contracted to jointly perform duties under Iowa Code chapter 28E.

Iowa Code section 455B.172 establishes the framework for the regulation of private sewage disposal facilities. The Department of Natural Resources must carry out state responsibilities related to such facilities. Iowa Code § 455B.172(2). At the local level, county boards of health, not cities, are expressly assigned responsibility for regulating such facilities. The Department of Natural Resources retains concurrent authority to enforce state standards for such facilities if a county board of health fails to fulfill its responsibilities. Iowa Code § 455B.172(5).

Iowa Code section 455B.172(3) provides:

> Each county board of health shall adopt standards for private water supplies and private sewage disposal facilities. These standards shall be at least as stringent but consistent with the standards adopted by the commission. If a county board of health has not adopted standards for private water supplies and private sewage disposal facilities, the standards adopted by the commission shall be applied and enforced within the county by the county board of health.

Iowa Code section 455B.172(4) provides:

> Each county board of health shall regulate the private water supply and private sewage disposal facilities located within the county board's jurisdiction, including the enforcement of standards adopted pursuant to this section.

No provision is included in Iowa Code section 455B.172 for the delegation by a county of these statutory duties to a city.

Iowa Code chapter 137 provides for the establishment and general authority of local boards of health. A "local board of health" is defined to include either a county, city, or district board of health. Iowa Code § 137.2(6). Although Iowa Code section 455B.172 does not define "county board of health," chapter 137 does and distinguishes a "city board" from a "county board." Iowa Code §§ 137.2(1) and (2).

Iowa Code chapter 137 does not refer to Iowa Code section 455B.172 but it does provide that a "local board of health" may

issue licenses and permits and charge reasonable fees therefor in relation to the construction or operation of private water supplies or sewage disposal facilities. Iowa Code § 137.7(4). We have previously opined that a county, not a city, has jurisdiction over private sewage disposal facilities when the city has a population under twenty-five thousand, citing Iowa Code section 137.5. 1978 Op.Att'yGen. 207.

Iowa Code section 137.5 provides:

> The county board shall have jurisdiction over public health matters within the county, except as set forth herein and in section 137.13 [relating to county and city board disbandment and transfer of powers and duties to a district board]. The council of any city having a population of twenty-five thousand or more, according to the latest federal census, may appoint a city board of health in the manner specified in sections 137.3 and 137.4 or the council may appoint itself to act as the city board of health. The city board shall have jurisdiction within the municipal limits.

At a minimum, this statute makes clear that counties, not cities with a population under twenty-five thousand, have jurisdiction over public health matters within the county and located within the corporate limits of such cities.

No provision in Iowa Code chapter 137 authorizes a county to delegate this responsibility to a city with a population under twenty-five thousand. We need not decide whether Iowa Code section 137.5 would allow a city to assume the county's responsibilities for private sewage disposal facilities within the city since you are concerned with the City of Creston which is not large enough in population to utilize this provision and, in any event, did not attempt to do so.

We conclude that a county does not appear to have authority to unilaterally delegate its responsibility for private sewage disposal facilities under Iowa Code sections 455B.172(3) and (4) to a city with a population under twenty-five thousand for facilities located within the city's corporate limits.

Having concluded that this kind of delegation is not authorized, we need not address your additional question whether a city would, by such delegation, assume liability for private

sewage disposal facilities which do not comply with state minimum standards. Nor would it be appropriate for us to opine on the city's potential liability under such circumstances. The function of an opinion is to decide a specific question of law or statutory construction. We cannot resolve issues which are dependent upon factual matters. 1972 Op.Att'yGen. 686.

Sincerely,

David R. Sheridan

DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
(515) 281-5351

DRS:rt

MUNICIPALITIES: Franchise Ordinance Referendum. Iowa Code §§ 364.2(4), 364.2(4)(a), 364.2(4)(b) (1993). A referendum is required by Iowa Code section 364.2(4) prior to a city granting a franchise to any person for the erection, maintenance and operation of an electrical plant or system. (Walding to Borlaug, State Senator, 2-17-93) #93-2-1(L)

February 17, 1993

The Honorable Allen Borlaug
State Senator
State Capitol
L O C A L

Dear Senator Borlaug:

I am writing in response to your request for an opinion of the Attorney General regarding the granting of a franchise for the generation of electricity. You indicated that a community in your district, the City of Nashua, owns an automated dam which the city desires to have converted to a hydro-electric facility.

In discussing the matter with John Cronin, Nashua city attorney, I was informed that the city intends to award the right to use the dam to generate power to a private enterprise. The electric current produced by the dam will be distributed to private utility companies at an established rate, a percentage of which will be shared with the city. The issue, as presented to this office, is whether a referendum is required for a city to grant a franchise for the generation of electricity.

The authority for a municipality to grant franchise agreements is found in Iowa Code section 364.2(4) (1993). That section, in subparagraph (a), provides:

> A city may grant to any person a franchise to erect, maintain, and operate plants and systems for <u>electric light and power</u>, heating, telephone, telegraph, cable

> television, district telegraph and alarm, motor bus, trolley bus, street railway or other public transit, waterworks, or gasworks, within the city for a term of not more than twenty-five years. The franchise may be granted, amended, extended, or renewed only by an ordinance, but no exclusive franchise shall be granted, amended, extended, or renewed.

Iowa Code § 364.2(4)(a) (1993) (emphasis added). Thus, a city does have authority to grant a person[1] a franchise to erect, maintain and operate an electrical plant or system.

The nature of a municipal franchise has been described by one legal treatise as follows:

> When the right to use the streets is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a valid right. The consideration for the grant is said to be the benefit that the public derives from the use and exercise of the franchise. The conditions in the franchise are binding, the same as the terms of any other contract, both on the municipality and the company, and their successors. The laws existing at the time and place of the contract form a part of it. However, until an ordinance granting a franchise is accepted, the franchise lacks the essential elements of a contract.

McQuillin, Municipal Corporations § 34.06 (3rd ed.) (footnotes omitted). Thus, a franchise, upon acceptance, constitutes a binding contract. See also Schneider v. Pocahontas, 213 Iowa 807, 811, 234 N.W. 207, 209 (1931); McLaughlin v. City of Newton, 189 Iowa 556, 563, 178 N.W. 540, 543 (1920).

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[1]A "person," as used in section 364.2(4), means "an individual, firm, partnership, domestic or foreign corporation, company, association, trust, or other legal entity . . . ." Iowa Code § 362.2(9) (1993).

The manner of accepting a franchise is proscribed by law. According to McQuillin:

> If the power to grant a franchise is conferred upon the city council, the consent of the people of the city to such franchise is not necessary. However, constitutions, statutes and municipal charters sometimes require that ordinances granting franchises, or certain franchises, shall be submitted to a vote of the people, and the referendum has been applied by statute to franchises in some states. Unless these requirements are complied with, an ordinance granting the franchise is invalid.

McQuillin, Municipal Corporations § 34.129 (3rd ed.) (footnotes omitted). Pursuant to Iowa Code section 364.2(4)(b):

> No such ordinance shall become effective unless approved at an election. The proposal may be submitted by the council on its own motion to the voters at any city election. Upon receipt of a valid petition as defined in section 362.4 requesting that a proposal be submitted to the voters, the council shall submit the proposal at the next regular city election or at a special election called for that purpose prior to the next regular city election. If a majority of those voting approves the proposal the city may proceed as proposed.

(Emphasis added.) Thus, a referendum is required by an Iowa municipality prior to enactment of a franchise ordinance.[2] That view is consistent with prior interpretations. See Interstate Power Co. v. Forest City, 225 Iowa 490, 281 N.W. 207 (1938) (authority for a privately owned light and power plant to render its service and occupy public grounds held subject to approval of a majority vote of electors).

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[2]Other provisions in section 364.2(4) proscribe the notice, costs allocation and content of a franchise election. Iowa Code §§ 364.2(4)(c)(d)(e) and (f).

Accordingly, it is our opinion that a referendum is required by Iowa Code section 364.2(4) prior to a city granting a franchise to any person for the erection, maintenance and operation of an electrical plant or system.[3]

Sincerely,

LYNN M. WALDING
Assistant Attorney General

LMW:rd

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[3]As a cautionary note, it is observed that such a project may also require a franchise for any electric transmission lines, Iowa Code ch. 478, a certificate to operate an electric power generating facility, Iowa Code ch. 476A, and be subject to the statutory regulation for hydro-electric facilities. See Iowa Code ch. 469A (1993); Iowa Code §§ 476.41 through 476.45 (1993). Federal regulations may also be applicable. See State of Iowa v. Federal Power Commission, 178 F.2d 421, 426 (1949).

BEER AND LIQUOR: Determination of "good moral character" for licensees. Iowa Code § 123.3(26)(e) (1993). The language found in Iowa Code section 123.3(26)(e) which provides that an individual and their spouse shall be regarded as one person applies only to section 123.3(26)(e) and not to the remainder of section 123.3(26). (McGuire to Angrick, **Citizens' Aide/ Ombudsman, 2-17-93) #93-2-2(L)**

February 17, 1993

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

Dear Mr. Angrick:

You have requested an Attorney General's opinion regarding Iowa Code section 123.3(26) which defines "good moral character" for the purpose of obtaining a liquor license. Subsections (a)-(d) of this section set forth requirements for "good moral character." Subsection (e) additionally provides that:

> If a person is a corporation, partnership, association, club or hotel or motel the requirements of this subsection shall apply to each of the officers, directors and partners of such person and to any person who directly or indirectly owns or controls ten percent or more of any class of stock of such person or has an interest of ten percent or more in the ownership or profits of such person. For the purposes of this provision, an individual and the individual's spouse shall be regarded as one person. (emphasis added)

You inquire whether the underlined sentence of subsection (e) applies to all of the requirements for "good moral character" delineated in subsections (a)-(d). It is the opinion of this office that the underlined sentence applies only to subsection (e). An individual and their spouse should be regarded as one person for the purpose of ownership or controlling interests.

Iowa Code chapter 123 was enacted for the regulation of alcoholic beverages in the state. Section 123.30(1) provides that a liquor license may be issued to "any person . . . of good moral character as defined by the chapter." A person of good moral character is defined in section 123.3(26):

> 26. "Person of good moral character" means any person who meets all of the following requirements:
>
> a. The person has such financial standing and good reputation as will satisfy the administrator that the person will comply with this chapter and all laws, ordinances, and regulations applicable to the person's operations under this chapter. However, the administrator shall not require the person to post bond to meet the requirements of this paragraph.
>
> b. The person is not prohibited by section 123.40 from obtaining a liquor control license or a wine or beer permit.
>
> c. Is a citizen of the United States and a resident of this state, or licensed to do business in this state in the case of a corporation. Notwithstanding paragraph "f," in the case of a partnership, only one partner need be a resident of this state.
>
> d. The person has not been convicted of a felony. However, if the person's conviction of a felony occurred more than five years before the date of the application for a license or permit, and if the person's rights of citizenship have been restored by the governor, the administrator may determine that the person is of good moral character notwithstanding such conviction.
>
> e. If such person is a corporation, partnership, association, club, or hotel or motel the requirements of this subsection shall apply to each of the officers, directors, and partners of such person, and to any person who directly or indirectly owns or controls ten percent or more of any class of stock of such person or has an interest of ten percent or more in the ownership or

> profits of such person. For the purposes of this provision, an individual and the individual's spouse shall be regarded as one person.

Subsection (e) is the only subsection which provides that an individual and their spouse "shall be regarded as one person."

The term "person" as defined in section 123.3(25) does not include an individual's spouse. Person is defined as:

> "Person" means any individual, association, partnership, corporation, club, hotel or motel, or municipal corporation owning or operating a bona fide airport, marina, park, coliseum, auditorium, or recreational facility in or at which the sale of alcoholic liquor, wine, or beer is only an incidental part of the ownership or operation.

Iowa Code § 123.3(25) (1993)

This definition of "person" in section 123.3(25) controls who is included in the statutory requirements of section 123.3(26) as they pertain to a person. The "definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute." Sutherland Statutory Construction § 20.08 (4th ed.).

Where the term person is used in section 123.3(26), it includes those entities included in the definition at section 123.3(25). The only provision that refers to an individual and their spouse as a person is section 123.3(26)(e). It follows that an individual and their spouse are considered a person only for section 123.3(26)(e).

If an individual and their spouse were considered a person for all of section 123.3(26), that would discount the statutory definition of person found in section 123.3(12). Statutory construction provides that effect be given to all parts of a statute. Iowa Code § 4.4(2); State v. Luppes, 358 N.W.2d 322, 324 (Iowa App. 1984).

The language used in section 23.3(26)(e) further supports this position. Section 123.3(26)(e) sets out requirements for liquor license applicants that are corporations, partnerships, associations, clubs, hotels or motels. This section provides that the "requirements of this subsection" apply to the officers, directors, partners and persons owning a specified interest in

the entity. (emphasis added) It would appear "subsection" refers to the requirements in section 123.3(26)(a) through (e).

When an applicant for a liquor license is a corporation, partnership, association, club, hotel or motel, it must be a "person of good moral character." See Iowa Code § 123.30(1). A corporation, partnership, association, club, hotel or motel cannot be a citizen as required by section 123.3(26)(c) nor would such an entity be convicted of a felony per section 123.3(26)(d), both factors used to determine whether an applicant is of good moral character. It makes sense to then look at the officers, directors, partners and persons with a specified ownership interest in such entities to determine whether they meet the requirements of a "person of good moral character." Therefore, "subsection" refers to the entire section 123.3(26)(e).

Section 123.3(26)(e) states that "[f]or the purposes of this provision, an individual and the individual's spouse shall be regarded as one person." (emphasis added) If this sentence referred back to all of section 123.3(26), then "provision" would have the same meaning as "subsection." Had the legislature intended "provision" and "subsection" to have the same meaning, it would have used the same word. See Beier Glass Co. v. Brundige, 329 N.W.2d 280, 286 (1983). (When identical language in a statute is used, it is given the same meaning.)

In view of the above, it is our opinion that the phrase "for the purposes of this provision" in section 123.3(26)(e) refers only to section 123.3(26)(e).

Sincerely,

Maureen McGuire

Maureen McGuire
Assistant Attorney General

MM/lm

SCHOOLS: Bond Elections; Location of School House Site. Iowa Code §§ 296.2, 297.1 (1993). A site location may be included as part of a ballot question placed before the voters of a school district pursuant to Iowa Code section 296.2. In the event that multiple competing proposals are placed on the ballot at the same election and more than one proposal receives the number of votes necessary for approval, the school board is authorized to choose the proposal receiving the highest number of votes as the sole proposal to be accomplished. (Krogmeier to Baxter, Secretary of State, 2-25-93) #93-2-3(L)

February 25, 1993

The Honorable Elaine Baxter
Secretary of State
State Capitol
L O C A L

Dear Secretary Baxter:

You have requested an opinion from our office as to whether specifying the location of a proposed schoolhouse site is a purpose under Iowa Code section 296.2 which may be included on the ballot question. You specifically ask:

> Is site location a purpose under 296.2, or is the purpose of the bond issue to defer the cost of purchasing, building, furnishing, reconstructing, repairing, improving or remodeling of school buildings and land as delineated in 296.1?

We understand this issue arises from the Southeast Warren School District which has experienced several attempts in recent years to pass various ballot proposals for the purpose of constructing school buildings. We understand that there is presently some dispute between the Warren County Auditor and the Southeast Warren school board on the question of whether or not a petition which has been submitted to the board, which lists a proposed location for a school site is a proper question to be placed on the ballot pursuant to Iowa Code section 296.2.

As noted in your request letter, analysis of this issue requires consideration of the interrelationship between Iowa Code sections 296.2 and 297.1 (1993). Code section 296.2 authorizes voters of a school district to petition for the initiation of a bond issue, providing as follows:

> Before indebtedness can be contracted in excess of one and one-quarter percent of the assessed value of the taxable property, a petition signed by a number equal to twenty-

> five percent of those voting at the last election of school officials shall be filed with the president of the board of directors, asking that an election be called, stating the amount of bonds proposed to be issued nd the purpose or purposes for which the indebtedness is to be created, and that the purpose or purposes cannot be accomplished within the limit of one and one-quarter percent of the valuation. The petition may request the calling of an election on one or more propositions and a proposition may include one or more purposes.

Upon receipt of a valid petition of the electorate, the board of directors of the school district is required to hold a meeting within ten days and "shall call the election, fixing the time of the election, . . . unless the board determines by unanimous vote that the proposition or propositions required by a petition to be submitted at an election are grossly unrealistic or contrary to the needs of the school district." Iowa Code § 296.3 (1993). While these statutory provisions empower the voters of a school district to have a proposition for the issuance of bonds put to an election, section 296.2 does not expressly authorize limitation of the proposition by inclusion of a site location in the petition. Nor do we believe that section 296.2 implicitly grants the voters the authority.

Iowa Code section 297.1 provides, in part, that "[t]he board of each school district may fix the site for each schoolhouse . . . In fixing such site, the board shall take into consideration the number of scholars residing in the various portions of the school district and the geographic location and convenience of any proposed site." This statute vests authority and discretion to determine the location of schools solely in the local school board. We do not believe that determination of school sites may be properly delegated to or assumed by the voters of a school district. See Kinney v. Howard, 133 Iowa 94, 110 N.W. 282 (1907) (holding that school board could not delegate its duty to select school site to a committee); Carpenter v. Ind. District No. 5 of Columbia Twsp., Tama County, 95 Iowa 300, 63 N.W. 708 (1895) (holding that school board erred in bowing to wishes of the majority of legal voters in changing proposed school site).

While we conclude that the inclusion of a site location within a petition for school bond election is not binding on the receiving school board, we do not believe that inclusion of a site location invalidates the petition. Iowa case law as far

back as 1915 has recognized such petitions as being lawful. See Consolidated Independent School District v. Martin, 170 Iowa 262, 152 N.W. 623 (1915). We quote from this decision:

> The second specification relates to a proviso in the petition which called for the location of the proposed schoolhouse at or near Johnston Station. This location appears to have been deemed by the petitioners as the most suitable location for the convenience of the inhabitants of the district. Its inclusion in the petition was not required by the statute. Nor do we find any provision of the statute which was in any way violated by its inclusion in such petition. . . .

As noted above, determination of school sites is a function of the school board. Iowa statutes neither require nor prohibit the inclusion of a site location on a ballot question seeking issuance of bonds. For many years it has been a common practice of school boards to include a site location on bond ballot issues. See 1990 Op.Att'yGen. 25; Harney v. Clear Creek Community School Dist., 154 N.W.2d 88, 90 (Iowa 1967); Rodgers v. Independent School Dist. of Colfax, 100 Iowa 317, 69 N.W. 544 (1896). The inclusion of a site location on the ballot question has been treated by Iowa courts as an exercise of board discretion in selecting the school site. If a school board chooses to include a site on the ballot issue and the issue is approved, the board is bound to execute the building project on that site, absent changed or unforeseen circumstances rendering use of the approved site impossible. See Munn v. Independent School Dist. of Jefferson, 188 Iowa 757, 763-69, 176 N.W. 811, 814-16 (1920); Rodgers v. Independent School Dist. of Colfax, 100 Iowa at 321-23, 69 N.W. at 545-46. Thus, we conclude that while a site location is not a necessary part of the ballot question, it may be included if approved by the school board.

In your opinion request you also make reference to a 1989 opinion (1990 Op.Att'yGen. 25) of this office and ask whether there is any inconsistency between two portions of that opinion. You note the part of the opinion that allows for more than one conflicting proposal to be placed before the voters at the same election and allowing the school board to choose the proposal receiving the largest vote in the event that more than one proposal passed. You then note that a subsequent part of the same opinion indicates that a vote in favor of the issuance of bonds that is equal to at least 60 percent of the total vote cast would require that the board issue the bonds and make provision for the payment thereof.

We do not interpret the 1989 opinion to require school boards to proceed with more than one approved proposal. We believe that the entire opinion, when read together, indicates that in the event a board has before it a situation where more than one conflicting ballot proposal had passed, the board would have the discretion to choose the proposal with the largest approval. The board would not be required to proceed with unnecessary projects or projects which might cause it to exceed its indebtedness limitation, or more than one project for the same purpose. We caution that repeated inclusion of conflicting bond issues on a single ballot resulting in the failure of all issues presented could be found to constitute an abuse of the board's discretion in presentation of the issues. See Gibson v. Winterset Comm. School Dist., 138 N.W.2d 112, 115 (Iowa 1966) (holding that a school board abused its discretion by repeatedly selecting for submission an $800,000 bond issue while rejecting a petition for a $500,000 issue). We cannot, however, determine the point at which the submission of conflicting bond issues would become an abuse of discretion.

Therefore, we conclude that site location may be included as part of a ballot question placed before the voters of a school district pursuant to Iowa Code section 296.2. In the event that multiple competing proposals are placed on the ballot at the same election and more than one proposal receives the number of votes necessary for approval, the school board is authorized to choose the proposal receiving the highest number of votes as the sole proposal to be accomplished.

Sincerely,

Charles J. Krogmeier
Executive Deputy Attorney General

/jam

HOSPITALS: Municipal Hospitals; Regulation of Parking Lot Use; Publication of Minutes. Iowa Code §§ 21.3, 347.28, 392.6 (1993). A municipal hospital may deny use of hospital parking lot to patrons of adjacent private clinic. A municipal hospital board of trustees is not required to publish minutes of its meetings in a newspaper. (Ewald to Black, State Representative, 3-5-93) # 93-3-1(L)

March 5, 1993

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

Dear Representative Black:

You have requested an opinion of the attorney general on two questions involving municipal hospitals, restated below:

1. May a municipal hospital deny use of its parking lot to patrons of an adjacent private clinic?

2. Is a municipal hospital board required to publish the minutes of its meetings in a local newspaper?

I. Use of Parking Lot

The situation presented involves the following facts. A municipal hospital recently built an addition to its parking lot in order to meet minimum city code parking space requirements.[1] A private clinic adjacent to the new parking lot requested permission from the hospital to allow patrons of the clinic to use part of the new lot so that the clinic could meet its future city code parking space requirements.

The legislature has granted the board of trustees of a municipal hospital "all of the powers and duties necessary for the management, control and government of the institution." Iowa Code § 392.6, last unnumbered paragraph (1993). These powers and duties specifically include, but are not limited to, those granted to public hospital boards in general under other provisions of the

[1]Your request included facts about how the parking lot addition was financed. However, the source of the funding for the improvement does not appear to be relevant.

Code, such as chapter 347. Id. A public hospital board of trustees may:

> Do all things necessary for the management, control and government of said hospital and exercise all the rights and duties pertaining to hospital trustees generally, unless such rights of hospital trustees generally are specifically denied by this chapter, or unless such duties are expressly charged by this chapter.

Iowa Code § 347.14(10) (1993). See also 1988 Op.Att'yGen. 10, 13-15 (city hospital as local agency of city government has no home-rule authority).

A city hospital has specific statutory authority, upon approval of its board of trustees, to lease or sell to any person any of its property which is not needed for hospital purposes. Iowa Code § 347.28 (1993).[2]

Federal law may also limit how a hospital manages its facilities. See, e.g., 42 C.F.R. §§ 1001.952(b) and (c) (under Medicare and Medicaid, hospital space and equipment rental must reflect fair market value).

In our judgment, the hospital board of trustees has authority to regulate the use of the hospital parking lot as it deems to be in the best interest of the hospital. There is no apparent reason that it could not limit use of its parking lot to persons using hospital facilities.

The board would ordinarily also have authority (but no obligation) to lease part of the hospital parking lot to an adjacent private clinic. Iowa Code § 347.28 (1993).

In conclusion, a municipal hospital, under the facts presented, has authority to deny the use of its parking lot to patrons of an adjacent private clinic.

II. Publication of Minutes

In regard to the second issue, we have been told that the hospital board of trustees meets approximately once a month to

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[2]This provision, added to the Code in 1975, supersedes several opinions of the attorney general issued prior to its enactment. See 1974 Op.Att'yGen. 18; 1972 Op.Att'yGen. 389; 1968 Op.Att'yGen. 667; 1968 Op.Att'yGen. 103.

discuss and act on hospital business. Public notice of the meetings is given in compliance with Iowa Code section 21.4 (1993), and the meetings are open to the public. Minutes of the meetings are made available to the public as provided in Iowa Code chapter 22. However, the hospital does not publish the minutes in any newspaper.

The board of trustees of a city hospital, being expressly created by statute, Iowa Code § 392.6, is a "governmental body" subject to the open meetings law. Iowa Code § 21.2(1)(a) (1993). That law requires minutes of public meetings to be kept. Iowa Code § 21.3 (1993). The minutes are "public records open to public inspection." Id. However, there is no general requirement that a governmental body have its minutes published in a newspaper. See 1980 Op.Att'yGen. 88, 90-92 (under open records law, governmental body must provide copy of minutes to public upon request and payment of copying and postage expenses). There is also no specific statute requiring newspaper publication of public hospital board minutes, as there is, for example, for meetings of city councils, Iowa Code § 372.13(6), school boards, Iowa Code § 279.35, and utility boards. Iowa Code § 388.4(4) (1993).

In conclusion, a municipal hospital board of trustees is not required by state law to publish the minutes of its meetings in a newspaper.

Sincerely,

ROBERT P. EWALD
Assistant Attorney General

TAXATION: Tax Sale; Initial Tax Sale And Tax Sale For Subsequent Year's Taxes. Iowa Code § 447.9 (1993). The sale of a parcel at tax sale does not, of itself, preclude another tax sale of the parcel for failure to pay subsequent year's taxes. If such multiple tax sale of the same parcel occurs, the initial tax sale certificate holder will be entitled to a tax deed, upon expiration of the right of redemption, even if the initial holder has not paid the subsequent year's taxes. The subsequent year tax sale certificate holder must serve a notice of expiration of right of redemption on the initial tax sale certificate holder. A redemption from only one of several tax sales of the same property for different tax periods will not prevent a tax deed from being issued to the holder of the unredeemed tax sale certificate. (Griger to Mullin, Woodbury County Attorney, **3-18-93) #93-3-2(L)**

March 18, 1993

Thomas S. Mullin
Woodbury County Attorney
300 Courthouse
Sioux City, Iowa 51101

Dear Mr. Mullin:

You have requested an opinion of the Attorney General with respect to the following situation. "X" is the tax sale purchaser at a June, 1992 tax sale for delinquent property taxes. The taxes for a subsequent year are not paid. In June, 1993, the county treasurer offers the property at tax sale and "Y" becomes the tax sale purchaser. "Y" pays the taxes for a subsequent year. Both "X" and "Y" have received certificates of purchase as authorized by Iowa Code section 446.29 (1993).

Given the above scenario, you ask a series of questions concerning various consequences that could occur. Your questions are:

1. Can there be more than one certificate outstanding for one piece of property?

2. Can "X" serve notice of expiration of right of redemption on the party in whose name the property is taxed and other interested parties one year and nine months after the date for the initial tax sale to "X", and obtain a tax deed, even though "X" has failed to pay the subsequent taxes?

3. If "X" fails or is unable to give notice and obtain a tax deed, and if "Y" pays subsequent property taxes after receiving the certificate, must "Y" give notice to "X" to enable "X" to redeem?

4. In the event the party in whose name the property is taxed redeems from "Y", must the party in whose name the property is taxed also redeem from "X"?

An affirmative answer is required for your first question.[1] Indeed, in Hubbard v. Hammerstrom, 231 Iowa 1316, 2 N.W.2d 658 (1942), and in White v. Hammerstrom, 224 Iowa 1041, 277 N.W. 483 (1938), the Iowa Supreme Court held that the same properties could be the subjects of tax sales for different years where taxes for years subsequent to the initial tax sale were not paid.

With respect to your second question, "X" can serve notice of expiration of right of redemption, pursuant to Iowa Code section 447.9 (1993), and in the absence of redemption, "X" is entitled to obtain a tax deed. See Iowa Code § 448.1 (1993). However, any tax deed obtained by "X" would not operate to cancel the tax sale certificate held by "Y". See Iowa Code § 448.3 (1993) (effect of tax deed).

Your third question is answered in the affirmative. The Iowa Supreme Court has held that the holder of a tax sale certificate of purchase under a prior tax sale has "a right to redeem from a subsequent tax sale certificate before it ripened into a deed." White v. Hammerstrom, 224 Iowa 1041, 1046, 277 N.W. 483, 486 (1938). See also Hubbard v. Hammerstrom, 231 Iowa 1316, 1318, 2 N.W.2d 658, 659 (1942). The precursor of section 447.9 did not purport to limit redemption to only those who, by statute, were entitled to notice of expiration of right of redemption. See Iowa Code § 7279 (1931). By contrast, the last sentence in section 447.9 states that "[o]nly those persons who are required to be sent the notice of expiration as provided in this section are eligible to redeem a parcel from tax sale." The question becomes whether section 447.9 requires notice of expiration of right of redemption to be served upon another tax sale certificate holder.

Iowa law "is well settled that the purchaser at a tax sale, including the county when the sale is under the scavenger statute, obtains no title or right of possession to the property before the deed issues." Currington v. Black Hawk County, 184 N.W.2d 675, 676 (Iowa 1971). "The holder of a tax certificate has, prior to the issuance of a tax deed, merely an inchoate right or lien which can ripen into title only upon compliance

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[1]The above response assumes that the county did not hold the tax sale certificate and that the properties did not belong to municipal and political subdivisions of Iowa, did not belong to a city or county agency or the Iowa finance authority for use in an Iowa homesteading project, and did not belong to the state or its agencies. Property within that criteria cannot be offered at tax sale. Iowa Code § 446.7 (1993).

with the statutory requisites."[2] Moffitt v. Future Assurance Associates, Inc., 258 Iowa 1160, 1169, 140 N.W.2d 108, 113 (1966). See Patterson v. May, 239 Iowa 602, 610, 29 N.W.2d 547, 552 (1947) (interest of tax sale purchaser sometimes referred to as inchoate right or lien).

Section 447.9 requires in part that notice of expiration of right of redemption be served "on any mortgagee having a lien upon the parcel, a vendor of the parcel under a recorded contract of sale, a lessor who has a recorded lease or memorandum of a recorded lease, and any other person who has an interest of record." The inchoate interest that a tax sale certificate holder has in the property has been held to be similar to the inchoate interest held by a mortgagee. Solecki v. United States, 693 F. Supp. 770, 774 (N.D. Iowa 1988). The certificate holder's interest is a matter of record in the county treasurer's office. Iowa Code §§ 446.31 and 446.24 (1993). Accordingly, a tax sale certificate holder has an "interest of record" under section 447.9 and, thus, is entitled to notice of expiration of right of redemption from another tax sale certificate holder. Such entitlement to notice clearly authorizes the tax sale certificate holder to redeem from a tax sale, if the holder chooses to do so.

The answer to your fourth question is that a redemption from the tax sale to "Y" by the party in whose name the property is taxed will not prevent a tax deed from being issued to "X", if there is no redemption from the tax sale to "X" before the right to redeem expires. It would make no sense if a party in whose name the property is taxed could, by failure to pay taxes, cause the property to be offered and sold at tax sales over several years and redeem from all the tax sales by only paying the redemption amount owed for one of those sales. There is no statutory provision that even suggests such an absurd result. In fact, Iowa Code sections 447.9, 447.5 and 447.1 (1993) suggest otherwise because they address redemption of a single tax sale.

Very truly yours,

Harry M Griger

HARRY M. GRIGER
Special Assistant Attorney General

HMG:cml

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[2]In Currington, the Court characterized the tax sale certificate holder's interest as "only an inchoate interest in the property." 184 N.W.2d at 676.

STATE OFFICERS AND DEPARTMENTS; GENERAL ASSEMBLY: Smoking in Capitol. Iowa Const. art. III, § 9; Iowa Code §§ 2.43, 18.8, 142B.1(2), (3) (1993). The Capitol rotunda is a "public place" subject to Iowa Code chapter 142B, the smoking law. In the absence of contrary legislative rules, application of chapter 142B to the Capitol rotunda and the legislative dining room would not unconstitutionally infringe upon the power of each house to control its own procedures and discipline its members as these areas are not used for legislative meetings or deliberations. (Osenbaugh to Halvorson, State Representative, 3-26-93) #93-3-3(L)

March 26, 1993

The Honorable Rod Halvorson
State Representative
Iowa House of Representatives
Capitol Building, 2nd Floor
L O C A L

Dear Representative Halvorson:

You have requested an opinion of the Attorney General regarding whether the Statehouse rotunda and legislative dining room are subject to Iowa Code ch. 142B regulating smoking.

For purposes of this opinion, we will assume that these areas have been assigned for legislative use by the Legislative Council under Iowa Code section 2.43 and are not therefore areas under the control of the Governor, the courts, or the Department of General Services. Iowa Code § 18.8. We will also assume that neither area is under the exclusive control of either house of the legislature and that neither area is used for legislative committees, offices, or deliberations. It is also our understanding that the rotunda is open to the general public and is a means of access to the state law library as well as to the legislative chambers. It is further our understanding that the legislative dining room is not open to the general public.

Your letter indicates that neither house nor the Legislative Council has designated the rotunda or the legislative dining room as a smoking area under chapter 142B.

On May 1, 1989, I advised Senator Beverly Hannon that we would construe chapter 142B as not encompassing legislative committee rooms. The basis for this advice was the potential conflict with the constitutional power of each house of the legislature to determine its rules of proceedings and punish its members for disorderly behavior. Iowa Const. art. III, § 9. See also Cliff v. Parsons, 90 Iowa 665, 57 N.W. 599 (1894); 1980 Op.Att'yGen. 681. Given the potential constitutional conflict, we concluded a court would not likely find that a legislative committee room was a "public place" under section 142B.1(3).

That defines a "public place" as "any enclosed indoor area used by the general public or serving as a place of work containing [250] or more square feet of floor space . . . ." § 142B.1(3). The letter also noted that legislative committee meetings are not "public meetings" under the smoking law. The definition of "public meeting" in section 142B.1(2) incorporates the open meetings law's definition of "governing body." The legislature is not a governing body under that statute. 1974 Op.Att'yGen. 41.

However, we conclude it would be error to extend this rationale to all areas subject to legislative control, as was suggested in the 1989 letter. We believe a court would find that the rotunda is a place used by the general public and therefore subject to the smoking law. Application of the smoking law to the rotunda would not infringe upon the authority of each house to determine its rules or procedure as legislative proceedings do not occur in the rotunda, and it is not under the control of either house. See 1974 Op.Att'yGen. 361 (Legislative Council decision to purchase voting machines not an infringement of Senate authority). Further, the smoking law would permit the person or entity having control of a public place to designate a smoking area. § 142B.1(2). Until there is a direct conflict between action of either house and chapter 142B, there is no constitutional conflict.

Whether the legislative dining room is subject to chapter 142B is a closer question. But, again, the smoking law's applicability would not abridge each house's control of the legislative process, and the Legislative Council or the houses could designate an area for smoking if desired. While a court would likely defer to a legislative decision governing its own dining room, chapter 142B can constitutionally be applied absent a legislative rule to the contrary. Cf. 1976 Op.Att'yGen. 749, 756.

It would thus appear that the Legislative Council should decide whether to designate the rotunda or the legislative dining room as a smoking area. If no designation is made, chapter 142B would prohibit smoking in those areas.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Deputy Attorney General

EMO:cw

SCHOOLS: School Districts; Dues Payments to School Associations; Lobbyists. Iowa Code ch. 68B, §§ 279.38, 280.14 (1993). Under section 279.38 a school district is not authorized to pay dues to any equivalent organization other than the Iowa Association of School Boards. A school district, however, does have implied authority under section 280.14 to hire a lobbyist to act on its behalf. (Weeg to Hansen, State Representative, 3/31/93) #93-3-4(L)

March 31, 1993

The Honorable Steven D. Hansen
State Representative
State Capitol
LOCAL

Dear Representative Hansen:

You have requested an opinion of the Attorney General on five questions relating to the authority of school districts to participate in membership organizations. In your request letter, you state that many Iowa school districts which maintain two or more high school attendance centers have formed a voluntary coalition called the Urban Education Network (UEN). This entity collects information relating to urban educational issues, disseminates the information to member school districts as well as the legislature and engages the services of a registered lobbyist. The UEN is funded by dues payments from member school districts. You point out, however, that Iowa Code § 279.38 expressly authorizes dues payments only to the Iowa Association of School Boards.

With regard to these activities and in light of § 279.38, you pose the following questions:

> 1. Does an Iowa school district have the legal authority to expend school district funds to make a dues payment to the Urban Education Network?
>
> 2. Other than the dues payment to the Iowa Association of School Boards which is expressly authorized by Iowa Code Section 279.38, does an Iowa school district have the legal authority to expend school district funds to make a dues payment to any association or organization?
>
> 3. If the answer to Question Number 2 is in the affirmative, is there any limitation or

> restriction which is imposed by law upon the nature of the associations or organizations to which an Iowa school district may belong and pay dues using school district funds?
>
> 4. If the answer to Question Number 3 is in the affirmative, what are the limitations or restrictions which are imposed by law upon the nature of the associations or organizations to which an Iowa school district may belong and pay dues using school district funds?
>
> 5. Does an Iowa school district have the legal authority to expend school district funds to hire or pay the salary of a lobbyist who lobbies on behalf of the school district before the Iowa legislature?

It is our opinion that a school district is not authorized to pay dues to any equivalent organization other than the Iowa Association of School Boards. A school district, however, does have implied authority under § 280.14 to hire a lobbyist to act on its behalf.

Your first two questions ask whether an Iowa school district has the legal authority to expend school district funds to make dues payments to the UEN or similar association or organization. In your opinion request, you note that dues payments to the Iowa Association of School Boards are expressly authorized by Iowa Code § 279.38 (1993). That section provides in relevant part:

> Boards of directors of school corporations may pay, out of funds available to them, reasonable annual dues to the Iowa association of school boards. The financial condition and transactions of the Iowa association of school boards shall be audited in the same manner as school corporations as provided in section 11.6. In addition, annually the Iowa association of school boards shall publish a listing of the school districts and the annual dues paid by each and shall publish an accounting of all moneys expended for expenses incurred by and salaries paid to legislative representatives and lobbyists of the association. . . .

This section specifically authorizes dues payments to the Iowa Association of School Boards. There is no other statutory

language expressly authorizing dues payments to any other equivalent organization.[1]

We have found no authority deciding your particular question. We note, however, school districts have limited authority. In Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947), the Iowa Supreme Court stated in defining the term "school district":

> It is a quasi-corporation, a creature of the legislature, and is endowed only with powers bestowed upon it by statute. It is defined as a political or civil subdivision of the state for the purpose of aiding in the exercise of that governmental function which relates to the education of children . . . The only powers of the school district are those expressly granted it or necessarily implied from the statutes by which it is governed and restrained in the exercise of such powers in performance of its duties.

29 N.W.2d at 217-218 (citations omitted). In Silver Lake the Court went on to hold that a school district did not have authority to provide bus transportation to private school students because the statute authorizing bus transportation for students applied only to public school students absent an express statute to the contrary. See also Pleasant Valley Education Association v. School District, 449 N.W.2d 894, 897 (Iowa 1989), and McFarland v. Board of Education of Norwalk, 277 N.W.2d 901, 906 (Iowa 1979) (school district did not have express or implied authority to impose a sanction in teacher termination case which was not included in statutory list of available sanctions).

Because there is no specific statutory language expressly authorizing dues payments by a school district for any organization other than the Iowa Association of School Boards, the question becomes whether this authority is necessarily implied. In deciding this question, we consider the limited

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[1] We assume for purposes of this opinion request that your question concerns dues payments to organizations that serve functions equivalent to functions which could be served by the Iowa association of school boards. We make this distinction because this office has previously opined that public funds may be used to pay a public employee's dues for service clubs if membership in such a club is directly related to an employee's duties. See 1990 Op.Att'yGen. 79 (#90-7-3(L)). In a note to that opinion, we stated this opinion did not address the question of membership in professional and governmental associations.

powers of a school district and refer to relevant principles of statutory construction. The Iowa Supreme Court has stated with regard to statutory interpretation that "legislative intent is expressed by omission as well as by inclusion. The express mention of certain conditions of entitlement implies exclusion of others." Barnes v. Iowa Department of Transportation, Motor Vehicle Division, 385 N.W.2d 260 (Iowa 1986). See also In re Marriage of Freel, 448 N.W.2d 26, 28 (Iowa 1989); and Crees v. Charles, 437 N.W.2d 249, 252 (Iowa 1989).

Had the legislature intended school districts to have implied authority to pay dues to organizations such as UEN under this principle, the legislature would not have specifically authorized payment of dues only to the Iowa Association of School Boards. Further, the language of § 279.38 which imposes the requirements for an audit, annual listing, and annual accounting for the association's lobbying activities suggests that the legislature sought to centralize the districts' organizational efforts into one association. Therefore, we conclude that the express authorization in § 279.38 for school districts to make dues payments to the Iowa Association of School Boards implies the exclusion of the authority to make dues payments to other organizations not specifically authorized by statute.[2] Because your third and fourth questions are predicated on an affirmative response to earlier questions, they need not be addressed.

We note that UEN appears to serve an important and valuable function, and that membership in this and similar organizations could be of benefit to school districts in pursuing their educational mission. School districts may consider seeking a legislative change if membership in such organizations is deemed to be a worthy expenditure of school district funds.

Although we conclude that a school district is not authorized to pay dues to UEN which, in turn, may use dues to hire a lobbyist, we do not believe a school district is precluded from hiring its own lobbyist. There is no statute expressly authorizing a school district to hire a lobbyist. The question,

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[2] We do not in this opinion address whether a similar opinion would be reached regarding § 260C.37, which authorizes boards of directors of community colleges to pay "reasonable annual dues to an Iowa association of school boards." We do note that this section does not contain provisions similar to § 279.38, which impose auditing and reporting requirements, and which additionally require an annual accounting "of all moneys expended for expenses incurred by and salaries paid to legislative representatives and lobbyists of the association."

therefore, becomes whether the school district has implied authority to hire a lobbyist.

The scope of a school district's implied authority was reviewed by the Iowa Supreme Court in Barnett v. Durant Community School District, 249 N.W.2d 626, 627 (Iowa 1977). The Court concluded that the school district's authority to pay tuition reimbursement to teachers was necessarily implied from the school board's statutory authority to establish "terms and conditions" of teacher employment.

Section 280.14 provides a similar statutory basis for implied authority to hire a lobbyist. Section 280.14 provides in relevant part:

> The board or governing authority of each school or school district subject to the provisions of this chapter shall establish and maintain adequate administration, school staffing, personnel assignment policies, teacher qualifications, certification requirements, facilities, equipment, grounds, graduation requirements, instructional requirements, instructional materials, maintenance procedures and policies on extracurricular activities . . . .

This section gives a school district express authority to maintain adequate administration and school staffing, and gives the district broad authority concerning personnel assignment policies. In our opinion, this language necessarily implies that a school district is authorized, if it so decides, to hire a lobbyist.

It is evident from the definition of a "lobbyist" in Iowa Code chapter 68B that existing personnel of the school district will become "lobbyists" themselves in the event that they represent the official position of the district before the legislature. Under chapter 68B a lobbyist includes:

> a . . . local government official or employee who represents the official position of the official or employee's agency and who encourages the passage, defeat, or modification of legislation or regulation, or the influencing of a decision of the members of the general assembly, a state agency, or the office of the governor.

Iowa Code § 68B.2(10)(a)(3) (1993). A person who "represents the official position" of the school district under this definition must be one who is authorized to speak for, and bind, the district. Op.Att'yGen. #92-12-4.

It would be an incongruous result to prohibit a school district from hiring a "lobbyist" when under § 68B.2(10)(a)(3) any official or employee who represents the official position of the school district before the legislature becomes a lobbyist. If the school district can expend funds to pay the salary of staff who spend at least part of their time "lobbying," then it must be implied that the school district can expend funds to hire a person solely for that function. We conclude that, because a prohibition on a school district from hiring a lobbyist cannot be reconciled with the definition of "lobbyist" in Iowa Code § 68B.2(10), a school district has implied statutory authority to hire a lobbyist to act on its behalf.

This conclusion is consistent with a prior opinion of this office on a closely related question applicable to merged area schools. See Op.Att'yGen. #85-12-5(L) (a merged area community college has authority to hire a lobbyist). See also Op.Att'yGen. #83-7-3(L) (merged area schools are limited to the exercise of those powers expressly granted or necessarily implied in its governing statutes).

In conclusion, it is our opinion that under § 279.38, a school district is not authorized to pay dues to any equivalent organization other than the Iowa Association of School Boards. A school district, however, does have implied authority under § 280.14 to hire a lobbyist to act on its behalf.

Sincerely,

Theresa O. Weeg

THERESA O'CONNELL WEEG
Assistant Attorney General

TOW

TREASURER; STATUTORY CONSTRUCTION: Treatment of Outdated State Warrants. Iowa Code §§ 25.2, 421.45, 556.8, 556.13, 556.18 (1993). Claims based on outdated state warrants are to be handled by the State Appeal Board pursuant to Iowa Code section 25.2 as opposed to the Treasurer of State pursuant to Iowa Code chapter 556. (Barnett to Fitzgerald, Treasurer of State, 4/2/93) #93-4-1(L)

April 2, 1993

The Honorable Michael L. Fitzgerald
Treasurer of State
Capitol Building
Des Moines, Iowa 50319-0147

Dear Treasurer Fitzgerald:

You have requested an opinion of the Attorney General regarding the disposition of outdated state warrants. Specifically you ask whether the disposition of outdated state warrants is controlled by Iowa Code section 25.2 (1993) or Iowa Code section 556.8 (1993).

Iowa Code section 25.2 provides that the State Appeal Board, with the recommendation of the special assistant attorney general for claims, may approve or reject claims against the State which are less than ten years of age. This provision specifically lists outdated warrants as a claim subject to this provision.

Iowa Code section 556.8 provides:

> All intangible personal property held for the owner by any court, public corporation, public authority, agency, instrumentality, employee or public officer of this state, or the United States, or a political subdivision of the state, another state or the United States, that has remained unclaimed by the owner for more than two years after becoming payable or distributable is presumed abandoned.

Pursuant to chapter 556 abandoned property is turned over to the State Treasurer. Iowa Code § 556.13 (1993). The owners of abandoned property may file claims with the Treasurer seeking the return of abandoned property. § 556.19. If the Treasurer allows a claim, the Treasurer is directed by the statute to pay the claim forthwith. § 556.20(2).

Iowa Code section 421.45 provides that the director of the Department of Revenue and Finance is to cancel, on a quarterly basis, state warrants which are outstanding and unredeemed for six months or longer. Following cancellation of a state warrant pursuant to this provision, it is the practice of the Department of Revenue and Finance to submit claims based on outdated warrants to the State Appeal Board. Claims based on outdated state warrants have been submitted to the State Appeal Board by the Department of Revenue and Finance pursuant to section 25.2 both before and after the passage of Iowa Code chapter 556.

When construing multiple legislative enactments dealing with the same subject matter, the courts will generally attempt to harmonize the legislation to give effect to all of the legislative enactments. See Coleman v. Iowa District Court for Linn County, 446 N.W.2d 806, 807 (Iowa 1989). If, however, the statutes cannot be harmonized, and a conflict exists between a general statute and a specific statute, the conflict will be resolved by giving effect to the specific statute whether the specific statute was passed before or after the general statute. See State v. Perry, 440 N.W.2d 389, 390 (Iowa 1989).

The procedure for handling claims arising from outdated state warrants which is specified in section 25.2 cannot be harmonized with chapter 556. As between section 556.8 and section 25.2, section 556.8 is the more general statute with regard to claims based on outdated state warrants while section 25.2 is the more specific statute on this subject. It is our opinion that a court would conclude that claims based on outdated state warrants are to be handled pursuant to Iowa Code section 25.2 as opposed to Iowa Code chapter 556.

Sincerely,

Sherie Barnett

Sherie Barnett
Assistant Attorney General

STATUTES; PUBLIC EMPLOYEES: Early Retirement. Iowa Code § 97B.41(3)(b)(4) (1993), 1992 Iowa Acts, chapter 1220, section 2. Section 2 of the 1992 Iowa Acts, chapter 1220, does not prevent a former employee who is receiving early retirement benefits pursuant to this Act from performing services for the State or a political subdivision of the State as an independent contractor. The definition of the word "employee" in Iowa Code section 97B.41(3)(b)(4) (1993) is not applicable to 1992 Iowa Acts, chapter 1120, section 2. (Barnett to Priebe, Chair, Administrative Rules Review Committee, 4/2/93) #93-4-2(L)

April 2, 1993

The Honorable Berl E. Priebe, Chair
Administrative Rules Review Committee
State Capitol, Room 116
L O C A L

Dear Senator Priebe:

Mr. Joseph A. Royce has requested an Attorney General's opinion on your behalf requesting an interpretation of 1992 Iowa Acts, chapter 1220, section 2, which provides early retirement incentives for certain state employees.

Specifically you inquire whether section 2(3) of this Act prohibits a former employee who continues to participate in a health insurance program for which the State is paying premiums pursuant to section 2(2) of the Act, from working as an independent contractor for the State. You also inquire whether the definition of "employee" in Iowa Code section 97B.41(3)(b)(4) (1993), which excludes persons hired for temporary employment of six months or less from the definition of "employee" for purposes of chapter 97B, affects the applicability of the Act to particular individuals.

Section 2(3) of the Act provides in part that if an eligible, former employee elects early retirement and the State continues to pay health or medical insurance premiums as authorized in section 2(2) of the Act, the former employee "is not eligible to accept further employment in which the state or a political subdivision of the state is the employer."

The Iowa Department of Personnel has adopted an administrative rule which is intended to implement the Act. This rule provides in relevant part that "[e]mployees who participate in this program are not eligible to accept any further employment, either bona fide or as an independent contractor,

with the state of Iowa or a political subdivision of the state." 581 IAC 11.1(3)(h).

Administrative rules are presumed to be valid, and a party challenging the validity of a rule must demonstrate by clear and convincing evidence that a rational agency could not have determined that the rule was within the agency's delegated authority. See Iowa Power & Light Company v. Iowa State Commerce Commission, 410 N.W.2d 236, 239 (Iowa 1987); Hiserote Homes, Inc. v. Riedmann, 277 N.W.2d 911, 913 (Iowa 1979). An administrative rule is beyond a statutory delegation of authority if the rule is at variance with the terms of the legislation or if the rule amends or nullifies legislative intent. See Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (Iowa 1983); Hiserote Homes, Inc., 277 N.W.2d at 913. A rule found to exceed the delegated authority of an agency is invalid. See Dunlap Care Center v. Iowa Department of Human Services, 353 N.W.2d 389, 397 (Iowa 1984).

When construing statutes, the courts will examine the language used and the purpose of the legislation to determine the legislature's intent. See Iowa Federation of Labor AFL-CIO v. Iowa Department of Job Service, 427 N.W.2d 443, 445 (Iowa 1988). Undefined terms in a statute will generally be given their ordinary meaning unless a literal interpretation of the statute would be in conflict with the general purpose of the legislation. See e.g., State v. White, 319 N.W.2d 213, 215 (Iowa 1982). In determining the meaning of a statute, the courts generally give weight to a construction of an administrative agency provided that the agency's construction doesn't make law or change the legal meaning of the statute. See Burlington Community School District v. Public Employment Relations Board, 268 N.W.2d 517, 521 (Iowa 1978).

The purpose of this legislation was to induce state employees to pursue early retirement resulting in the elimination of employment positions in state government. See 1992 Iowa Acts, ch. 1220, § 2(4). This legislation contemplates that the elimination of employment positions will result in a monetary savings to the State. The Act allows the replacement of employees taking early retirement only if the failure to replace an employee would be detrimental to the provision of critical services to the public. Id. If critical services would be detrimentally affected, the vacancy created by the retiring employee is to be exchanged with an employment position or positions of equivalent value. Id. Only if an employee position exchange is not possible and the director of the Department of Management approves, will the employment position be retained and filled. Id.

The ordinary meaning of the words "employment" and "employer" do not encompass the relationship between an independent contractor and the person hiring the contractor. We have previously indicated that the ordinary meaning of the word "employee" is defined as a person working for a salary or wages who performs tasks subject to the control and direction of another. 1982 Op.Att'yGen. 496, 500. We have also indicated that this ordinary definition of the word "employee" excludes an independent contractor. Op.Att'yGen. # 92-9-3, page 13. Similarly, the ordinary meaning of the words "employer" and "employment" do not include the relationship between an independent contractor and the contracting party for whom the contractor provides services.

If the words "employment" and "employer" in section 2(3) of the Act are given their ordinary meaning, the purpose of the legislation is not necessarily frustrated. Independent contractors, regardless of their former employment with the State, do not increase the number of employment positions in state government. The restriction in section 2(3) prevents an employee from receiving the rights and benefits attributable to employment with the state of Iowa while receiving the rights and benefits attributable to retirement from employment with the state of Iowa. Independent contractors performing services for the State are not entitled to the rights and benefits of employment with the State. Hiring an independent contractor to perform services previously provided by an employee may reduce the monetary savings anticipated from the elimination of the employment position, but any such reduction will occur regardless of whether the independent contractor hired is or is not a former employee of the State.

It is likely that a court construing the words "employer" and "employment" in section 2(3) of the Act would give these words their ordinary meaning and would not extend the restriction in the Act to independent contractors. Therefore, a party challenging the validity of the rule issued by the Iowa Department of Personnel on the ground that the rule impermissibly extends the restriction to independent contractors is likely to prevail.[1]

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[1] In February we issued a letter of informal advice to Mr. Christopher Wass, Chairperson of the Vocational Education Council, in which we deferred to the Iowa Department of Personnel on issues of application of this rule in a specific case. We did not, however, discuss in the letter the validity of the rule itself.

You have also inquired whether the definition of employee in Iowa Code section 97B.41(3)(b)(4) affects the applicability of this Act to particular individuals. Section 97B.41(3)(b) defines the word "employee" for purposes of determining rights in the Iowa Public Employee Retirement System. This definition of "employee" is not an ordinary definition of the word "employee" but rather contains fifteen subsections specific to application of chapter 97B.

The word "employee" appears several times in chapter 1220, but it is not specifically defined in the Act. The word "member" is defined in subsection 2(1)(b) as follows:

> "Member" means an employee of the executive branch of the state or the judicial branch of the state who is a member of the Iowa public employee' retirement system or the Iowa department of public safety peace officers' retirement, accident, and disability system, who at the date of termination of employment is receiving full health or medical insurance benefits pursuant to a health or medical insurance program in which the state makes contributions, and is not receiving disability payments under the state employee' disability insurance program, and who is not a member of the general assembly. "Member" does not mean an employee of the state board of regents.

It is unlikely that the legislature would have defined the word "member" in this manner if the legislature expected the word "employee" to be defined pursuant to chapter 97B. Accordingly, it is unlikely that the legislature intended the definition of "employee" in section 97B.41(3)(b)(4) to be applicable to the interpretation of this Act.

Sincerely,

Sherie Barnett

Sherie Barnett
Assistant Attorney General

cc: Mr. Joseph A. Royce

COUNTY OFFICERS: Resignation effective date; filling vacancy. Iowa Code §§ 69.2, 69.14A (1993). A county officer's resignation becomes effective creating a vacancy upon the effective date specified in the resignation or upon submission when no future effective date is specified. Iowa Code section 69.14A.(1)(a) allows the committee designated to fill a vacancy in county office to give notice of its intent to fill the vacancy by appointment prior to existence of the vacancy if a resignation is to take effect at a future date. The committee must, however, wait until the vacancy occurs to issue a call for special election to fill the vacancy. (Scase to Halvorson, State Representative, 4/2/93) #93-4-3(L)

April 2, 1993

The Honorable Roger A. Halvorson
State Representative
State Capitol
LOCAL

Dear Representative Halvorson:

You have requested an opinion of the Attorney General concerning the resignation of a county supervisor and the applicable procedure for filling the vacancy. Specifically, you ask whether a resignation is effective on receipt or may specify a future effective date, when the process may be commenced to fill the vacancy either by appointment or by special election and whether a call for a special election may be issued between submission of a resignation and the specified effective date?

This office has previously considered on several occasions whether a written resignation may specify a future effective date. A civil office becomes vacant upon the resignation of the incumbent. Iowa Code § 69.2(4) (1993). A resignation of a county supervisor, in turn, is to be submitted to the county auditor. Iowa Code § 69.4(4). When the resignation submitted specifies a future effective date, this office has determined that the resignation becomes effective "upon the effective date specified in the resignation." 1982 Op.Att'yGen. 446, 448. See also 1976 Op.Att'yGen. 72; 1938 Op.Att'yGen. 1. When no future effective date is specified, the resignation becomes effective upon submission.

The procedures for filling vacancies in chapter 69 contemplate that some steps toward filling the vacancy may commence after submission of the written resignation but before a future effective date of the resignation. Section 69.14A(1) delineates the procedures for filling a vacancy on the board of supervisors by a committee composed of the treasurer, auditor and recorder. See Iowa Code § 69.8(4). This committee may elect whether to fill the vacancy by appointment or special election.

If this committee chooses to proceed by appointment:

> [T]he committee shall publish notice in the manner prescribed by section 331.305 stating that the committee intends to fill the vacancy by appointment but that the electors of the district or county, as the case may be, have the right to file a petition requiring that the vacancy be filled by special election. The committee may publish notice in advance if an elected official submits a resignation to take effect at a future date.

Iowa Code § 69.14A(1)(a) (emphasis added). As the emphasized language makes clear, publication of the notice may precede the actual effective date of the resignation if a future effective date is specified.

The vacancy cannot actually be filled by appointment under subsection 69.14A(1)(a) until after the effective date stated in a written resignation. If appointment is the method selected to fill the vacancy, the committee may make the appointment "after the notice is published or after the vacancy occurs, whichever is later." Iowa Code § 69.14A(1)(a). In any event, the appointment "shall be made within forty days after the vacancy occurs." Id. An appointment, therefore, must be made "after the vacancy occurs."

The point at which a call for a special election may be initiated by the committee is less clear. If, after notice of intent to proceed by appointment is published or after the appointment is made, the electors decide to file a petition requiring the vacancy to be filled by special election, a petition must be filed "within fourteen days after publication of the notice or within fourteen days after the appointment is made, whichever is later." Iowa Code § 69.14A(1)(a). The committee, however, may call for a special election on its own motion:

> The committee of county officers designated to fill the vacancy in section 69.8 may, on its own motion, or shall, upon receipt of a petition as provided in paragraph "a", call for a special election to fill the vacancy in lieu of appointment. The committee shall order the special election at the earliest practicable date, but giving at least thirty days' notice of the election.

Iowa Code § 69.14A(1)(b). Unlike subsection 69.14A(1)(a), which

clearly allows the commission to publish notice of its intent to fill a vacancy by appointment in advance of the effective date of a resignation, subsection 69.14A(1)(b) does not specify a time period within which the call by the committee for the election may be made.

We are reluctant to imply authorization in subsection 69.14A(1)(b) for the committee to take steps to fill a vacancy before the vacancy occurs. Statutes should be given a construction that is logical, workable, sensible and practical. Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980). Because a resignation which specifies a future effective date does not become effective and create a vacancy until the effective date specified in the resignation, a resignation may be submitted but withdrawn before it becomes effective. This office has previously recognized that "the authority to whom a resignation is submitted may permit a withdrawal of the resignation prior to its effective date." 1990 Op.Att'yGen. 45 [#89-9-3(L)], citing 1976 Op.Att'yGen. 72, 75. A call for a special election that precedes the effective date may initiate special election preparations that will have to be cancelled in the event that the resignation is withdrawn before the vacancy occurs. We conclude, therefore, that the committee must wait until a resignation becomes effective before calling for a special election on its own motion.[1]

In summary, we advise that a county officer's resignation becomes effective creating a vacancy upon the effective date specified in the resignation or upon submission when no future effective date is specified. Iowa Code section 69.14A(1)(a) allows the committee designated to fill a vacancy in county office to give notice of its intent to fill the vacancy by appointment prior to existence of the vacancy if a resignation is

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[1] It is unlikely that a committee's failure to wait until the effective date of a resignation to call for a special election would invalidate the election. The grounds upon which an election may be contested are set forth within Iowa Code section 57.1 (1993). As a general rule, the results of an election will not be overturned absent a showing that but for the error or misconduct alleged the outcome of the election would have been different. "Where mistakes of administrative officials are relied upon, prejudice must be shown to defeat an election fairly held." State v. Community School Dist. of Jefferson, 252 Iowa 491, 495, 106 N.W.2d 80, 84 (1961).

to take effect at a future date. The committee must, however, wait until the vacancy occurs to issue a call for special election to fill the vacancy.

Sincerely,

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

TAXATION; REAL PROPERTY: Statutory water and sewer lien. Iowa Code § 384.84(1) (1993). Statutory lien attaches to property served by various services enumerated in section 384.84(1) even if the current owner of that property did not incur the charges for those services. The only exception where the lien does not attach to the property involves water services incurred by the tenant and which are separately metered and paid directly by the tenant. (Miller to Siegrist, State Representative, 4-9-93) #93-4-4(L)

April 9, 1993

The Honorable Brent Siegrist
House Majority Leader
Iowa House of Representatives
State Capitol
L O C A L

Dear Representative Siegrist:

The Attorney General has received your opinion request concerning Iowa Code section 384.84(1) (1993). Your question is whether delinquent municipal sewer and water charges are a lien against real estate when certified to the county treasurer after sale of the real estate by the owner who incurred the charges.

Section 384.84(1) provides, in part, that:

> All rates or charges for the services of sewer systems, storm water drainage systems, sewage treatment, solid waste collection, water, solid waste disposal, or any of these, if not paid as provided by ordinance of the council, or resolution of the trustees, are a lien upon the premises served by any of these services upon certification to the county treasurer that the rates or charges are due . . . .

(Emphasis added.)

Generally, "a lien is a charge upon property for the payment of a specific obligation that is independent of the lien." Federal Land Bank of Omaha v. Boese, 373 N.W.2d 118, 120 (Iowa 1985). It is a method of collecting a debt or payment for services previously rendered. Section 384.84(1) provides that the lien for delinquent charges will attach to the premises which are served by the various water or sewer services. It does not

provide for an exception where the property has been subsequently sold to a party who did not incur these delinquent charges.

An earlier Attorney General's opinion addressed the constitutionality of this statute when the lien attaches to the property for services incurred by the tenant of that property. See 1974 Op.Att'yGen. 129. There, it was determined that the statute was constitutional and that the landlord would have a cause of action to require the tenant to pay the charges or to recover from the tenant any payment made by the owner in satisfying the debt. Id. at 130. The opinion noted that the existence of the various sewer and waste collection services add value to and benefit the owner's property even if the charges were incurred by the tenant. It was further pointed out that the facilities providing these services are constructed and controlled by municipalities under their police power to provide for the health, safety and welfare of its citizens. Id.

In 1990, section 384.84(1) was amended to allow residential properties, under specific circumstances, to be exempt from the lien provisions when the delinquent charges are incurred by a tenant for water services which are separately metered and paid directly by the tenant. See 1990 Iowa Acts, ch. 1211, § 1. This is the only exception provided by the statute wherein the lien does not attach directly to the premises which are served by the water service. Since your question does not pertain to this situation, the lien in this case will attach to the premises of the current owner upon certification to the county treasurer that the rates or charges are due even though the previous owner incurred the charges which are now delinquent.

Sincerely,

James D. Miller

JAMES D. MILLER
Assistant Attorney General

JDM:cml

TAXATION: Tax Sales; Application of Law in Effect on Date of Tax Sale. Iowa Code §§ 446.37 and 447.9 (1993). The law in effect on the date of the tax sale will control as to the minimum time that must elapse from the date of the tax sale before the notice of expiration of right of redemption can be served. Section 446.37, in effect on the date of the tax sale, will determine the time within which a tax deed must be obtained to avoid cancellation of the tax sale. (Griger to Hansen, State Representative, 4-20-93) #93-4-5(L)

April 20, 1993

The Honorable Steve Hansen
State Representative
State Capitol
L O C A L

Dear Representative Hansen:

You have requested an opinion of the Attorney General concerning recent legislation which impacts tax sales conducted for the purpose of collection of delinquent taxes on property. In your request, you note that in 1991, the legislature enacted 1991 Iowa Acts, chapter 191 (H.F. 687). Section 96 of H.F. 687 amended Iowa Code section 447.9 (1991) to change the minimum time period which must pass before the notice of expiration of right of redemption from annual tax sale could be served from two years and nine months to one year and nine months from the date of the tax sale. Section 86 of H.F. 687 amended Iowa Code section 446.37 (1991) to reduce the five year period allowed to complete action to obtain a tax deed to three years from the time of the tax sale. These statutory provisions became effective on April 1, 1992. 1991 Iowa Acts, ch. 191, § 124.

You have presented three questions concerning the application of the above statutory provisions with respect to annual tax sales which occurred prior to April 1, 1992. These are:

1. Is the minimum time for commencing notice of expiration of right of redemption reduced to one year and nine months for annual tax sales or do the pre-House File 687 time standards apply?[1]

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[1]You also suggested that chapter 191 had changed the time for service of notice of expiration of right of redemption from the "public bidder" sale from one year and nine months from date

2. Is the five year limitation for obtaining tax deeds reduced to three years?

3. If only one of those amended sections is deemed retroactive, how is it reconciled with the other amended section?

The answer to your first question is that the law in effect on the date of the tax sale will control as to the minimum time that must elapse from the date of the tax sale before the notice of expiration of right of redemption can be served. In Lockie v. Hammerstrom, 222 Iowa 451, 269 N.W. 507 (1936), the Iowa Supreme Court held that the minimum time period in section 447.9 on the date of the tax sale was dispositive where that time period is changed after the tax sale occurred.[2] Thus, with respect to tax sales which occurred prior to April 1, 1992, the minimum time period that must pass before the notice of expiration of right of redemption can be served is two years and nine months from the date of the annual tax sale.

The answer to your second question is that the five year period in Iowa Code section 446.37 (1991) to obtain a tax deed will apply to tax sales which occurred prior to April 1, 1992. Section 31 of H.F. 2269 provides:

> Sections 446.21, 446.31, 446.32, and 446.37, as amended by 1991 Iowa Acts, chapter 191, sections 73, 83 and 86, only apply if associated with a tax sale that occurred on or after April 1, 1992. For tax sales occurring prior to April 1, 1992, the provisions of sections 446.21, 446.31, 446.32, and 446.37 in effect on the date of the tax sale apply.

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of sale to nine months. However, no such change occurred. The nine month period is in Iowa Code section 447.9 (1991) and has existed for a number of years. Therefore, for purposes of this opinion, your first question has been modified.

[2]In 1992, the legislature enacted 1992 Iowa Acts, chapter 1016 (H.F. 2269) in which the principle of law in the Lockie case was codified. Section 33 of H.F. 2269 states that "[t]he law in effect at the time of tax sale governs redemption." Section 33 of H.F. 2269 took effect on April 1, 1992. 1992 Iowa Acts, ch. 1016, § 42.

There is no response required for your third question. Neither of the statutory amendments at issue have any retroactive effect.

Very truly yours,

Harry M Griger

HARRY M. GRIGER
Special Assistant Attorney General

HMG:cml

SCHOOL BOARDS: School Board Elections; School District Reorganization. Iowa Code §§ 275.25, 275.41, 275.41(2), 275.41(4-7), 275.41(8) (1993). School board members for a newly-organized school district appointed to the new board pursuant Iowa Code section 275.41 who are subsequently defeated for reelection to the board of the old districts remain members of the board of directors of the newly-organized district. (Valde to Peterson, State Representative, 4-20-93) #93-4-6(L)

April 20, 1993

The Honorable Michael K. Peterson
State Representative
State Capitol
Des Moines, IA 50319

Dear Representative Peterson:

You have requested an opinion of the Attorney General relating to a hypothetical school district reorganization involving two school districts. You have asked us to assume that the consolidation was approved in an election held on May 19, 1992, and that the reorganization utilized the alternative method for director elections and temporary appointments pursuant to Iowa Code section 275.41. You further state that the board of the larger of the former school districts designated four of its current directors to serve on the board of the newly-consolidated district on June 3, 1992, pursuant to Iowa Code section 275.41(2). Thereafter, at a regular school board election of the former districts held in September of 1992, two of the members previously appointed to the new board of directors were defeated for reelection to the boards of the old school districts.

You state that the four appointed directors will commence their duties as members of the newly-consolidated school district in February of 1993, and question whether, under this assumed set of facts, they are being legally "retained" as members, as required by Iowa Code section 275.41(2).

In our opinion, the board of directors of the newly-consolidated school district in your hypothetical would have commenced their duties much earlier than February of 1993, and thus assumed authority and duties for the new school district prior to the election held in September. Iowa Code section 275.41(8) provides that "[t]he board of the newly formed district shall organize within forty-five days after the approval of the

merger . . . ." At that time the new board has taken office and has control of employment, policy, curriculum, contracts and other matters for the new district. Iowa Code § 275.41(8) (1993). Thus the new board would have been organized and duly constituted no later that July 3, 1992 (e.g., forty-five days after May 19, 1992).

A subsequent election held to elect members to boards of the old districts could have no effect on the terms of members of the new school board who were appointed and serving on the new board of directors at the time of the election.

We note that Iowa Code sections 275.25 and 275.41 provide alternative methods to fill the board of a newly-consolidated school district. Each, however, provides for quickly filling and organizing the board. Section 275.25 provides for a special election "as soon as possible" in accordance with the election laws, and that the board "shall organize within fifteen days after the special election." Section 275.41 provides for appointment of the new board members and organization of the new board "within forty-five days after the approval of the merger . . . ." Under either alternative the new board has broad duties and authority for the newly-consolidated district as soon as it is organized, and we have found no language indicating that the legislature contemplated any delays or changes based upon a subsequent election held to fill board positions in a school district which will soon cease to exist. Iowa Code section 275.41(4-7) discusses in detail the length of the terms of the appointed members and the elections at which their successors will be chosen.

Therefore, under the assumptions of your hypothetical, members who were properly appointed to the board of the newly-organized school district pursuant to Iowa Code section 275.41, were in office as members of the newly-organized district prior to the subsequent school board election held for the purpose of electing a board for the former school districts. Their membership on the new board is not affected by the fact that they were not reelected to the board of the former school district.

Respectfully submitted,

Michael Valde jm

MICHAEL PAUL VALDE
Assistant Attorney General

CONFLICT OF INTEREST; INCOMPATIBILITY OF OFFICES: Business between City Officer and City; County Supervisor and Mayor; County Supervisor and Veteran's Affairs Commission. Iowa Code §§ 35B.4, 35B.6(1)(a), 35B.7, 35B.10, 35B.14; 362.5(4), (5), (7), (9), (10); 441.2, 441.6, 441.9, 441.16, 441.31 (1993). It is permitted for a city officer to do business with that city if an enumerated exception in section 362.5 is satisfied. The offices of county supervisor and mayor are incompatible. A position on the Veteran's Affairs Commission is not an office, and is therefore not incompatible with the office of county supervisor. (Condo to Ferguson, Black Hawk County Attorney, **4-28-93**) **#93-4-8(L)**

April 28, 1993

Mr. Thomas Ferguson
Black Hawk County Attorney
B-1 Courthouse Bldg.
Waterloo, IA 50703

Dear Mr. Ferguson:

You have requested an opinion of this office addressing conflict of interest and incompatibility issues concerning the position of county supervisor. You point out that a Black Hawk county supervisor is interested in running for the position of mayor of Waterloo. You further state that the supervisor owns a significant interest in several plumbing-related businesses that do business with the city of Waterloo. Also, you state that the Director of the Black Hawk County Veteran's Affairs Commission is interested in running for a position on the Black Hawk County Board of Supervisors. Specifically, you inquire:

1) Is it a conflict of interest for a mayor of a city to do business with the city through his plumbing business?

2) Are the offices of mayor and county supervisor incompatible?

3) Are the offices of county supervisor and director of the Veteran's Affairs Commission incompatible?

It is our opinion that the question of conflict of interest is answered by Iowa Code section 362.5. To the extent that the mayor's business dealings comply with the statute, those dealings do not create a conflict of interest. The offices of mayor and county supervisor are incompatible, due to conflicting statutory duties. The position of director of Veteran's Affairs, however,

is not a "public office" to which the doctrine of incompatibility applies, and, therefore, is not incompatible with the office of county supervisor.

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The question of a city officer's ability to do business with the city is governed by Iowa Code section 362.5, which states, in relevant part:

> A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to....
>
> 4. Contracts made by a city, upon competitive bid in writing, publicly invited and opened.
>
> 5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contract is for professional services not customarily awarded by competitive bid, if the remuneration of employment will not be directly affected as a result of the contract, and if the duties of employment do not directly involve the procurement or preparation of any part of the contract....
>
> 7. A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed....
>
> 9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

> 10. Contracts not otherwise permitted by this section, for the purchase of goods or services by a city having a population of more than two thousand five hundred, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of one thousand five hundred dollars in a fiscal year.

Several of the enumerated exceptions could apply to a mayor who is the owner or part-owner of a business. Section 362.5(4) allows contracts with a city officer or employee where competitive bidding is used. If the mayor's business were awarded a contract in this manner, the contract would be permissible. Section 362.5(7) allows contracts that are awarded prior to the election or appointment of the official to continue, but the contract may not be renewed. Section 362.5(9) allows a city officer or employee to maintain an interest in a contract between the city and a corporation if the officer or employee (or immediate family) do not hold over five percent of the stock of the corporation. The type of stock held is not addressed in the statute. Section 362.5(10) allows contracts with a city of a population over 2,500, if the benefit to the officer or employee does not exceed $1,500 in a fiscal year.

Under section 362.5(5), a contract involving stock ownership of the kind described in section 362.5(9), but not satisfying the five percent cutoff of that subsection, may still be valid if certain procedural requirements are followed. The requirements of section 362.5(5) are stated in the conjunctive so that each of them must be satisfied. 1980 Op.Att'yGen. 580, 583. First, the contract must be one for professional services not customarily awarded by competitive bid. Second, the remuneration of employment must not be directly affected as a result of the contract. An example of this would be a case where the city officer or employee received a raise or bonus from the corporation for procurement of the contract with the city. See 1980 Op.Att'yGen. 580, 583. Third, the duties of employment must not directly involve the procurement or preparation of the contract. This provision prevents the officer/owner from becoming involved in the negotiations leading to the formation of the contract.

The exceptions listed in section 362.5 are the only lawful means by which a city officer or employee may do business with that city. If a particular transaction does not fall under one of the exceptions, it is not permitted.

II

In Iowa, there is no constitutional or statutory provision that directly prohibits a person from serving concurrently as mayor of a city and as a county supervisor. Therefore, the common law doctrine of incompatibility of offices must be applied. "If a person, while occupying one office, accept[s] another incompatible with the first, he ipso facto vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." State ex rel. LeBuhn v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965), quoting State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912). For incompatibility of offices to exist, both positions in question must be considered "offices." 1982 Op.Att'yGen. 220, 224. Our office has determined that a mayor and a county supervisor are both public offices for purposes of an incompatibility analysis. Op.Att'yGen. #84-8-7(L) (county supervisor is an office); 1982 Op.Att'yGen. 188 (#81-7-31(L)) (city council member is an office).

The Iowa Supreme Court has articulated the common law principles of incompatibility of offices:

> [T]he test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other and subject in some degree to revisory power, or where the duties of the two offices are inherently inconsistent and repugnant. A still different definition has been adopted by several courts. It is held that incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.

White, 257 Iowa at 609, 133 N.W.2d at 905, quoting Anderson, 155 Iowa at 273, 136 N.W. at 129 (citations omitted).

In a 1920 opinion, this office declared the offices of mayor and county supervisor to be incompatible. 1920 Op.Att'yGen. 639, 640. The opinion stated that, while most of the duties of mayor are not incompatible with the duties of a county supervisor, a few duties do render the offices incompatible. Two grounds stated in the opinion are: 1) the mayor, as justice of the peace, files bills for services with the board of supervisors, and 2) a mayor's actions as a member of the board of review are subject to review by supervisors. In modern times, a mayor is no longer automatically a justice of the peace. However, the dual

role of a mayor/supervisor on the board of review remains troublesome.

Iowa Code section 441.2 states that every county in the state must maintain a conference board. Pursuant to section 441.1, cities with a population over 125,000 must have an assessor, and smaller cities have discretion to appoint one. Each city in Iowa that has a city assessor must maintain a conference board. Among the conference board's duties are hiring and removing the assessor (§§ 441.6 and 441.9), establishing the budget and salaries for the assessor's office (§ 441.16), and appointing the board of review (§ 441.31).

In both county and city conference boards, mayors and supervisors participate as members of separate voting units. Pursuant to section 441.2, the mayors of all the cities in the county, the board of supervisors, and a representative of each school district sit on the county conference board. Each group votes as a unit. In city conference boards, the city council, the county board of supervisors, and the city school board have positions on the conference board, and comprise the three voting units. A mayor who is also a supervisor, therefore, would have a place on two separate units in both the county and city conference boards. Furthermore, the mayor of a city is the chairperson of the city conference board. Chapter 441 does not provide for an alternate representative to be selected.

The entire assessment process demands participants who represent the best interests of their constituents. Whether on a county or a city conference board, a mayor who is also a supervisor would be forced to represent two separate voting units.

Other situations may raise incompatibility issues. An example of a situation in which it could be difficult for a mayor to serve as a county supervisor would be during annexation proceedings, under which a city may annex county territory. See Iowa Code § 368.5 (1993).

The concept of incompatibility is viewed in a less restrictive light today than it was in 1920. The modern tendency is to allow dual service, if at all possible. This office has stated that "the common law doctrine of incompatibility should be construed narrowly and applied cautiously, which has not always been the practice in the past." Op.Att'yGen. # 92-9-1, quoting 1982 Op.Att'yGen. 16 (#81-1-8(L)).

The duties of the two offices are generally not "inherently inconsistent and repugnant." Nor is one subordinate to the other, or subject to the revisory power of the other. Any incompatibility would have to be based on public policy. This

office has in the past used principles associated with conflict of interest issues as public policy standards in an incompatibility analysis. "Allowing a person to occupy two public offices where impartiality is necessary but is jeopardized is contrary to public policy." 1982 Op.Att'yGen. 188 (#81-7-31(L)). Specifically, public policy demands that even the potential for conflict is to be avoided. Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969). While an opinion is not the proper place to speculate on the specifics of those issues, effective public policy dictates that each side be represented fairly and impartially. We, therefore, conclude that the office of mayor is incompatible with the office of county supervisor.

III

For incompatibility of offices to become an issue, both the positions of county supervisor and director of the Veteran's Affairs Commission must be considered "public offices." The doctrine of incompatibility is only applicable if both of the positions in question are "offices." 1982 Op.Att'yGen. 220, 224. The Iowa Supreme Court has addressed the factors that are necessary to make a position a "public office."

> (1) The position must be created by the constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The position must have some permanency and continuity, and not only be temporary and occasional.

State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966).

Applying the Taylor standards, the position of director of Veteran's Affairs is not an office and, therefore, cannot be incompatible with the office of county supervisor. Specifically, it is clear that the fourth prong of the Taylor test is not met. The board of supervisors exercises control over the actions of the commission. Iowa Code chapter 35B authorizes the creation of county commissions of veteran's affairs. Section 35B.4 states that the board of supervisors appoints the members of the commission. The commission then appoints the director of the commission, subject to approval of the board of supervisors, under section 35B.6(1)(a). Section 35B.7 states that the budget

of the commission is subject to approval by the board of supervisors. Section 35B.10 states that any benefits that the commission awards must be approved by the county board of supervisors. The board of supervisors and the commission of veteran affairs have joint control of appropriations given to indigent veterans through section 35B.14.

It is the unsupervised exercise of sovereign power which is the hallmark of a public office. State v. Pinckney, 276 N.W.2d 433, 436 (Iowa 1979). The duties of the commission are not performed independently and, therefore, a position on the commission, whether director or not, does not qualify as a public office.

Although the two positions are not incompatible, some conflicts of interest could arise. Conflict of interest issues are resolved through an evidentiary analysis of the facts surrounding the conduct of the office holder, which cannot be done in an opinion. 1982 Op.Att'yGen. 220, 223. However, due to the fact that chapter 35B mandates control over the commission by the board of supervisors, potential conflicts for a supervisor/commission member exist.

Despite these potential conflicts, issues related to the veteran's affairs commission make up a minute amount of the business of a county board of supervisors. Based on prior opinions of this office, a proper course of action for the supervisor/director of commission is to disclose to the board of supervisors the potential for conflict and abstain from discussion and voting on any issue that affects the veteran's affairs commission. Cf. Op.Att'yGen. #92-9-1; Op.Att'yGen. #91-4-4(L); 1982 Op.Att'yGen. 16 (#81-1-8(L)).

In conclusion, it is the opinion of this office that Iowa Code section 362.5 governs a city officer's business dealings with that particular city. The offices of mayor and county supervisor are incompatible, due to conflicting statutory duties. The position of director of Veteran's Affairs is not a "public office" to which the doctrine of incompatibility applies and, therefore, cannot be incompatible with the office of county supervisor.

Sincerely,

Joseph Condo
Assistant Attorney General

CRIMINAL PROCEDURE; SCHOOLS; COUNTY ATTORNEYS: Venue for truancy mediation/prosecution. Iowa Code §§ 299.1, 299.2, 299.3, 299,4, 299.5, 299.5A, 299.6, 299.19, 803.2(1), 803.3(1) (1993). When referrals are made for mediation and/or prosecution of violations of the compulsory education provisions, Iowa Code §§ 299.1 - 299.5A, venue lies generally in the violator's county of residence. Under certain circumstances, more than one county may have a right to proceed with the mediation/prosecution. (Lerner to Lepley, 5/11/93) #93-5-1(L)

May 11, 1993

William L. Lepley, Ed.D.
Director
Department of Education
Grimes State Office Building
Des Moines, IA 50319-0146

Dear Dr. Lepley:

You have requested our opinion on the "site of a violation" if a truant student's parents need to be referred for mediation or prosecution under the provisions of the compulsory education law, Iowa Code section 299.5A (1993). Your request is prompted by the question as to who, of two county attorneys, has "jurisdiction" to pursue such a referral. Confusion exists because both counties have some connection with the events necessitating action.

The specific referral you cite in your request involves a student who resides with his or her parents in one county, but is truant by virtue of his or her failure to attend school (in their resident district) in another county. However, you also note that the open enrollment law has made it more commonplace for a student who resides in one county to attend school in another. Therefore, our opinion has application beyond the particular facts on which it is based.[1]

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[1]There are a number of additional fact situations where your question would arise. For example, each "parent, guardian or legal or actual custodian" of a child who is of compulsory attendance age is required to cause the child to attend school. Iowa Code § 299.1. Divorced parents may reside in different counties, the legal and actual custodians may reside in different counties, etc. Each may be subject to prosecution for their offense.

Initially, it is worth noting that a referral for mediation differs from a referral for prosecution. See Iowa Code § 299.5A (truancy officer to refer the matter for "mediation or prosecution"). This difference is noteworthy because the Iowa Code provides guidance concerning a county attorney's duty to prosecute a criminal matter as well as guidance concerning the appropriate venue for prosecution. No such guidance is found in the Code concerning mediation. Nonetheless, it would be unreasonable to read section 299.5A in a way that required referral of the matter to different county attorneys depending upon whether the referral was made for mediation or prosecution purposes. See John Deere Dubuque Works of Deere & Co. v. Weyant, 442 N.W.2d 101 (Iowa 1989) (statutes to be construed to effectuate purpose and avoid absurd result). Therefore, the same county attorney should have mediation and/or prosecution responsibilities upon referral of a particular matter, regardless of the purpose of the referral.

The duties of a county attorney are set forth in Iowa Code section 331.756. Although no reference is made to truancy matters per se, section 331.756(1) requires diligent enforcement of state laws and section 331.756(4) requires prosecution of misdemeanors "when not otherwise engaged in the performance of other official duties." Iowa Code section 299.6 makes violations of the compulsory education law, Iowa Code sections 299.1 - 299.5A, a misdemeanor. The misdemeanor is either simple or serious, depending upon the number of offenses committed. Iowa Code § 299.6. Therefore, unless "otherwise engaged in the performance of other official duties," the county attorney is charged with prosecuting the offense.

Iowa Code section 299.6 details the elements of various criminal truancy offenses. The offense may involve the parent's, guardian's or legal or actual custodian's criminal liability for the child's nonattendance.[2] The offense may also involve a violation of the mediation agreement, refusal to participate in mediation, or a violation of any of the provisions of sections 299.1 through 299.5. Iowa Code § 299.6.

Obviously, chapter 299 does not specify the county in which any such offense is to be prosecuted. The county attorney whose duty it is to prosecute is not specifically identified within the chapter. Neither does chapter 299 identify which county attorney is responsible for mediation if the matter is referred pursuant to the provisions of Iowa Code section 299.5A relating to mediation.

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[2]The parent, guardian, or legal or actual custodian can avoid criminal liability by filing an affidavit meeting the requirements of Iowa Code section 299.6.

The legislature can and has specifically identified venue, by county, where proceedings on particular matters are to take place. Chapter 299 itself identifies the specific venue for district or juvenile court action when the state board of regents makes application for an order requiring a person having control or custody of a deaf, blind or seriously handicapped child to compel that child to attend school. See Iowa Code § 299.19. Section 299.19 identifies the "county in which the person resides" as the proper location for court proceedings against that person. Several other specific venue provisions are found throughout the Code. See, e.g., Iowa Code § 232.10 (venue for delinquency proceedings) and § 232.62 (venue for child in need of assistance proceedings).

The Code also contains specific provisions addressing the issue of which county attorney is responsible for investigating and prosecuting particular kinds of cases. For example, the child labor laws make it a crime for a "parent, guardian or other person" having control of any person under the age of eighteen to willfully permit that person (under certain circumstances) to work or be employed. Iowa Code § 92.19. Section 92.22 provides, in relevant part:

> County attorneys shall investigate all complaints made to them of violations of this chapter, and prosecute all such cases of violation within their respective counties.[3]

Absent specific legislation, however, the general criminal venue provisions found at Iowa Code section 803.2 would apply:

> A criminal action shall be tried in the county in which the crime is committed, except as otherwise provided by law.

Iowa Code § 803.2(1).

Under the provisions of Iowa Code section 299.5A, a crime is committed at the time the parent, guardian or legal or actual custodian fails to cause the child's attendance, refuses to participate in mediation, or violates the mediation agreement. Consequently, the county in which the parent, guardian, or legal or actual custodian resides would generally be found to be, as

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[3]The unanswered question here, as well, is "where does the violation occur?" Does it occur in the county where the parent willfully permits employment or in the county where the underage child works, or both?

you phrase it, the "site of the violation."[4] Of course, the violation may be committed, in whole or in part, in a county other than the person's county of residence. When the violation occurs entirely in another county, venue lies in that county. When the violation occurs in more than one county, Iowa Code section 803.3, containing special criminal venue provisions, must be referenced. In particular, Iowa Code section 803.3(1) provides:

> If conduct or results which constitute elements of an offense occur in two or more counties, prosecution of the offense may be had in any of such counties. In such cases, where a dominant number of elements occur in one county, that county shall have the primary right to proceed with prosecution of the offender.

Therefore, if the dominant number of elements constituting the offense occur outside the person's county of residence, that "dominant" county (of nonresidence), as opposed to the county of residence, would have "the primary right to proceed" with the prosecution.

The question whether a child's nonattendance (by itself) at a schoolhouse in a different county will afford that county attorney a right to proceed with the prosecution has, by implication, been addressed by the Iowa Supreme Court. In State v. Standard Oil Co. of Indiana, 150 Iowa 46, 129 N.W. 336 (1911), the Court discussed the issue of venue when the "resulting consequences" of a crime occur in a different county than where the crime was committed. The court stated:

> The fact that the criminality of the consummated act may ultimately depend on the resulting consequences of the act occurring elsewhere does not make the act punishable in the county where the consequence results.

Id. at 51-52, 129 N.W. at 338.

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[4]This determination is consistent with the analogous situation referenced above where persons having custody or control of deaf, blind, or severely handicapped children fail to compel those children to attend school. Despite the fact that these special children are to attend a school which is likely to be located in a different county, venue lies in the "county in which the person resides." Iowa Code § 299.19.

In the case of a violation of the compulsory education provisions involving the parent's, guardian's or legal or actual custodian's failure to cause the child's attendance, the "resulting consequence" of their "consummated act" is the child's absence from school. Therefore, according to the Court in Standard Oil, the child's nonattendance alone would not make the violation punishable in the county where the schoolhouse is located.

Likewise, in the case of a violation of the compulsory education provisions involving the parent's, guardian's or legal or actual custodian's refusal to participate in mediation or violation of the mediation agreement, the child's attendance may not even be considered to be a "resulting consequence." Here, too, the location of the schoolhouse would not, by itself, make the offense punishable in that county.

We conclude the specific facts relating to an alleged violation of each compulsory education provision must be examined to determine the issues of venue and county attorney responsibility. Violation of a mediation agreement, refusal to participate in mediation, failure to cause the child's attendance, etc., are separate and distinct offenses. See Iowa Code § 299.6. Absent legislation specifically identifying the county attorney whose duty it is to prosecute and/or venue for these particular proceedings, factual matters become crucial. Your specific inquiry does not provide all facts necessary for a definite determination. Even if it did, we cannot resolve issues which are dependent upon factual matters. 1972 Op.Att'yGen. 686. The function of an opinion is to decide a specific question of law or statutory construction.

In sum, when referrals are made for mediation and/or prosecution of violations of the compulsory education provisions, Iowa Code §§ 299.1 - 299.5A, venue lies generally in the violator's county of residence. Under certain circumstances, more than one county may have a right to proceed with the mediation/prosecution.

Sincerely,

DEAN A. LERNER
Assistant Attorney General

HIGHWAYS; COUNTIES AND COUNTY OFFICERS: Tree Removal. Iowa Code §§ 306.3(12), 314.7 (1993); 1992 Iowa Acts, ch. 1153, § 1. Amendment of section 306.3 to add definition of public right-of-way has no effect on existing responsibilities of county boards of supervisors or rights of private property owners regarding tree removal for highway purposes. (Anderson to Van Maanen, State Representative, 5-20-93) #93-5-2(L)

May 20, 1993

The Honorable Harold Van Maanen
Speaker of the House
State Capitol
Des Moines, IA 50319

Dear Speaker Van Maanen:

The late Representative Kenneth De Groot requested an opinion of the Attorney General regarding the effect of chapter 1153, Acts of the 1992 General Assembly, which amended Iowa Code section 306.3 on the existing authority of county boards of supervisors to remove trees from private property or county right-of-way. Due to his demise during the pendency of his opinion request, we are providing this opinion to you as Speaker.

Specifically, Representative De Groot asked whether the new legislation:

> 1. changes the responsibility of county supervisors when removing trees from private property;
>
> 2. gives county supervisors more protection from damages when removing trees from private property; or,
>
> 3. strengthens the rights of property owners to refuse removal of trees from county road right-of-way.

Chapter 306 of the Iowa Code provides the mechanisms for establishing, altering, and vacating highways. During the 1992 session, the Iowa Legislature amended Iowa Code section 306.3 by adding subsection 12 which defines the term "public road right-of-way." The new subsection reads:

> "Public road right-of-way" means the area of land, the right to possession of which is

> secured or reserved by a governmental subdivision for roadway purposes. The right-of-way for all secondary roads is sixty-six feet in width, unless otherwise specified by the county board of supervisors of the respective counties.

The responsibilities of the counties, and other governmental units, with regard to tree removal along highways is found in Iowa Code section 314.7. The relevant portion of that statute reads:

> Officers, employees and contractors in charge of improvement or maintenance work on any highway shall not cut down or injure any tree growing by the wayside which does not materially obstruct the highway, or tile drains, or interfere with the improvement or maintenance of the road, and which stands in front of any city lot, farmyard orchard or feed lot, or any ground reserved for any public use. . . .

This statute does not differentiate between trees located on publicly-owned right-of-way and those on private property. Likewise, Iowa courts have long held, regardless of ownership, trees may not be removed by public entities except when public necessity dictates. Carstensen v. Clinton County, 250 Iowa 487, 94 N.W.2d 734 (1959); Rabiner v. Humboldt County, 224 Iowa 1190, 278 N.W. 612 (1938); Crimson v. Deck, 84 Iowa 344, 51 N.W. 55 (1892).

The amendment to section 306.3 defining "public right-of-way" may not be construed to change the original statute further than expressly stated. State v. Blythe, 226 N.W.2d 250 (Iowa 1975). Further, it neither expressly nor impliedly purports to amend section 314.7. The duties of county boards of supervisors as well as the rights of private property owners regarding trees along highways remain unchanged.

In summary, it is our opinion that the enactment of Iowa Code section 306.3(12) will not affect the responsibilities or liabilities of county boards of supervisors or the rights of private property owners relating to the removal of trees for highway purposes.

Sincerely,

Kerry Anderson

KERRY ANDERSON
Assistant Attorney General

STATE EMPLOYEES: Compensation; Dual Employment. Iowa Code §§ 15.105, 15.106, 15E.152, 15E.153, 15E.154, 15E.155, 15E.156, 70A.1, ch. 104A (1993); S.F. 2393, § 10 (1992 Iowa Acts, ch. 1001, § 103, 74th G.A., Second Extraordinary Sess.). Iowa Code section 15E.153 does not preclude the Wallace Technology Transfer Foundation from selecting a state employee, specifically the Director of the Department of Economic Development, as its executive director. Senate File 2393, section 10, 1992 Acts of the General Assembly, Second Extraordinary Session, prohibits additional remuneration for a state employee's duties, but does not prohibit an employee from engaging in additional duties for additional remuneration. Finally, Iowa Code section 70A.1 prohibits state employees from receiving additional compensation for services performed during the same time period for which the employee is already receiving state compensation. (Hunacek to Murphy, State Senator, 6-1-93) #93-6-1(L)

June 1, 1993

The Honorable Larry Murphy
State Senator
531 6th Street N.W.
Oelwein, IA 50662

Dear Senator Murphy:

You have requested an opinion of the Attorney General concerning the selection of Allan Thoms, Director of the Department of Economic Development, to also serve as the Executive Director of the Wallace Technology Transfer Foundation. Specifically, you ask the following three questions:

I. Is the foundation's decision to select Allan Thoms as its Executive Director inconsistent with the parameters established for the foundation in Iowa Code section 15E.153?

2. Is the employment arrangement between Thoms and the foundation inconsistent with SF 2393, section 103, which restricts compensation for appointed state officers?

3. The employment arrangement between Thoms and the foundation states that Thoms' service is expected to constitute thirty percent of normal working time, the major portion of which is to occur in the offices of the foundation. As Thoms continues to maintain his full salary and duties as Director of the Department of Economic Development, does this condition (salary in return for 30 percent of normal working time) violate other Code provisions or requirements?

Before answering these questions, we first survey and review the pertinent statutes relating to the Wallace Technology Transfer Foundation. (All statutory references to follow are to the 1993 Code, unless otherwise indicated.) Iowa Code section 15E.152 specifies a legislative finding that Iowa should "successfully participate and compete in the emerging world economy." The statute goes on to establish the Wallace Technology Transfer Foundation, the purpose of which is "to formulate and implement plans and programs for the development of

advanced sciences and technologies and to facilitate their commercial application within the state, including determining the needs of individual Iowa businesses and farms for scientific and technological innovations to improve products and processes, and encouraging the transfer of the technology from the laboratory to the factory and farm." Iowa Code section 15E.153 establishes that the foundation shall be incorporated under chapter 104A, and further provides that a member of the board of directors of the foundation, or the executive director or a natural person employed by the executive director, shall not be considered state employees except for certain purposes, discussed in more detail below. Iowa Code section 15E.154 defines the standing members, public members, and ex officio nonvoting members of the board of directors. The general powers and duties of this board are enumerated in Iowa Code section 15E.155. Iowa Code section 15E.156 specifies the duties of the executive director of the foundation.

With this brief statutory overview as background, we turn to the questions posed by your opinion request.

1. You first ask whether the selection of Thoms as executive director is inconsistent with Iowa Code section 15E.153. Your opinion request expresses concern that section 15E.153 precludes the appointment of a state employee as executive director.

The statute provides, in relevant part:

> The foundation shall not be regarded as a state agency, except for purposes of chapter 17A. A member of the board of directors is not considered a state employee, except for purposes of chapter 669. The executive director is a state employee for purposes of the Iowa Public Employees' Retirement System, state health and dental plans, and other state employee benefits in chapter 669. A natural person employed by the executive director is a state employee for purposes of the Iowa Public Employees' Retirement System, state health and dental plans, and other state employee benefits plans and chapter 669.

Iowa Code § 15E.153. We do not construe this provision as prohibiting the selection of a state employee as executive director of the foundation.

In reaching this conclusion, we are guided by a number of familiar principles of statutory construction. The "ultimate goal is to determine and effectuate the intent of the legislature." Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). All parts of the statute should be considered, and the statute should not be construed in such a way as to make any part of it redundant or superfluous. State v. Hauan, 361 N.W.2d 336, 338 (Iowa App. 1984).

In the present situation, the statute does not, by its terms, prohibit a state employee from being the executive director of the foundation. Likewise, the statute does not state that a member of the board of directors will not be a state employee; it instead states that a member of the board "is not considered" a state employee. We think that the legislative intent expressed by this phrase is that a member of the board, or the executive director, shall not be construed to be a state employee simply by virtue of that member's relationship with the foundation. The question whether an employee-employer relationship exists arises in a number of different legal contexts, including but not limited to issues of workers' compensation, benefit rights, liability to third parties, and so forth. We believe that the statutory language quoted above is designed to express the legislative intent that a person's membership on the board, or status as executive director, will not, in and of itself, give that person "state employee" status; however, we do not believe that the statute is intended to prohibit a state employee from occupying one or more of these positions. In fact, the statute itself provides to the contrary. For example, the director of the Department of Economic Development and the Secretary of Agriculture (or their designees) are both standing members of the board of directors. Iowa Code § 15E.154(1)(a)(2), (3). We cannot conclude, therefore, that the statute acts to prohibit state employees or officials from serving in these positions.

We should point out that Thoms' status as director of the foundation may lead, in certain specific cases, to potential conflicts of interest, particularly given that Thoms, or his designee, serves as a board member. One of the responsibilities of the board is to employ and provide "general direction" to the executive director. Iowa Code §§ 15E.155(a), 15E.156. Therefore, Thoms may be put in the position of directing himself. Also, the foundation may be involved in dealings with the Department of Economic Development; if Thoms directs both, the potential for a conflict of interest again exists. We do not believe that this potential for conflict automatically precludes Thoms' appointment, however. As we recently stated in another opinion:

> We do caution, however, that there may well be situations in which an actual conflict of interest arises for an individual serving in these two capacities. We cannot, through an opinion, anticipate all circumstances in which a conflict might arise for an individual serving both as a county supervisor and school board director. It appears, however, from review of the statutory functions of each of these boards, that the potential for conflict would be minimal and that conflicts could be avoided by the officer's awareness, and cautious exercise, of the need to abstain from discussion and voting when a conflict or potential for conflict exists.

Op.Att'y.Gen. # 92-9-1 (Scase to Halvorson and Ferguson).

In conclusion, we believe that section 15E.153, rather than acting to prohibit a state employee from serving as a board member or executive director of the foundation, simply clarifies the circumstances under which such a member would, by virtue of this status, be considered a state employee. We therefore do not read into section 15E.153 any specific prohibition of the director of the Department of Economic Development also serving as executive director of the foundation.

2. You next ask whether the employment arrangement between Thoms and the foundation violates section 103 of Senate File 2393. That statute reads, in pertinent part:

> A person whose salary is established pursuant to section 104 of this Act and who is a full-time permanent employee of the state shall not receive any other remuneration from the state or from any other source for the performance of that person's duties unless the additional remuneration is first approved by the governor or authorized by law.

Senate File 2393, 74th G.A., 2nd Extraordinary 1992 Session, section 103. (Identical language has been adopted by the 1993 Session of the General Assembly. See Senate File 422, section 5.) By its own explicit terms, this statute only prohibits receiving additional remuneration "for the performance of that person's duties." In other words, this statute, by its terms, prohibits additional remuneration for the person's original

duties, but does not prohibit that person from engaging in additional duties for additional remuneration. Thus, it does not appear that this statute automatically precludes the arrangement referred to in your letter.

3. Your final question is whether Thoms' employment violates any other statute. Because we are not privy to the specific terms of Thoms' employment relationship with the foundation, and cannot, in any event, issue opinions that require the application of legal principles to a particular set of facts, we are not in a position to say whether any given statute has or has not been violated by this employment relationship. However, we think it advisable to also consider the effect of Iowa Code section 70A.1 (1993), which provides in relevant part that "all salaries. . . shall be in full compensation of all services, including any service on committees, boards, commissions or similar duty for Iowa government." It seems clear from this statute, for example, that Thoms' statutory service as a standing member of the board of directors of the foundation (if he does not designate another person as a member) cannot be the subject of additional compensation. Arguably, however, service as the director of the foundation is an entirely separate job and thus properly the subject of additional remuneration. Several prior opinions of this office are relevant to this contention. Early opinions of this office took a fairly restrictive view of when extra compensation was allowed. In 1922 Op.Att'y.Gen. 278 we opined, in partial reliance on the statutory predecessor to section 70A.1, that certain officials of the dental board could not receive a per diem, in addition to their regular salary, while acting as a member of the board. We also stated: "It is also the stated policy of this state that two compensations will not be paid to one person covering the same period of time . . . ." Id. at 279. In 1922 Op.Att'y.Gen. 286, we also noted that "Persons in the employ of the state, working for a stated salary, are not entitled to other compensation from the state unless it is expressly provided for by statute." Id. at 286-87.

More recently we have adopted a broader view. We have opined that former Iowa Code section 79.1 (1983), the immediate statutory predecessor to Iowa Code section 70A.1 (1993), does not prevent dual employment where an employee is not being paid twice for the same time period. 1984 Op.Att'y.Gen. 103, 105; 1978 Op.Att'y.Gen. 308, 309. Both of these opinions referred to an employee holding two part-time state jobs. In reaching this conclusion, we explicitly rejected the idea that former section 79.1 precluded a state employee from receiving any other payment from the state, and overruled a previous opinion of this office, issued in 1976, which had stated that the section precluded

payment of per diem for service on a state commission to any state employee. 1984 Op.Att'y.Gen. at 105.

The statute which defines the Department of Economic Development, and specifies the duties of the director, does not specifically require that the director devote full time to that position. Iowa Code §§ 15.105, 106. We also note that in cases where the legislature wishes to indicate that certain state officials will devote full time to the performance of those duties, it knows how to say so explicitly. See, e.g., Iowa Code § 13.4 (assistant attorneys general "shall devote their entire time to the duties of their positions). Therefore, we assume it to be legally possible for the DED director to be a part-time position. However, the employment relationship described in your letter in all likelihood contravenes Iowa Code section 70A.1, in providing that Thoms is being reimbursed twice for the same time period. You indicate that he is receiving full pay as DED director plus a salary as head of Wallace Technology Transfer Foundation. The full-time salary is for normal working time. Iowa Code section 70A.1 prohibits double pay for the same time period. Thus, if, in fact, Thoms is receiving the full salary of DED director plus the partial salary as director of Wallace Tech for services performed during the same normal working hours, section 70A.1 is violated. If, however, the additional duties as Wallace Tech director are performed outside normal working hours, section 70A.1 is not applicable. As we stated in our 1984 opinion:

> We agree with the 1977 opinion insofar as the opinion characterizes the policy underlying § 79.1 to preclude paying compensation to an individual twice for the same time period. The state has no interest which we can discern in denying compensation to an individual for separate services performed during separate time periods. Conversely, the state does have a fiscal interest in denying additional compensation to an individual for services performed during a period in which the individual is already receiving state compensation. . . .

1984 Op.Att'yGen. 105.

In summary, Iowa Code section 15E.153 does not preclude the Wallace Technology Transfer Foundation from selecting a state employee, specifically the director of the Department of Economic Development, as its executive director. Senate File 2393, section 10, 1992 Acts of the General Assembly, Second

Extraordinary Session, prohibits additional remuneration for a state employee's duties, but does not prohibit an employee from engaging in additional duties for additional remuneration. Finally, Iowa Code section 70A.1 prohibits state employees from receiving additional compensation for services performed during the same time period for which the employee is already receiving state compensation.

Sincerely,

Mark Hunacek

Mark Hunacek
Assistant Attorney General

COUNTIES: County Attorney Duties. Iowa Code ch. 331 (1993). The county attorney has a duty to perform all responsibilities enumerated in Iowa Code sections 331.756, 331.323. Beyond those specific duties, any action by the county attorney is solely within his or her discretion. (Reno to Maddox, State Senator, 6-24-93) **#93-6-4(L)**

June 24, 1993

Honorable O. Gene Maddox
State Senator
P.O. Box 3553
Urbandale, IA 50322

Dear Senator Maddox:

You have requested our opinion as to the duties a county attorney is required to perform. Specifically, you question whether a part-time county attorney can refuse to handle certain matters such as general civil matters of the county. This letter will initially address the general question posed and, secondly, the more specific question will be answered.

The county attorney cannot be required to perform any duty not requested by law. Bevington v. Woodbury County, 107 Iowa 424, 78 N.W. 222 (1899). The presumption of performance of acts by a county attorney extends to no acts which it is not under the law the duty of the office to perform. Ford v. Dilley, 174 Iowa 243, 156 N.W. 513 (1916). Therefore, a county attorney is not required to perform any duty unless the duty is specifically mandated by statute.

As you have stated in your opinion request, the duties of the county attorney are set out in Iowa Code section 331.756 (1993). This section commences with the phrase, "The county attorney shall: . . ." (emphasis added) and then numerically lists eighty-five subsections. The use of the word "shall" in this instance is not merely a guide to conduct; rather, it imposes a duty upon the county attorney to act. See Iowa Code § 4.1(30). Therefore, a county attorney is required to perform all duties enumerated therein as a regular part of the obligations of that office.

Additionally, it should be noted that Iowa Code section 331.756(85) requires the county attorney to perform other duties required by law and duties assigned pursuant to section 331.323.

Based upon this subsection, any other code section that mandates a county attorney to take action, even though not specifically referenced in Iowa Code section 331.756, carries the same burden of duty for the county attorney as if it were set forth therein.

You specifically question whether a part-time county attorney can refuse to handle certain matters such as general civil matters relating to the county. Iowa Code section 331.756(6) states that the county attorney shall:

> Commence, prosecute and defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party.

Iowa Code section 331.756(7) further states that the county attorney shall:

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

As with all the numbered subsections of Iowa Code section 331.756, these specific duties are mandatory. If the civil matters with which you express concern fall within these categories, the county attorney is required to act on behalf of the appropriate officers. For example, the county attorney has a duty to defend the board of supervisors and individual supervisors when sued for an act or omission while serving in his or her official capacity. 1980 Op.Att'yGen. 222. Further, the county attorney has a statutory obligation to provide defense for a county sheriff in an action before the civil service commission. 1976 Op.Att'yGen. 461. Likewise, the county attorney is required to advise the township officials with respect to the preparation and conduct of special election and bond proceedings. 1968 Op.Att'yGen. 88. However, it is worth noting that even though the county attorney is the official adviser to the board of supervisors and other county officers, it has long been opined that the county attorney may not be required to do everything such officer may ask. 1912 Op.Att'yGen. 320.

In conclusion, the county attorney has a duty to perform all responsibilities enumerated in Iowa Code section 331.756. Beyond those specific duties, any action by the county attorney on behalf of the appropriate state, county, school or township officer(s) is solely within his or her discretion.

Sincerely,

STEPHEN E. RENO
Assistant Attorney General

COUNTIES; SANITARY DISPOSAL PROJECTS: Iowa Code §§ 331.301, 331.422, 331.428, 331.432 and 455B.302. A county may not levy a tax for the general fund to pay for operation and maintenance of its sanitary landfill. The Code prohibits appropriations from the general fund for that purpose. There is no express authority from the General Assembly to do so and therefore it would violate the Home Rule Amendment and Iowa Code section 331.301. The effect would be to require cities to participate jointly with counties which would be inconsistent with the provisions of Iowa Code section 455B.302. (Hindt to Drew, Franklin County Attorney, 7-7-93) #93-7-1(L)

July 7, 1993

James M. Drew
Franklin County Attorney
321 Central Avenue, East
Hampton, IA 50441

Dear Mr. Drew:

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

> May a county which owns and operates a sanitary landfill levy a tax for the general fund to be used for the operating and maintenance of the sanitary landfill?

It is our opinion, based upon review of the relevant statutory and case law, that a county which owns and operates a sanitary landfill may not levy a tax for the general fund to be used for the operation and maintenance of the sanitary landfill.

There is a duty imposed upon counties and cities by Iowa Code section 455B.302 (1993) to establish sanitary landfill programs. The duty is imposed upon each county and city separately. Section 455B.302 provides in part as follows:

> Every city and county of this state shall provide for the establishment and operation of a comprehensive solid waste reduction program consistent with the waste management hierarchy under section 455B.301A, and a sanitary disposal project for final disposal of solid waste by its residents. Comprehensive programs and sanitary disposal projects may be established either separately or through co-operative efforts for the joint use of the participating public agencies as provided by law . . .

County boards of supervisors are authorized by Iowa Code section 331.422 to levy for rural county services. Counties are specifically authorized by Iowa Code section 331.428(2)(c) to

pay for sanitary disposal with appropriations from the rural services fund. Iowa Code section 331.428(3) provides in pertinent part:

> Appropriation specifically authorized to be made from the rural services fund shall not be made from the general fund, but may be made from other sources.

The statute specifically prohibits a county from appropriating money for sanitary disposal from the general fund.

Furthermore, the counties' power to tax is limited according to the Iowa Constitution, Article III, section 39A, ("Home Rule Amendment") and Iowa Code section 331.301. Under these provisions counties have no power to levy a tax unless expressly authorized to do so by the General Assembly. Since we find no authorization by the General Assembly to levy and pay for sanitary disposal from the general fund, such an appropriation would be in violation of the Home Rule Amendment and Iowa Code section 331.301.

The language of Iowa Code section 455B.302 is permissive but not mandatory. It provides that comprehensive programs "may" be established through "co-operative efforts." If a county could levy a tax for the general fund, the effect would be to require cities to participate with counties. Thus it would be inconsistent with Iowa Code section 455B.302 to levy a tax for the general fund, the effect of which would be to require cities to participate with counties.

In conclusion, a county may not levy a tax for the general fund to pay for operation and maintenance of its sanitary landfill. The Code prohibits appropriations from the general fund for that purpose. There is no express authority from the General Assembly to do so and therefore it would violate the Home Rule Amendment and Iowa Code section 331.301. The effect would be to require cities to participate jointly with counties which would be inconsistent with the provisions of Iowa Code section 455B.302.

Sincerely,

NOEL C. HINDT
Assistant Attorney General

NCH:krd

SCHOOLS: Appropriations; Tuition; School Supply. Iowa Code §§ 282.6, 301.1 (1993); 257.13 (1991). The repeal of the Code section which allowed an increase in funding for school districts with increasing enrollments is reasonably related to a legitimate governmental interest in allocating and controlling state finances. A school district may not assess fees for items which are necessary or essential to the instruction of a class unless such a fee is specifically authorized by the Code; however, a district may assess fees for school supplies which represents the cost of the item or a reasonable rental fee. (Parmeter to Metcalf, State Representative, **7-12-93) #93-7-3(L)**

July 12, 1993

The Honorable Janet Metcalf
State Representative
1808 79th Street
Des Moines, IA 50322

Dear Representative Metcalf:

You have requested an opinion of the Attorney General on two issues:

1. Whether the repeal of Iowa Code section 257.13 (1991) results in an educational funding method that is illegal or unconstitutional under either the state or federal Constitution; and

2. If the classification is valid and is not unconstitutional or illegal, may the district, in turn, charge fees to the same class of students to help defer the cost of their education?

Your first question is whether the repeal of Iowa Code section 257.13 results in an educational funding method that is illegal or unconstitutional under either the state or federal Constitution. You have specifically asked that the opinion address whether the funding method violates the equal protection clauses of either Constitution by creating an improper classification of students. The equal protection clauses of the Fourteenth Amendment of the United States Constitution and Iowa Constitution, Article I, section 6 require that similarly situated individuals be treated equally. San Antonio School District v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990). Education is not a fundamental right which is protected by the Constitution. San Antonio School District v. Rodriquez, 411 U.S. at 35. Unless the classification involves a fundamental right or an inherently suspect class of persons, the state may create categories of individuals which are reasonably related to legitimate state interest. San Antonio School District v. Rodriquez, 411 U.S. at 44; Thomas v. Fellows, 456 N.W.2d at 172.

When challenging the constitutionality of a statute, every reasonable basis for the classification must be negated. Id.

Iowa Code chapter 257 sets forth the method by which school districts receive appropriations for funding of their educational programs. Iowa Code chapter 257. Iowa Code section 257.13 (1991) formerly provided a methodology for increasing an allotment to a school district if its enrollment increased from the level which was used to preliminarily determine the allocation to the given school district. Iowa Code § 257.13 (1991). The repeal of that provision causes the date on which enrollment is determined for the state aid formula to be the third Friday in September as provided in Iowa Code section 257.6. The enactment of Iowa Code section 257.6 created a class of school districts, and similarly its repeal affects a class of districts by the elimination of the exception to the general rule. It should be noted that the school budget review committee has the authority to grant additional aid to districts which experience an unusual increase in enrollment. Iowa Code § 257.31(5)(a). That classification would not violate the equal protection clause of the United States Constitution or the Iowa Constitution if it's reasonably related to a legitimate governmental interest. Id. The designation of a date certain for the determination of the level of funding is a reasonable purpose. 1992 Iowa Acts, chapter 20 appears to be intended to allow the amount of state aid to school districts to be computed at the time of the legislative session so that the legislature can more accurately and effectively allocate its financial resources. The allocation and control of state finances is a legitimate governmental interest, and it would appear that the repeal of Iowa Code section 257.13 (1991) is reasonably related to that goal. Id. As a result, the repeal of Iowa Code section 257.13 (1991) does not violate the equal protection clause of the United States Constitution or Iowa Constitution, Article I, section 6.

Your second question is whether, assuming the classification is valid and not unconstitutional or illegal, may the school district, in turn, charge fees to the same class of students to help defer the cost of their education. Iowa Code section 282.6 provides:

> Every school shall be free of tuition to all actual residents between the ages of 5 and 21 years . . . , provided however, fees may be charged covering instructional costs for a summer school or drivers education program.

Iowa Code § 282.6.

Iowa Code section 301.1 provides in pertinent part:

> The board of directors of each and every school district is authorized and empowered . . . to contract for and buy books and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, . . . or rent them to such pupils at such reasonable fee as the board shall fix . . .

Iowa Code § 301.1.

Further, Iowa Code section 282.24 sets the maximum tuition fee for non-resident students as follows:

> The maximum fee that may be charged for an elementary and high school students residing within another school district corporation except students attending school in another district under section 282.7, subsection 1, or subsections 1 and 3, is the district cost per pupil of the receiving district as computed in section 257.10.

Iowa Code § 282.24.

We have previously addressed the question whether the assessment of course fees and fees for extracurricular activities are permissible under Iowa Code section 282.6. We held that course fees could not be charged unless there was a specific exception to the prohibition under section 282.6. 1982 Op.AttyGen. 227. We noted that a specific exception for the instructional costs of summer school was provided. Id. That section has been subsequently amended to include drivers education. We also held that assessing extracurricular fees were not permissible because no affirmative statutory authority existed for the assessment of those fees. Id.; see, Iowa Code §§ 280.10 (eye-protective devices), 280.11 (ear-protective devices) and 301.1 (textbooks and other necessary school supplies).

We have also addressed what fees may be charged for necessary school supplies under Iowa Code section 301.1. We held that the cost of items which were necessary or essential to the instruction of a class must be properly characterized as tuition rather than school supplies. Op.Att'yGen. #79-12-22(L) Examples were art supplies for art classes and chemicals for science classes. In contrast, pencils, pens and paper used by students to take notes would be properly characterized as school supplies.

Obviously, the determination of whether a given fee would be for school supplies is heavily dependent on the facts of each case. If a fee is assessed for school supplies, it must be at cost or for a reasonable rental fee. Iowa Code § 301.1.

The analysis does not change in the case of a non-resident student. Under the provisions of section 282.20 the payment of the tuition fees is to be paid by the school corporation in which the student resides. Iowa Code § 282.20. These provisions indicate that fees may not be assessed against resident students and that the tuition fees which are charged for non-resident students must be paid by the school corporation in which the student is a resident. This interpretation is also consistent with the provisions which control the funding for non-resident students who transfer under the open enrollment. Iowa Code § 282.18(8).

In summary, the repeal of Iowa Code section 257.13 does not violate the equal protection clause of the Iowa Constitution or the United States Constitution. Further a school district may not charge a tuition fee in the form of course fees, extracurricular fees or other fees which are necessary or essential to the instruction of a course or which are not specifically authorized by statute.

Sincerely,

JOHN M. PARMETER
Special Assistant Attorney General

JMP/mo

OPEN MEETINGS LAW; State Board Retreats. Iowa Code sections 21.2(1), 21.4 (1993). Retreats by a governmental body are subject to all requirements of Iowa Code chapter 21 if there is a gathering of a majority of the members where there is deliberation or action upon policy matters within the agency's jurisdiction. If retreats do constitute "meetings" under Iowa Code section 21.2(1), proper notice must be given to the public under section 21.4 and a closed session may only be held to the extent expressly permitted by law. A court may assess limited damages and costs to individuals who participate in a violation of the Open Meetings Law, but the actual moneys spent on the meeting are not recoverable from the offending board members. (Olson to Boddicker, State Representative, 7-28-93) #93-7-5(L)

July 28, 1993

The Honorable Dan Boddicker
State Representative
R. R. 2, Box 56
Tipton, IA 52772

Dear Representative Boddicker:

You have requested an opinion of the Attorney General concerning the application of the Open Meetings Law to State Board of Education retreats. Your questions, paraphrased, are as follows:

1. Are the retreats in violation of Iowa Code chapter 21 if "the public is not invited to attend"?

2. If the retreats do violate the Open Meetings Law, are moneys spent on the retreats recoverable from members of the Board?

Your opinion request indicates that you are seeking a determination of whether the Open Meetings Law has been violated. Ordinarily, we do not utilize the opinion process to determine specific violations of statutes. 1982 Op.Att'yGen. 162. Determination of whether the statute has been violated should be made in an adjudicative setting where factual issues can be resolved with the participation of the governmental body. We can, however, make some observations concerning principles of law.

I

The first consideration is whether the State Board of Education is a "governmental body" to which the Open Meetings Law is applicable. A governmental body, as defined in Iowa Code section 21.2(1)(a) (1993) includes a "board, council, commission or other governing body expressly created by the statutes of this state or by executive order." The State Board of Education is a

nine member board created under section 256.3. It is the policy-making body for the Department of Education and thus is covered by the law.

The second consideration is whether a particular gathering or assemblage of a governmental body's members constitutes a "meeting" within the definition of section 21.2(2), which provides:

> "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

By definition, a meeting occurs only when a majority of the members of a governmental body gather and there is deliberation or action upon a matter within the scope of the governmental body's policy-making duties. "Deliberation" includes discussion and evaluative processes in arriving at an ultimate decision or policy. 1980 Op.Att'yGen. 164, 166; 1982 Op.Att'yGen. 423, 426. The term "deliberation" has been applied in several instances. See, e.g., 1982 Op.Att'yGen. 41 ("deliberation" occurs where commission gathers at state penitentiary to obtain information on civil rights concerns of inmates); Wells v. Dallas County Board of Adjustment, 475 N.W.2d 680 (Iowa App. 1991) ("deliberation" occurs where board of adjustment meets on applicants' property to which certain members of the public are denied access).

However, some gatherings of a governmental body are not "meetings," when those gatherings are for solely ministerial or social purposes. We have previously opined that ministerial acts are those "performed by a governmental body which do not involve an exercise of discretion or judgment." 1990 Op.Att'yGen. 65 (# 90-2-6(L)). Social gatherings are limited to those occasions where board members "do not engage in discussions or conduct amounting to policy-making or deliberations of the body." 1980 Op.Att'yGen. 164, 166. No deliberations occurred in the following examples: Hettinga v. Dallas County Board of Adjustment, 375 N.W.2d 293, 295 (Iowa App. 1985) (no "deliberation" where a board of adjustment is addressed by the

county attorney clarifying a point of law); 1980 Op.Att'yGen. 164, 166-167 (no "deliberation" where board members gather socially for a cup of coffee or ride together in a car to a basketball game); 1990 Op.Att'yGen. 65 (#90-2-6(L)) (no "deliberation" where a board of supervisors gathers to canvass an election).

If a particular gathering of a governmental body does constitute a meeting, then the provisions of chapter 21 are triggered and must be followed. For example, section 21.4 provides that at least twenty-four hours advance notice of the time, date, and place of each meeting and its tentative agenda must be given to the public. Reasonable notice includes posting the notice on a bulletin board or other prominent place clearly designed for that purpose at the governmental body's principal office, or at the building where the meeting is to be held, if the body has no principal office. The news media which have filed a request for notice with the public body are also entitled to be advised of approaching meetings.

Retreats can be helpful to a state agency by allowing the agency to focus on policy issues in the abstract without the need to decide pending agenda items. The purpose of the Open Meetings Law, however, is to open the deliberative process of governmental bodies. When a retreat is utilized by a board to deliberate or take action on issues within the agency's policy-making jurisdiction, the public has a right to attend and must receive the same notice, including an agenda, that accompanies more traditional meetings. If the members engage in deliberation, a retreat would constitute a "meeting" under the Open Meetings Law and all provisions of chapter 21 apply.

II

Your statement that the public "is not invited" to the retreats suggests that either the public received no notice of an open meeting or that the board met in closed session. Assuming, arguendo, that a board retreat is a meeting, it must be held in open session unless a closed session is expressly permitted by law. Iowa Code § 21.3. A "closed session" means a meeting as defined in section 21.2(2), to which any member of the public is denied access by a governmental body. 1980 Op.Att'yGen. 430, 432. Mere failure to give the public adequate notice under section 21.4 does not render a meeting, during which all members of the public are permitted access, a "closed session." Id.

If a person believes that a governmental body has violated the Open Meetings Law, the person may seek judicial enforcement under section 21.6. Section 21.6(2) applies only to those cases where a closed session has actually been held. 1980 Op.Att'yGen. 430, 433. Where only a notice violation occurs, but the public is not actually denied access to the meeting by the body, subsection two is inapplicable. Id. If the court finds that the body violated "any provision" of the Open Meetings Law, however, it may impose sanctions against the board under section 21.6(3). One sanction is to assess damages against each board member who participated in the violation. A member may establish a legal defense and avoid damages under section 21.6(3)(a) by proving that the member:

1. Voted against the closed session.

2. Had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this chapter.

3. Reasonably relied upon a decision of a court or a formal opinion of the attorney general or the attorney for the governmental body.

Members who are assessed damages are also liable to pay costs and attorneys fees to any party successfully establishing a violation of the Open Meetings Law, section 21.6(3)(b). If all members have a legal defense under section 21.6(3)(a), the costs and fees shall be paid to the successful party from the budget of the offending governmental body or its parent. Id. "Costs" include sums ordinarily taxable for expenses incurred in an action as provided by statute. Woodbury County v. Anderson, 164 N.W.2d 129, 133 (Iowa 1969). Statutes providing for payment of costs are strictly construed. Id.

In answer to your second question, therefore, if a court finds that a governmental body has violated any provision of the Open Meetings Law, including a failure to "invite the public" by giving required notice, the court may assess limited damages against each member who cannot establish a legal defense. No section of chapter 21 provides that moneys spent on the actual meetings are recoverable from board members as well, however. Legislative intent is expressed by omission as well as inclusion; the expression of certain conditions of entitlement implies the exclusion of others. Barnes v. Iowa Dept. of Transportation, 385 N.W.2d 260, 263 (Iowa 1986). We believe that any amount assessed

against board members is limited to the damages specified in section 21.6(3)(a) and (b).

CONCLUSION

Retreats held by a governmental body are subject to all requirements of Iowa Code chapter 21 if there is a gathering of a majority of the members where there is deliberation or action upon policy matters within the agency's jurisdiction. If retreats do constitute "meetings" under Iowa Code section 21.2(1), proper notice must be given to the public under section 21.4 and a closed session may only be held to the extent expressly permitted by law. A court may assess limited damages and costs to individuals who participate in a violation of the Open Meetings Law, but the actual moneys spent on the meeting are not recoverable from the offending board members.

Sincerely,

Carolyn J. Olson

CAROLYN J. OLSON
Assistant Attorney General

CJO:krd

GIFTS: Discounts; Market Value. Iowa Code §§ 68B.2(9), 68B.2(24)(1993); 1993 Iowa Acts, Ch. ____ (House File 144, § 1). A discount on a computer purchase is not a gift prohibited by the gift law, if the purchase price constitutes legal consideration of equal or greater value than the computer products and the discount reflects a list price available to a particular segment of the public. Ultimately, determination of the market value of the computer products is an issue of fact. If the computer retailer is not a "restricted donor" within the scope of one of the four alternative categories set forth in the statute, the gift law does not apply and a discount could not violate the gift law. (Pottorff to Carpenter, State Representative, 7-18-92) #93-7-7(L)

July 28, 1993

The Honorable Dorothy Carpenter
State Representative
1100 24th Street
West Des Moines, Iowa 50266

Dear Representative Carpenter:

We are in receipt of your request for an opinion of our office concerning discounts on computer products offered by a private company to school districts and educators. Specifically, you inquire whether a school board member or a school district employee may purchase computer products with a discount that is not available to all members of the public.[1] We conclude that a discount on a computer purchase is not a gift prohibited by the gift law, if the purchase price constitutes legal consideration of equal or greater value than the computer products and the discount reflects a list price available to a particular segment of the public.

In responding to your opinion request it is important to clarify at the outset the limitations of the opinion process. We are unable to resolve issues of fact in an opinion. 61 IAC 1.5(3)(c). We do not utilize the opinion process, moreover, to determine whether a violation of statute has occurred. Op.Att'yGen. #81-7-4(L). This is especially true where the statute in issue, like the gift law, is penal. 1972 Op.Att'yGen. 564, 565. Our opinion on this issue, therefore, is limited to a legal construction of the statute.

In determining whether a discount is a "gift" we turn to the definitional provisions of chapter 68B. Under amendments to chapter 68B enacted in 1993, a "gift" is defined as "a rendering

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[1]We construe your request to mean that the discount is available to educators in both public and private schools. The gift law, however, is in issue only with respect to public officials and public employees.

of anything of value in return for which legal consideration of equal or greater value is not given and received." Iowa Code § 68B.2(9)(1993)(as amended by House File 144, 75th G.A., 1st Sess. § 1).

Prior to 1992 the definition of "gift" specifically included a "discount." Under this definition a "gift" was defined to mean "a rendering of money, property, services, discount, loan forgiveness, payment of indebtedness, or anything else of value for which legal consideration of equal or greater value is not given and received." Iowa Code § 68B.2(5)(a)(1991)(emphasis added). The specific term "discount" was eliminated from the definition in 1992. 1992 Iowa Acts, ch. 1228, § 1(6).

We do not view the streamlining of the definition of a "gift" in 1992 to constitute a substantive change in the definition with respect to discounts. Changes made by statutory revision are not construed as altering the law unless the legislature's intent to do so is clear and unmistakable. State Board of Engineering Examiners v. Olson, 421 N.W.2d 523, 525 (Iowa 1988). Examination of other words deleted from the definition of "gift" in recent amendments suggest that no alteration of the law was intended. Words deleted from the definition of "gift" in the 1992 amendments include "money" and "property." Certainly the legislature did not intend deletion of these terms to exclude money and property from the scope of the gift law. In our view, therefore, a "discount" may still be a gift.

The sale of computer products at a price to school districts and educators that is lower than the price paid by other members of the general public would only constitute a "gift" if this discounted price does not constitute "legal consideration of equal or greater value" than the computer products. In analyzing this issue, the benefit to the seller constitutes legal consideration. See Insurance Agents, Inc. v. Abel, 338 N.W.2d 531, 534 (Iowa App. 1983). Where the benefit is the price paid to the seller for the computer products, the inquiry under the gift law is whether this price is equal or greater than the value of the computer products. Value in this context means the price the products will command in the market. See Comstock v. Iowa State Highway Commission, 121 N.W.2d 205, 210, 254 Iowa 1301, 1309 (1963). Ultimately, determination of the market value of the computer products is an issue of fact.

The fact that other members of the general public may pay a different price for the same computer products does not mean that the sale is not a fair market transaction. The State, like private corporate entities, often pays for goods and services at a rate that is less than that offered to the general public. Hotels, for example, frequently offer to customers a "government

rate" or "corporate rate" for rooms that is less than the rate paid by others for the same facility. Attorneys General in other jurisdictions have observed that special rates provided to state employees by hotels or car rental agencies have never been considered to be "gifts" in violation of gift statutes. See Alaska OAG #366-427-83 (1983). In our view, the gift law is not intended to prohibit public officials and public employees from fair market transactions with companies which utilize separate price lists for different classes of customers.

A significant factor in our analysis of this issue is the fact that the discount is offered to a broad class of customers. This suggests that the price, albeit lower than other members of the public may pay, reflects a price equal or greater than the value of the computer products. Although the retailer will receive less profit on discounted sales, even a discounted price may constitute fair market value.

Where a discounted price is offered to customers on an individual basis, it will be much more difficult to establish that the discounted price reflects the fair market value. The buyer is not generally in a position to know whether the price at which a product is offered reflects the fair market value. Where a discount price is offered specially to one person, however, the individual nature of the transaction suggests the transaction may not be at fair market value. This is especially true if the seller is a restricted donor with respect to the buyer. Under these circumstances, in the absence of objective criteria for determining fair market value, there is a substantial risk that a violation of the gift law would be found.

Although your question focuses on whether the discount is a gift, we point out that any gift is prohibited only if the donor falls within one of four categories:

> (1) Is or is seeking to be a party to one or any combination of sales, purchases, leases, or contracts to, from, or with the agency in which the donee holds an office or is employed.
>
> (2) Will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee's official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region.

> (3) Is personally, or is the agent of a person who is, the subject of or a party to a matter which is pending before a subunit of a regulatory agency and over which the donee has discretionary authority as part of the donee's official duties or employment with the regulatory agency.
>
> (4) Is a lobbyist or a client of a lobbyist with respect to matters within the donee's jurisdiction.

Iowa Code § 68B.2(24)(a)-(d)(1993)(as amended by House File 144, 75th G.A., 1st Sess. § 1). If the computer retailer is not a "restricted donor" within the scope of one of these four alternative categories set forth in the statute, the gift law does not apply and a discount could not violate the gift law.

Application of these alternative definitions of "restricted donor" will require resolution of issues of fact. The definition of donor would be satisfied if, for example, the computer retailer is a party to a contract with the school district in which the school board member serves or the school employee is employed.

In summary, a discount on a computer purchase is not a gift prohibited by the gift law, if the purchase price constitutes legal consideration of equal or greater value than the computer products and the discount reflects a list price available to a particular segment of the public. Ultimately, determination of the market value of the computer products is an issue of fact. If the computer retailer is not a "restricted donor" within the scope of one of the four alternative categories set forth in the statute, the gift law does not apply and a discount could not violate the gift law.

Sincerely,

Julie F. Pottorff

Julie F. Pottorff
Special Assistant Attorney General

TAXATION: Costs Payable Upon Redemption. Iowa Code § 447.13 (1993). Attorney fees and any portions of abstracting fees in excess of charges for conducting a search of the public records are not authorized costs collectable by county treasurers upon redemption pursuant to section 447.13. (Hardy to Ferguson, Black Hawk County Attorney, **8-13-93) #93-8-1(L)**

August 13, 1993

Thomas J. Ferguson
Black Hawk County Attorney
B-1 Courthouse Building
Waterloo, Iowa 50703

Dear Mr. Ferguson:

You requested an opinion of the Attorney General regarding which specific costs must be paid by a redeemer pursuant to Iowa Code section 447.13 (1993) in order to redeem a parcel subsequent to a tax sale. In your request, you set forth the following factual scenario:

An individual obtains a tax sale certificate for a parcel of real estate and hires an attorney to assist him in obtaining the tax deed to that parcel. The attorney requests the local abstract company to prepare an abstract for the property and subsequently examines the abstract for the purpose of determining who is entitled to receive the notice of expiration of right of redemption. The attorney also prepares the documents necessary to obtain the deed, such as the affidavits, the notice of expiration of right of redemption, etc., and has these served and/or filed as required. The attorney then submits to the county treasurer a statement of costs which includes the cost of the abstract preparation, the attorney's fees in examining the abstract and the attorney's fees for preparing each of the documents necessary to obtain the deed, in addition to the actual costs of service of the notices of expiration of right of redemption.

Based on these facts, you have asked which of the above-enumerated costs must be paid in order to effect a redemption of the property under section 447.13. It is our opinion that, of the charges mentioned, only that portion of the abstract fee representing the charges for conducting a search of the public records plus the costs of service of the notices of expiration of

right of redemption are authorized recoverable costs which must be paid in order to redeem a parcel under section 447.13.

Section 447.13 states in relevant part that:

> The cost of a record search and the cost of serving the notice, including the cost of mailing certified mail notices and the cost of publication under § 447.10 if publication is required, shall be added to the amount necessary to redeem. The fee for personal service of the notice shall be the same as for service of an original notice, including copy fee and mileage.

(Emphasis added.) The term "record search" is not defined in this statute. Consequently, the proper construction of that term must be determined by applying rules of statutory construction in order to ascertain what the intent of the legislature was when it employed the language "cost of a record search" in section 447.13. American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981).

In determining the intent of the legislature, all related provisions which are in pari materia must be read together and harmonized if possible. Goergen v. State Tax Commission, 165 N.W.2d 782, 785-787 (Iowa 1969). Further, words and phrases are to be given their ordinary meaning unless they have a specific commercial or trade meaning which would apply within the context of the legislation in question. Farmers Drainage Dist. v. Monona-Harrison Drainage Dist., 256 Iowa 285, 67 N.W.2d 445, 448 (1955). In this regard, the primary purpose for the legislation should also be considered. 67 N.W.2d at 449. In addition, because legislative intent is often expressed by omission as well as inclusion, legislative intent must be inferred by what is actually said by the legislature and not what should or might have been said. State v. Hatter, 414 N.W.2d 333, 337 (Iowa 1987). Finally, the general rule concerning redemption is that only those costs which are clearly authorized by statute can be added to the amount required to redeem a parcel and, in cases where ambiguity exists, the right of redemption is to be liberally construed in favor of the redeemer. Adams v. Thorp Credit, Inc., 452 N.W.2d 435, 436-437 (Iowa 1990); White v. Moon, 127 N.W.2d 578, 579 (Iowa 1964).

We first note that the term "costs" does not, as a general rule, include attorney fees. In order for attorney fees to be recoverable, the legislation allowing recovery of such fees must be specific. Wilson v. Fleming, 239 Iowa 918, 32 N.W.2d 798

(1948). Since the legislature did not include such fees specifically in the costs recoverable under section 447.13, no attorney fees may be included in the amount required in order to redeem the property. Further, neither the costs of reviewing the abstract to identify those entitled to notice of expiration of right of redemption nor the costs of preparing the documents to be served are enumerated costs under the statute whether done by an attorney or otherwise.

As to the abstracting fees, after contacting several abstracting companies, we are apprised that many such companies provide what is termed a "title certificate," a "title report" or a "record title search." This service is normally considerably less costly than obtaining a complete abstract of title and should allow identification of most persons to whom the notice of expiration of right of redemption must be given under Iowa Code section 447.9 (1993). It appears that this type of report or search is the type often requested in the event that a county takes the tax sale certificate. Thus, while the specific terms used within the abstracting community vary somewhat, the rather generic term "record search" does appear to have a unique commercial usage foundation in the context of real estate transactions in general. In that context, the terminology "record search" implies something less than what is required to obtain a complete abstract of title. Fagan v. Hook, 134 Iowa 381, 105 N.W. 155-157 (1905).

In addition, it is clear that when the Iowa legislature intends to use the now legally well defined term "abstract of title" it does so specifically. Iowa Code § 624.21 (1993). It must be assumed that the legislature intentionally chose not to employ that term in section 447.13.

Further, certificate holders already have available to them statutory protection from claims adverse to their tax title under Iowa Code sections 448.15 and 448.16 (1993) once a tax deed is issued. Therefore, no guarantee of marketable title would be necessary in order to protect the interests of certificate holders. "Code provisions must be construed so as to promote its objects and to assist all parties in obtaining justice." Farmers Drainage Dist v. Monona-Harrison Drainage Dist, 67 N.W.2d at 449. In fact, it appears clear that pursuant to section 447.9, the sole purpose for the record search is to identify those persons of record to whom notice of expiration of right of redemption must be given. Consequently, construing section 447.13 to allow a tax certificate holder to seek reimbursement of the costs of a complete abstract as a prerequisite to redemption does not appear to be consistent with either the purpose for the record search or

the rule counseling a strict construction in favor of the redeemer.

In summary, it is our opinion that, of the costs enumerated, only the portion of the abstract fee which represents the charges for conducting a search of the public records plus the costs of service of the notices of expiration of right of redemption are authorized recoverable costs which must be paid in order to redeem a parcel under section 447.13.

Sincerely,

Lucille M. Hardy

LUCILLE M. HARDY
Assistant Attorney General

LMH:cml

MUNICIPALITIES: Council Members Eligibility for City Employment. Iowa Code §§ 362.5, 362.5(1), 362.5(10), 362.5(11), 372.13(8) (1993). The term "contract," as it is defined in Iowa Code section 362.5, is broadly defined to include any financial or pecuniary interest and does include an employment contract with the city. A mayor's service of mowing a city park is not prohibited under Iowa Code sections 372.13(8) and 362.5 when the city population is 2,500 or less and the service's cumulative total does not exceed $2,500 in a fiscal year because of the exception in Iowa Code section 362.5(11). A city council member is prohibited from receiving additional compensation for her services as a water and sewer superintendent under Iowa Code sections 372.13(8) and 362.5(1). (Doland to Angrick, Citizen's Aide/Ombudsman, 8-17-93) #93-8-2(L)

August 17, 1993

William Angrick
Citizens' Aide/Ombudsman
Capitol Complex
215 E. Seventh Street
Des Moines, Iowa 50319-0231

Dear Mr. Angrick:

This letter opinion is in response to your four-part question to this office concerning the legality of city officials receiving compensation for work performed in other capacities for the city.

You first asked whether the term "contract," as it is broadly defined in Iowa Code section 362.5, entails an employment contract in which a city officer is appointed to, or is employed in, a position which results in an employee-employer relationship with the city. We have previously indicated that the ordinary meaning of the words "employer" and "employment" do not include the relationship between an independent contractor and the contracting party for whom the contractor provides services. Op.Att'yGen. #93-4-2(L). The questions you have asked, however, do not appear to hinge on whether the city officer receives compensation as an "employee" or "independent contractor" for the city. The relevant portion of Iowa Code section 372.13(8) states:

> Except as provided in section 362.5, an elected city officer is not entitled to receive any other compensation for any other city office or city employment during that officer's tenure in office, but may be reimbursed for actual expenses incurred.

While section 372.13(8) does prohibit compensation for any additional "city employment," section 362.5 makes clear that this prohibition is designed to be much broader than an employer-employee relationship. "Contract" in section 362.5 means "any claim, account, or demand against or agreement with a city, express or implied." Further, section 362.5 states:

> A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void.

In a previous opinion we stated that the "interest" prohibited by section 362.5 is a financial or pecuniary interest. 1980 Op.Att'yGen. 300, 301. This language clearly intends to prohibit additional compensation from the officer's city regardless of the officer's status as an "independent contractor" or "employee".

Case law and prior attorney general opinions support our position that the reach of Iowa Code section 362.5 is intended to be very broad. In an early interpretation of the statute, which was then found in Iowa Code section 668, the Iowa Supreme Court stated that the phrase "contract or job" in the statute should be construed in the conjunctive. It stated that what was intended "was to forbid in connection with municipal work the employment by the council of one of its own members." The Court went on to state, however, that "public policy" and "general law" prohibited the compensation of a council member to increase "either by direct payment, or indirectly through the medium of profits on sales of goods" to the city. The Court, therefore, enjoined the mayor and members of the council from making payment for lumber and other supplies to a local merchant who was also a council member. Bay v. Davidson, 133 Iowa 689, 690; 111 N.W. 25, 26 (1907). The Court's rationale was that it is a "well established and salutary rule in equity that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself." Id.

A more recent Supreme Court case indicates that the broad prohibition against additional compensation for council members still exists. The Supreme Court in Leffingwell v. Lake City, 257 Iowa 1022, 1027-1028; 135 N.W.2d 536, 539 (1965), stated that the purpose of the statute is to "protect the public from public officers who would profit personally from their place of advantage in government. They cannot recover for such services." Further, in a recent attorney general opinion, which is attached for your review, we stated that the "exception clause in section 372.13(8) will not avail a city council member seeking any other compensation for city employment during that officer's term of

office."[1] Our rationale was that the exception in Iowa Code section 362.5(1) should not be construed as broader than the general prohibition against dual compensation in Iowa Code section 372.13(8). 1984 Op.Att'yGen. 47. We stated that although a city council member could accept employment with the city upon resignation, a council member could not receive any compensation for any other city employment during the officer's term of office. We will therefore apply the above principles to the facts you have presented.

You have asked whether a mayor of a city may be compensated for mowing the city park under sections 372.13(8) and 362.5. According to your letter, after no one responded to a notice by the city seeking applicants to mow the city park, the mayor volunteered and is being compensated at $5.00 per hour to do the mowing. Here, despite the broad prohibition in section 362.5, section 362.5(11) appears to provide an exception applicable to this scenario. Section 362.5(11) states that contracts for services that may benefit the city officer are not prohibited when the city population is 2,500 or less and the service's cumulative total does not exceed $2,500 in a fiscal year. The facts you have provided indicate that the mayor volunteered to do the mowing only after there were no other applicants for the job, the mayor is from a city with a population of less than 2,500 and his total earnings do not exceed $2,500 in a fiscal year. The mayor's services of mowing a city park would, therefore, not be prohibited under Iowa Code section 362.5 upon the facts in the scenario you have described.

You next asked whether a person appointed by the city council to be the water superintendent and the sewer superintendent who is subsequently elected to the city council may be compensated for services in both positions under sections 372.13(8) and 362.5. You state that the council member is compensated annually at $3,465 as water superintendent and at $2,196 as sewer superintendent.

Unlike the scenario concerning the mayor above, there does not appear to be an exception in section 362.5 that would make this additional compensation acceptable. The cumulative total compensation the council member receives for these positions exceeds each of the allowable limits in the exceptions. See sections 362.5(10) and (11). In addition, your letter indicates that unlike the scenario concerning the mayor, the appointment of the city council member to the superintendent positions was not the result of competitive bids. Further, because the city council actually makes the appointments for the superintendent

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[1]Iowa Code section 372.13(8) has since been amended to change the phrase "term" in office to "tenure" in office.

positions, there is at least the potential for the council member to "profit personally" from her position in government contrary to Leffingwell and other authorities cited above.[2] Consistent with our prior attorney general opinion, therefore, we find that this additional compensation is compensation "prohibited by law" under section 362.5(1). The council member under the scenario you have described, therefore, may not be compensated for her services in her position as water/sewer superintendent. 1984 Op.Att'yGen. 47.

Finally, you have asked whether the council member may continue as both the water and sewer superintendent since her compensation for her positions was increased during her term following her election to the city council. Because we have found that the additional compensation to the council member is prohibited by law under section 362.5(1), we will refrain from answering this question because we assume it is now moot.

In summary, the term "contract," as it is defined in Iowa Code section 362.5, is broadly defined to include any financial or pecuniary interest and does include an employment contract with the city. A mayor's service of mowing a city park is not prohibited under Iowa Code sections 372.13(8) and 362.5 when the city population is 2,500 or less and the service's cumulative total does not exceed $2,500 in a fiscal year because of the exception in Iowa Code section 362.5(11). A city council member is prohibited from receiving additional compensation for her services as a water and sewer superintendent under Iowa Code sections 372.13(8) and 362.5(1).

Sincerely,

Karen Doland

KAREN DOLAND
Assistant Attorney General

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[2]The holding of these two offices simultaneously may raise an issue of incompatibility and conflict of interest as well. An issue of incompatibility arises when there is an inconsistency in the function of two offices, as where one is subordinate to the other and subject in some degree to its revisory power. State v. Anderson, 155 Iowa 271, 273; 136 N.W. 128, 129 (1912). Conflict of interest questions raise a question of "divergence of loyalties" and require an analysis of the particular facts in the situation and the action taken by the office holder. 1982 Op.Att'yGen. 220, 223. We have not addressed these issues because an analysis would require additional facts that we do not have before us since your question focused solely on the permissibility of additional compensation to council members.

INCOMPATIBILITY OF OFFICE: Statutory ban. Iowa Code Supp. §§ 39.11, 39.12 (1993); 1993 Iowa Acts, ch. 143, §§ 4-5. For purposes of applying Iowa Code section 39.11, each political subdivision is a different "level of government." A county hospital and a community college are not at the same "level of government." Iowa Code sections 39.11 and 39.12, therefore, do not preclude an individual from simultaneously holding elective offices on the governing bodies of a county hospital and a community college. (Scase to Gustafson, Crawford County Attorney, 9-9-93) #93-9-1(L)

September 9, 1993

Mr. Thomas E. Gustafson
Crawford County Attorney
Warren Building - 27 S. Main
Denison, IA 51442

Dear Mr. Gustafson:

You have requested an opinion of the Attorney General interpreting Iowa Code Supp. sections 39.11 and 39.12 (1993), which were recently enacted by the General Assembly. 1993 Iowa Acts, ch. 143, §§ 4-5. These Code sections provide as follows:

> Statewide elected officials and members of the general assembly shall not hold more than one elective office at a time. All other elected officials shall not hold more than one elective office at the same level of government at a time. This section does not apply to the following offices: county agricultural extension council, soil and water conservation district commission, or regional library board of trustees.

Iowa Code Supp. § 39.11 (1993).

> An elected official who has been elected to another elective office to which section 39.11 applies shall choose only one office in which to serve. The official shall resign from all but one of the offices to which section 39.11 applies before the beginning of the term of the office to which the person was most recently elected. Failure to submit the required resignation will result in a vacancy in all elective offices to which the person was elected.

Iowa Code Supp. § 39.12 (1993).

Specifically, you ask whether serving on the board of trustees of a county hospital, established pursuant to Iowa Code

chapter 347, and serving on the board of directors of a community college, established pursuant to Iowa Code chapter 260C, constitutes service on elected boards at the "same level of government," under Code section 39.11. It is our opinion that positions on a county hospital board of trustees and the board of directors of a community college are not elective offices at the "same level of government."

We begin our discussion with recognition of the following basic principles of statutory construction. "[The] ultimate goal in interpreting statutes is to ascertain and give effect to the legislature's intent." John Deere Dubuque Works v. Weyant, 442 N.W.2d 101, 104 (Iowa 1989). "We seek a reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result. We consider all portions of the statute together, without attributing undue importance to any single or isolated portion." Id.

> To ascertain the legislative intent in construing a statute, a court may properly consider not only the language of the statute, but also its subject matter, object sought to be accomplished, purpose to be served, underlying policies, remedies provided, and consequences of various interpretation.

Probasco v. Iowa Civil Rights Com'n., 420 N.W.2d 432, 435 (Iowa 1988).

Iowa courts and this office have long recognized and applied the common law doctrine of incompatibility of office. See State v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965), citing State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912); 1992 Op.Att'yGen. _____ (#92-9-1); 1982 Op.Att'yGen. 220. New Iowa Code sections 39.11 and 39.12 create a statutory ban on dual office holding which will reach many situations previously encompassed within the incompatibility doctrine. These statutes do not, however, contain an expression of legislative intent to supersede the common law doctrine. Nor do Code sections 39.11 and 39.12 appear to negate the common law principles governing this area.

Under the common law doctrine, two offices are considered incompatible when "there is an inconsistency in the functions of the two, as where one is subordinate to the other, or when the duties of the two offices are inherently inconsistent or repugnant." State v. White, 257 Iowa at 609, 133 N.W.2d at 904-05. "If a person, while occupying one office, accept[s] another incompatible with the first, he ipso facto vacates the

first office, and his title thereto is thereby terminated without any other act or proceeding." Id.

This office has, in recent years, construed the principles of the common law incompatibility doctrine narrowly and applied it cautiously, recognizing that "certain applications of the incompatibility doctrine . . . approach infringing upon interests of institutional dimension: the interest of a person in seeking public office, and the interest of constituents in having their choice of representation respected." 1992 Op.Att'yGen. [#92-9-1], quoting 1982 Op.Att'yGen. 16 [#81-1-8(L) at p. 2-3]. The common law doctrine of incompatibility, while most frequently applied to two offices which are within the same governmental subdivision, may also preclude simultaneous service in offices of different governmental entities if one is subordinate to or subject to revisory power of the other. See 1982 Op.Att'yGen. 188 (#81-7-31(L)] (positions on city council and county board of review found incompatible).

In our approach to interpretation of sections 39.11 and 39.12, we acknowledge that we must "interpret statutes in conformity with the common law wherever statutory language does not directly negate it." Cookies Food Products v. Lakers Warehouse, 430 N.W.2d 447, 452 (Iowa 1988), citing Hardwick v. Bublitz, 253 Iowa 49, 59, 111 N.W.2d 309, 314 (1961), and Iowa Code § 4.2 (1987); see also 3 McQullin, Municipal Corporations, § 12.67, p. 343 at N. 10 (3d ed. 1990) (common law and statutory compatibility of office provisions should be construed together as far as possible); Childs v. Moses, 265 App. Div. 353, _____, 38 N.Y.S.2d 704, 707 (1942) ("On the issue of incompatibility, if the statute and common law rule can stand together, the statute should not be construed so as to abolish the common law rule.").

With these general principles in mind, we turn to Code section 39.11, which prohibits elected officials from holding more than one elective office "at the same level of government." Neither the Iowa Code nor Iowa case law provides us with a definition for the phrase "same level of government." This phrase could be construed expansively, to indicate broad categories of governmental functions (i.e. federal, state, and local "levels" of government), or more narrowly, as meaning each distinct governmental subdivision (i.e. county, townships, city, school district) is a separate "level of government". Having considered the impact of applying each of these constructions of the phrase "same level of government" to section 39.11, we conclude that the latter results in a more reasonable outcome.

If we were to find that all local governmental entities were a part of a singular local "level of government," section 39.11 would, in effect, preclude any person elected to either state or local office from simultaneously holding more than one elective

office. This interpretation would result in a prohibition on dual office holding much broader than the common law doctrine. We believe that, if the legislature intended this result, it would have directly adopted an across-the-board prohibition on holding two elective offices at the same time.

While the legislature did create a complete ban on dual office holding applicable to statewide elected officials and members of the general assembly, other office holders are only precluded from simultaneous service in two elected offices "at the same level of government." If this qualifying phrase is to have any effective meaning, it must be construed to mean that a local office holder may not simultaneously hold two elective offices for the same governmental subdivision (i.e. county, city, school district). Therefore, we adopt this construction of Code section 39.11.

Applying this interpretation to the question you have presented, we conclude that a county hospital and a community college are not at the "same level of government." Iowa Code sections 39.11 and 39.12, therefore, do not preclude an individual from simultaneously holding elected positions on the governing bodies of a county hospital and a community college.[1]

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

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[1] Nor does the common law doctrine of incompatibility prohibit dual service in these two positions. See 1984 Op.Att'yGen. 153 [#84-8-7(L)] (positions as a member of the board of directors of an area vocational school and member of a county board of supervisors are not incompatible).

ETHICS; PUBLIC OFFICIALS; PUBLIC EMPLOYEES: Authority of Ethics and Campaign Disclosure Board. 1993 Iowa Acts, ch. _____ (House File 144, §§ 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16). The Ethics and Campaign Disclosure Board does not have authority to promulgate rules governing or to impose penalties against local officials and employees under chapter 68B. (Condo to Williams, Executive Director, Ethics and Campaign Disclosure Board, 9-14-93) #93-9-4(L)

September 14, 1993

Ms. Kay Williams
Executive Director
Iowa Ethics and Campaign Disclosure Board
507 10th Street, 7th Floor
Des Moines, IA 50309

Dear Ms. Williams:

You have requested an opinion addressing the authority of the Ethics and Campaign Disclosure Board over local officials and employees for purposes of administering and enforcing chapter 68B. Specifically, you inquire:

> (1) Does the Ethics and Campaign Disclosure Board ("the Board") have authority to promulgate rules establishing and imposing penalties (or recommendations for penalties) covering local officials and employees?
>
> (2) Are local officials and employees included in the classification of "other person" referred to in Iowa Code section 68B.32B(1)?

It is our opinion that the Board does not have authority to promulgate rules governing, or to impose penalties against, local officials and employees under chapter 68B.

The statute contemplates that the Board has jurisdiction over compliance with chapter 68B by state executive branch officials and employees. Iowa Code section 68B.32(1) establishes the Board and defines its role. This section states that the Board "shall administer this chapter and set ethical standards for, investigate complaints relating to, and monitor the ethics of officials, employees, lobbyists, and candidates for office in the executive branch of state government" (emphasis added).

The use of the term "official" in section 68B.32(1) specifically excludes local officials. In the definitional provisions of chapter 68B, section 68B.2(16) expressly states

that an "'[o]fficial' does not include officers or employees of political subdivisions of the state."

Other sections of chapter 68B support the conclusion that local officials and employees are not included under the jurisdiction of the Board for purposes of administering or enforcing chapter 68B. Section 68B.32A(11) states that the Board shall "[e]stablish a procedure for requesting and issuing formal and informal board opinions to local officials and employees and to persons subject to the authority of the board under this chapter or chapter 56." Statutes should not be construed so as to render any part superfluous, unless no other construction is reasonably possible. Iowa Auto Dealers Association v. Iowa Department of Revenue, 301 N.W.2d 760, 765 (Iowa 1981). Specification of "local officials and employees" in addition to "persons subject to the authority of the board" would be superfluous if "local officials and employees" were included among those "persons subject to the authority of the board." This language, therefore, indicates a distinction between local officials and employees and "persons subject to the authority of the board," although local officials and employees could be subject to Board authority as candidates under chapter 56.

Section 68B.32A(12) further states that the Board shall "[e]stablish rules relating to ethical conduct for persons holding a state office in the executive branch of state government, including candidates, and for employees of the executive branch of state government and regulations governing the conduct of lobbyists of the executive branch of state government." Local officials and employees are not included in this section, unless currently running as a candidate for office in the executive branch.

In addition, Iowa Code section 68B.32A(8) states that the Board shall "[e]stablish and impose penalties, and recommendations for punishment of persons who are subject to penalties. . .for the failure to comply with the requirements of this chapter or chapter 56." Chapter 56 applies to all candidates for public office at any level, including local office. By contrast, local officials and employees are subject to some, but not all, of the requirements of chapter 68B. Compare Iowa Code §§ 68B.2A (conflicts of interest), 68B.22 (gifts accepted or received), 68B.23 (honoraria) with Iowa Code §§ 68B.3 (sales to state agencies) and 68B.24 (receipt of loans from lobbyists). The fact that a local official or employee can be in violation of any particular provision of chapter 68B does not by itself provide the Board with jurisdiction over that person.

Notably, the complaint procedure delineated in section 68B.32B(1) states as follows:

> Any person may file a complaint alleging that a candidate, committee, person holding a state office in the executive branch of state government, or other person has committed a violation of this chapter or chapter 56 or rules adopted by the board. The board shall prescribe and provide forms for this purpose [emphasis added].

Although this section permits a complaint regarding "any person" to be filed with the Board, it does not specifically grant jurisdiction over local officials and employees to the Board for purposes of administering and enforcing chapter 68B. If this section were construed as providing a grant of jurisdiction to the Board over all persons subject to chapter 68B, it would include legislators and legislative employees. Yet, jurisdiction over legislative branch compliance is clearly granted to the legislative committees. See Iowa Code § 68B.31.

Section 68B.32B(1) cannot be read in isolation. Statutes related to the same subject matter should be read together and construed in light of their common purpose and intent. Krueger v. Iowa Department of Transportation, 493 N.W.2d 844, 845 (Iowa 1992). In our view, the construction of sections 68B.32(1), 68B.32A(11), and 68B.32A(12) precludes construing the term "other person" in section 68B.32B(1) as broadening the Board's jurisdiction to reach local officials and local employees for purposes of administering and enforcing chapter 68B.

Our conclusion does not mean that there is no enforcement mechanism for violations of chapter 68B by local officials or local employees. Iowa Code section 68B.26 states in relevant part: "Complaints regarding conduct of local officials or local employees which violates this chapter shall be filed with the county attorney in the county where the accused resides." Section 68B.25, in turn, provides that a violation of certain sections of chapter 68B is a serious misdemeanor, and that the violator may be "reprimanded, suspended, or dismissed from the person's position or otherwise sanctioned." These remedies remain available.

In conclusion, it is the opinion of this office that the board does not have authority to promulgate rules governing or to impose penalties against local officials and employees under chapter 68B.

Sincerely,

Joseph Condo

JOSEPH CONDO
Assistant Attorney General

REAL PROPERTY; TAXATION: Abandoned railroad right-of-way. Iowa Code §§ 327G.77, 327G.78, 447.9, 448.6 (1993); Iowa Code chapters 446, 447, 448 (1993). When railroad right of way is abandoned and chapter 327G applies, the transfer of ownership to adjacent landowners occurs at the time of the abandonment. The county may tax an adjacent landowner on that property even if no affidavit of ownership has been filed. If the property is subsequently sold at a tax sale, that sale is not rendered void simply by virtue of an adjacent landowner subsequently filing an affidavit of ownership. (Hunacek to Wink, 10/22/93) #93-10-2(L)

October 22, 1993

Timothy K. Wink
Louisa County Attorney
P.O. Box 112
Columbus Junction, IA 52738

Dear Mr. Wink:

You have requested an opinion of the Attorney General concerning the application of Iowa Code sections 327G.76 and 327G.77, which discuss the disposition of abandoned railroad right of way. Your opinion request is apparently prompted by a specific situation in your county involving the abandonment of property by the Rock Island Railroad, but you also ask certain general questions about the operation of these statutes.

At the outset, we must explain why we cannot answer all of the questions you pose. This office can only render an opinion on issues of law, meaning those issues which can be answered by statutory construction or legal research. 1972 Op.Att'yGen. 686. In particular, a question that involves mixed issues of law and fact cannot be resolved in an attorney general opinion. Therefore, to the extent that your request asks this office to resolve specific controversies involving the Rock Island abandonment, we must decline to do so. However, we discern in your opinion request the following two purely legal questions:

1. When railroad right of way is abandoned, does title pass to the adjacent landowners immediately? In particular, can the county tax the adjacent landowner, even though that owner has not filed an Affidavit of Ownership?

2. If such property is sold at a tax sale, and an Affidavit of Ownership is subsequently filed by an adjacent landowner, is the tax sale necessarily null and void?

We will answer these questions in the order posed. For reasons that are explained in more detail below, we believe the answer to the first question is yes and the answer to the second question is no.

A.

We begin by briefly surveying the relevant statutes. As the Iowa Supreme Court noted in Notelzah, Inc. v. Destival, 489 N.W.2d 744, 747 (Iowa 1992), "Through the years, Iowa has adopted different statutes dealing with conflicting rights in abandoned railroad property. We have long recognized it to be the legislature's prerogative to sort through and fix those rights." The current Iowa statutes dealing with abandoned railroad property are Iowa Code sections 327G.76-.79. Particularly pertinent to our inquiry are sections 327G.76 and 327G.77. The first of these statutes, as interpreted by the Iowa Supreme Court in Macerich Real Estate Co. v. City of Ames, 433 N.W.2d 726 (Iowa 1988), provides for extinguishment of railroad property rights upon cessation of service by the railroad. Id. at 729-30. Section 327G.77, in turn, provides that when "a railroad easement is extinguished under section 327G.76, the property shall pass to the owners of the adjacent property at the time of abandonment." Iowa Code § 327G.77(1). Such an adjoining property owner "may perfect title under subsection 1 by filing an affidavit of ownership with the county recorder . . . The landowner shall pay taxes on the right-of-way from the date the affidavit is filed." Iowa Code § 327G.77(2). The statute applies only where the railroad possessed an easement in the property, rather than fee simple ownership. Turner v. Unknown Claimants, 207 N.W.2d 544, 546 (Iowa 1973). This distinction has often led to litigation to determine the nature of the interest held by the railroad. Illustrative cases include Estate of Rockafellow v. Lihs, 494 N.W.2d 734 (Iowa App. 1992); Macerich, 433 N.W.2d at 727-28; Hawk v. Rice, 325 N.W.2d 97, 98 (Iowa 1982).

Your first question is whether, if the railroad owned only an easement and then abandoned its interest in the property, does the property immediately pass to the adjacent landowners and can it be taxed to them? We believe that an affirmative answer to this question is required by section 327G.77(1), which provides that "the property shall pass to the owners of the adjacent property at the time of abandonment." (Emphasis added.) The word "shall", of course, imposes a duty. Iowa Code § 4.1(30)(a). We believe that the legislature's use of mandatory language in this statute evinces a legislative intent to require property to pass immediately to the adjacent landowners. A contrary interpretation would leave a gap in the ownership of the property -- a circumstance which is, of course, to be avoided. We also note that section 327G.77(3), which requires utilities to extend a written offer to the landowner to purchase the easement at fair market value within sixty days from

the time the property is transferred from the railroad, supports our conclusion that the property is transferred immediately. This latter statute appears to assume, at least by inference, that the property has been transferred to the adjacent owner at the time of abandonment.

We recognize that Iowa Code section 327G.77(2) contains language that is, at first blush, somewhat at odds with this analysis. Section 327G.77(2) states that an adjoining property owner "may perfect title under subsection 1 by filing an affidavit of ownership", and goes on to say that the "landowner shall pay taxes on the right-of-way from the date the affidavit is filed." In construing this section, we must of course attempt to harmonize it with section 327G.77(1) and give meaning to both sections if possible. American Asbestos Training Center, Ltd. v. Eastern Iowa Community College, 463 N.W.2d 56, 58 (Iowa 1990). We first note that subsection 2 uses the word "may", which, unlike the word "shall", does not impose a duty but, instead, confers a power. Iowa Code § 4.1(30)(c). In other words, while subsection 1 requires the land to revert to the adjacent landowner, subsection 2 does not require the adjacent landowner to file an affidavit of ownership. We believe that subsection 2, though not requiring an adjacent landowner to file an affidavit to obtain ownership, allows the adjacent landowner to do so as a means of perfecting title -- i.e., removing clouds on the property's title without the necessity of a quiet title action. This interpretation gives meaning to the phrase "may perfect title" in the statute and harmonizes it with subsection 1. In addition, this interpretation explains the reference to payment of taxes from the date of filing the affidavit: the legislature simply wished to make clear that payment of taxes on the property was requisite to invocation of this method of perfecting title. In other words, we construe the filing of the affidavit of ownership as a means of clearing title, not a means of triggering liability for taxation. A contrary construction would, in view of the non-mandatory nature of the filing requirement, allow an individual to avoid taxation on the property. We do not believe the legislature intended such an absurd result. Cf. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983) ("we avoid strained, impractical or absurd results in favor of a sensible, logical construction.").

In conclusion, we believe that, providing chapter 327G is applicable, the county may conclude that the adjacent landowners are the property owners as soon as the property has been abandoned, and may tax the adjacent landowners accordingly. Whether chapter 327G applies -- e.g., whether the railroad possessed an easement rather than fee simple title to the property -- is obviously an inquiry which depends on the facts and circumstances of each individual case, and cannot be resolved in an Attorney General's opinion.

B.

Your second question concerns tax sales. Specifically, you address the situation where, after a railroad abandonment, property is not taxed to adjacent landowners and is subsequently sold at a tax sale by the county. You ask whether this tax sale is null and void if, subsequent to it, the adjacent land owner files an affidavit of ownership pursuant to Iowa Code section 327G.77(2). We do not believe that the tax sale is automatically rendered null and void by this circumstance.

Once again, we begin by summarizing the pertinent statutes. According to Iowa Code section 446.7, the county treasurer, on the third Monday in June, "shall offer at public sale all parcels on which taxes are delinquent. The sale shall be made for the total amount of taxes, interest, fees, and costs due." Notice of the time and place of the sale shall be served upon the person in whose name the parcel is taxed. Iowa Code § 446.9(1). Publication of the time and place of the sale is also made in "an official newspaper in the county". Iowa Code § 446.9(2). The Code also requires notice to any mortgagees having a lien upon the parcel, any vendor of the parcel under a recorded contract of sale, any lessor of the parcel who has a recorded lease or memorandum of a recorded lease, and any other person who has an interest of record in the parcel if any of these people have requested notice on a prescribed form, filed the request form, and paid a fee. Iowa Code § 446.9(3). A sale of a parcel through tax sale "is not invalid if taxed in any other name than that of the rightful owner, if it is in other respects sufficiently described." Iowa Code § 446.35.

After the sale has been made, there is a statutory "redemption period" that is the subject of Iowa Code chapter 447. Under section 447.9, the purchaser of the property at tax sale may, after one year and nine months (or nine months if the sale was conducted pursuant to certain specific statutes) cause to be served on the person in possession of the parcel a notice of expiration of right of redemption, specifying that the right of redemption will expire and a deed for the parcel will be made unless redemption is made within ninety days from the completed service of the notice. Immediately after the expiration of ninety days from the date of completed service of the notice, the county treasurer shall make out a deed for each parcel sold and unredeemed, and deliver it to the purchaser upon the return of the certificate of purchase. Iowa Code § 448.1. The deed is presumptive evidence of the following: that the parcel conveyed was subject to taxes for the year or years stated in the deed; that the taxes were not paid at any time before the sale; that the parcel had been listed and assessed; that the taxes were levied or set according to law; that the parcel was duly advertised for sale; and that the parcel was sold as stated in the deed. Iowa Code § 448.4. The deed is conclusive evidence of the following facts: that the manner in which the listing, assessment,

levy, notice and sale were conducted was in all respects as the law directed; that the grantee named in the deed was the purchaser; that all prerequisites of the law were complied with by all officers having any part in any transaction relating to or affecting the title conveyed or purporting to be conveyed by the deed; and that all things required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the points specified in section 448.4, for which the deed is presumptive evidence only. Iowa Code § 448.5. In order to defeat a tax deed, a person claiming title adverse to the title conveyed by the deed must prove one of the following: that the parcel was not subject to taxes for the year or years named in the deed; that the taxes had been paid before the sale; that the parcel had been redeemed from the sale and that the redemption was made for the use and benefit of persons having the right of redemption; or that there had been an entire omission to list or assess the parcel, or to levy the taxes, or to give notice of the sale, or to sell the parcel. Iowa Code § 448.6.

The Code also establishes a limitations period for bringing an action for the recovery of a parcel sold for the nonpayment of taxes. Specifically, such an action must be brought within three years from the execution and recording of the county treasurer's deed, unless the limitations period is tolled for any one of several specifically enumerated circumstances. Iowa Code § 448.12. Another limitations period is established by operation of sections 448.15 and 448.16. The first of these statutes allows the owner or holder of the title or purported title to file, immediately after the issuance and recording of a tax deed, an affidavit in a statutorily specified form. Pursuant to the latter statute, when such an affidavit is filed it shall give notice to all persons, and any person claiming any right, title, or interest in or to the parcel must file a claim with the county recorder within 120 days after the filing of the affidavit. At the expiration of this 120 day period, if no claim has been filed, "all persons shall thereafter be forever barred and estopped from having or claiming any right, title, or interest in the parcel adverse to the tax title or purported tax title, and no action shall thereafter be brought to recover the parcel, and the then tax-title owner or owner of the purported tax title shall also have acquired title to the parcel by adverse possession." Iowa Code § 448.16.

Our review of these statutes convinces us, for several reasons, that the legislature intended to provide some finality to the tax sale process, and did not intend to allow a tax sale to be rendered null and void at any time simply by virtue of an adjacent landowner subsequently filing an affidavit of ownership. First, even if the adjacent landowner was never assessed taxes, section 446.35 implies that this should not, by itself, defeat a tax sale. Moreover, any such adjacent landowner can take advantage of the statutory redemption period.

Moreover, it appears that, without more, an adjacent landowner filing an affidavit of ownership does not establish any of the grounds enumerated in section 448.6 for defeating a tax deed. There would not be an "entire omission" to list the property if the property was merely listed in another's name. Finally, the limitations period established by the legislature is clearly intended to set title to rest after a specified time. Certainly, then, the filing of an affidavit of ownership after this time should not, by itself, serve to nullify the tax sale.

This interpretation of the statute, admittedly, puts some responsibility on the adjacent landowner to know of the passage of title upon the railroad abandonment. We believe, however, that the legislature intended this result. This assumption is also supported by presumptions established by decisions of the Iowa Supreme Court. For example, in Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982), the Court held that "[e]very citizen is assumed to know the law and charged with knowledge of the provisions of statutes." Id. at 33. If a layman can be charged, as in Millwright, with knowledge of the Rule Against Perpetuities, then it is not unreasonable to assume knowledge of chapter 327G. Likewise, in Husker News Co. v. Mahaska State Bank, 460 N.W.2d 476, 478 (Iowa 1990), the Court quoted with approval from a South Dakota case stating that "it is presumed that a property owner knows what and where his property is". Thus, we believe that the legislature intended that adjacent landowners would know if and when property passed to them by operation of chapter 327G, and would act accordingly.

In summary, when chapter 327G is applicable, the adjacent landowners become the owners of abandoned railroad right-of-way when the right-of-way is abandoned, and the county may tax these adjacent landowners accordingly. If the property is sold at a tax sale, the subsequent filing of an affidavit of ownership by an adjacent landowner does not necessarily invalidate the tax sale.

Sincerely yours,

Mark Hunacek

MARK HUNACEK
Assistant Attorney General

MH:mb

MOTOR VEHICLES; HIGHWAYS: Authority of county or city to impose weight restrictions. Iowa Code §§ 321.1, 321.236, 321.471, and 321.473 (1993). Local authorities do not have the authority to impose restrictions on the use of implements of husbandry on highways within their jurisdiction. Local authorities are authorized to regulate the use of highways under their jurisdiction as long as the rule bears a reasonable relationship to the preservation of the safety of the traveling public or the protection of highway surface and structures. In regulating trucks or other commercial vehicles pursuant to section 321.473, the definition of "truck" should be related to the type of problem the ordinance is designed to address and the restriction imposed by the local authority. A comma has been inadvertently placed between farm and feeds in section 321.473. The legislature clearly intended permits to be issued to persons moving feeds and fuel to any farm. (Burger to Lievens, Butler County Attorney, 11-8-93) #93-11-2(L)

November 8, 1993

Mr. Greg Lievens
Butler County Attorney
Butler County Courthouse
Allison, IA 50602

Dear Mr. Lievens:

You have requested an opinion of the Attorney General concerning the ability of a local authority to impose prohibitions or weight restrictions upon vehicles within its jurisdiction.

Specifically you have asked the following questions:

1. Pursuant to Iowa Code sections 321.471 and 321.473, is it possible for a local authority to impose prohibitions or weight restrictions on implements of husbandry at any time?

2. Notwithstanding Iowa Code section 321.471, can a local authority, pursuant to section 321.473, create permanent prohibitions or weight restrictions on commercial vehicles and trucks?

3. What definition should a local authority use for a "truck"?

4. Is the reference to "farm, feeds," in the last sentence of Iowa Code section 321.473 a typographical error? If not, what is the interpretation of its meaning in the context of section 321.473?

Local authorities have the right to enact ordinances affecting the operation of motor vehicles where additional regulations are not in conflict with chapter 321 of the Iowa

Code. Iowa Code § 321.236[1]. See City of Vinton v. Engledow, 258 Iowa 861, 140 N.W.2d 857 (1966). Local authorities have, within the reasonable exercise of their police power, the limited ability to restrict the use of highways under their jurisdiction as authorized in Iowa Code sections 321.471 and 321.473. Section 321.236(8). Pursuant to section 321.471, local authorities have the ability to temporarily regulate weight of vehicles where in their judgment traffic will seriously damage or destroy the street. This section specifically exempts implements of husbandry as defined in Iowa Code section 321.1(32). Prior to 1987, the exception had been limited to "farm tractors." However, the legislature decreased the authority of local officials by expanding the statutory exception to include "implements of husbandry."

Although section 321.473 authorizes local authorities to promulgate an ordinance or resolution to prohibit the operation of trucks or commercial vehicles on their highways, the statute does not permit a local authority to regulate implements of husbandry. Therefore, in answer to your first question, it is the opinion of this office that local authorities do not have the authority to impose restrictions on the use of implements of husbandry on highways within their jurisdiction.

Your second question asks whether local authorities, pursuant to section 321.473, can create permanent prohibitions or weight restrictions on trucks and commercial vehicles. Section 321.473 states:

> Local authorities with respect to highways under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

The Iowa Supreme Court recently upheld a constitutional challenge to a city ordinance placing a seven-ton weight restriction on certain gravel roads. The ordinance had been enacted in order to help maintain the roads. It involved a street-by-street limitation, rather than a blanket limit on all roads. Des Moines Metro. Area v. City of Grimes, 495 N.W.2d 746

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[1] All statutory references herein are to the 1993 Code of Iowa unless otherwise noted.

(Iowa 1993). The court, relying upon section 321.473, found that a city had a statutory right to impose limitations on the weight of vehicles using its streets. Id. at 749. In answer to your second question, it is the opinion of this office that local authorities are authorized to regulate the use of highways under their jurisdiction as long as the rule bears a reasonable relationship to the preservation of the safety of the traveling public or the protection of highway surface and structures.

Your third question concerns which definition of truck should be used by a local authority when imposing restrictions pursuant to section 321.473. A local authority may prohibit the operation of trucks or other commercial vehicles on highways under its jurisdiction. The Code defines commercial vehicles, but does not provide a definition of truck generally. The Iowa Code defines three types of trucks: section 321.1(35) (light delivery truck, panel delivery truck or pickup); section 321.1(41) (motor truck); and section 321.1(76) (special truck). In enacting its ordinance, the City of Grimes prohibited all vehicles exceeding seven tons from operating on certain roads. Id. at 748. It did not define the type of vehicle it chose to regulate. Therefore, it appears that a specific definition of truck is not critical to the local ordinance. If a local authority does intend to define the word "truck," it is the opinion of this office that the appropriate definition of "truck" should be related to the type of problem the ordinance or regulation is designed to address and the restriction imposed by the local authority.

Your final question concerns a possible error in the last sentence of section 321.473. Section 321.473 states: ". . . such authorities shall issue such permits upon a showing that there is a need to move to market farm produce or to move to any farm, feeds or fuel for home heating purposes." (Emphasis added.) A similar portion of section 321.471(1) allows a local authority to issue a permit upon a showing of need to "move to any farm feeds or fuel." In 1969, the legislature amended section 321.471 by adding the following: "move to market produce of the type subject to rapid spoilage and loss of value." 1969 Iowa Acts, chapter 1153. Subsequently, the legislature amended section 321.471 again by adding: "or to move to any farm feeds or fuel for home heating purpose." 1973 Iowa Acts, chapter 220. In 1977, the legislature amended section 321.473 by adding language similar to section 321.471. 1977 Iowa Acts, chapter 105. The comma in section 321.473 appears in the original act. The polestar of statutory interpretation is legislative intent. State v. Conner, 292 N.W.2d 682, 684 (Iowa 1980). Punctuation is seldom a highly persuasive factor in statutory construction and will not defeat evident legislative intent. State v. Lohr, 266

N.W.2d 1, 4 (Iowa 1978). It appears the legislature intended to allow local authorities to issue permits allowing a person to move feeds or fuel for home heating purposes to any farm. This interpretation is consistent with the clause immediately preceding which authorizes permits to be issued for moving "to market farm produce." There is no comma following market. It is the conclusion of this office that a comma has been inadvertently placed between farm and feeds. The legislature clearly intended permits to be issued to persons moving feeds and fuel to any farm.

Sincerely,

Julie Burger

JULIE BURGER
Assistant Attorney General

JB:vr

COUNTIES; TAXATION: Property Tax Limitation Applicable To Local Emergency Management Commission. Iowa Code §§ 29C.17, 331.422, 331.424(1)(p), 331.427(2)(a), 444.25 (1993). The property tax limitation provisions of section 444.25 do apply to the county-wide special levy authorized under section 29C.17 to fund the local emergency management commission. (Miller to Richards, Story County Attorney, **11-16-93) #93-11-4(L)**

November 16, 1993

Mary E. Richards
Story County Attorney
900 6th Street
Nevada, Iowa 50201

Dear Ms. Richards:

The Attorney General has received your opinion request concerning the interaction between Iowa Code sections 29C.17 and 444.25 (1993). The legislature created a county-wide special levy under section 29C.17 whereby the county board of supervisors could utilize such a levy as one means for funding the newly created local emergency management agency under chapter 29C. Subsequent to the passage of section 29C.17, the legislature adopted section 444.25 which places a property tax limitation on each county for fiscal years beginning July 1, 1993 and 1994 by prohibiting the amount of property tax dollars certified by the county from exceeding the previous fiscal year.

The crux of your question is whether the property tax limitation provisions of section 444.25 apply to the county-wide special levy authorized under section 29C.17. For reasons stated in this opinion, the property tax limitation provisions do apply to section 29C.17.

In 1992, the legislature substantially amended chapter 29C in order to reorganize the disaster services division of the department of public defense, including renaming and making certain administrative changes to the local emergency management commissions and managers. See 1992 Iowa Acts, ch. 1139, preamble. As part of this reorganization, section 29C.9 established a local emergency management commission. This commission succeeded the joint county-municipal disaster services and emergency planning administration provided for in section 29C.9 (1991). The joint administration, as part of its duties, was required under section 29C.9(2)(c) (1991) to adopt an annual budget for administrative expenses, which would include "the

operating budget, personnel, salaries and compensation and other costs for operating a joint administration." Op.Att'yGen. #92-2-7. Section 29C.9(2)(c) (1991) also provided that "all expenditures shall be subject to the provisions of chapter 24, and the chairperson or vice chairperson of the joint administration are declared to be the certifying officials."

In Op.Att'yGen. #92-2-7, it was found that the joint administration was a "certifying board" under section 24.2(3). Because of this, the joint administration had the authority to adopt a budget and certify that budget to the county board of supervisors under section 29C.9(2)(c) and chapter 24. As opined by the Attorney General, "the board of supervisors, pursuant to ch. 24 and § 331.401(1)(k), then levies sufficient taxes to satisfy the budget certified to it by the joint administration. These taxes, as with other county-wide taxes, would be levied against all property within the county. . . ." Op.Att'yGen. #92-2-7.

In amending chapter 29C in 1992, the legislature did not significantly alter the budget and levying mechanisms in place under the prior joint administration. Section 29C.17(1), as amended, states that "The commission shall be the fiscal authority and the chairperson or vice-chairperson of the commission is the certifying official." (Emphasis added.) Section 29C.17(5), further provides that:

> Subject to chapter 24, the commission shall adopt, certify, and submit a budget, on or before February 28 of each year, to the county board of supervisors and the cities for the ensuing fiscal year which will include an itemized list of the number of emergency management personnel, their salaries and cost of personnel benefits, travel and transportation costs, fixed costs of operation, and all other anticipated emergency management expenses. . . .

As under the previous statute, the local emergency management commission certifies its budget to the county board of supervisors which then has the responsibility to levy the taxes needed to satisfy the budget. The statute does not provide for the commission to be an independent taxing district with the authority to levy taxes apart from the county board of supervisors.

In the same legislation that amended ch. 29C, the legislature amended both sections 331.424(1)(p) and 331.427(2)(a). The effect of these two additional changes in

the law is that the emergency management tax levy is now part of the county supplemental levy for general county services. Thus, it is part of the levy made pursuant to section 331.422(1). Additionally, the funds raised for this purpose are part of the county general fund for expenditure purposes pursuant to section 331.427(2)(a).

Subsequent to the reorganization of chapter 29C, the legislature passed section 444.25. Section 444.25(1), states in part, the following:

> The maximum amount of property tax dollars which may be certified by a county for taxes payable in the fiscal year beginning July 1, 1993, shall not exceed the amount of property tax dollars certified by the county for taxes payable in the fiscal year beginning July 1, 1992, and the maximum amount of property tax dollars which may be certified by a county for taxes payable in the fiscal year beginning July 1, 1994, shall not exceed the amount of property tax dollars certified by the county for taxes payable in the fiscal year beginning July 1, 1993, for each of the levies for the following. . . .
>
> a. General county services under section 331.422, subsection 1.
> b. Rural county services under section 331.422, subsection 2.
> c. Other taxes under section 331.422, subsection 4.

Section 444.25(3) sets forth the following exceptions in which the county property tax limitations do not apply:

> a. Debt service to be deposited into the debt service fund pursuant to section 331.430 or section 384.4.
> b. Taxes approved by a vote of the people which are payable during the fiscal year beginning July 1, 1993, or July 1, 1994.
> c. Hospitals pursuant to chapters 37, 347, and 347A.
> d. Unusual need for additional moneys to finance existing programs which would provide substantial benefit to city or county residents or compelling need to finance new

> programs which would provide substantial benefit to city or county residents. . . .

Levies to fund the budget for the local emergency management commission do not fall under these enumerated exceptions but rather, as we stated above, are made pursuant to section 331.422(1).

Since it is required that the budget of the local emergency management commission is to be certified, and thereafter the taxes are levied by the county board of supervisors, with the resulting levy included in the total amount of general services property tax levied by the county under section 331.422(1), it is part of the levy for purposes of determining the property tax limitation. The legislature provided several exceptions to the property tax limitation provisions, but they did not include funding for the local emergency management commission. Therefore, we conclude that the county property tax limitation provisions of section 444.25 do apply to section 29C.17 and that the two sections are not in conflict.

Sincerely,

James D. Miller

JAMES D. MILLER
Assistant Attorney General

JDM:cml

PUBLIC OFFICIALS; COUNTIES AND COUNTY OFFICERS: Refusal to accept salary increase. Iowa Code §§ 331.215(1), 331.907(1) (1993). A member of a board of supervisors may not decline to receive an increase in salary established or provided by law. Any agreement to accept a salary different than that established by law is against public policy. 1934 Op.Att'yGen. 58 is overruled. (Krogmeier to Lytle, Van Buren County Attorney, 11-22-93) #93-11-6(L)

Richard H. Lytle
Van Buren County Attorney
905 Fourth Street
Keosauqua, IA 52565

Dear Mr. Lytle:

You have requested an opinion of this office with regard to whether a member of a county board of supervisors can decline to receive an increase in salary authorized by the compensation board and approved by the board of supervisors. For the reasons set forth in this opinion, we conclude that a member of the board of supervisors may not decline to receive an increase in salary that is established as provided by law.

At least as early as 1879, the Iowa Supreme Court held that a candidate for public office who, for the purpose of influencing voters, pledges himself, if elected, to pay into the treasury all of the fees of the office allowed by law in excess of a certain sum annually, was guilty of offering a bribe. Carrothers v. Russell, 53 Iowa 346, 5 N.W. 499 (1879). See also, Glavey v. U.S., 182 U.S. 595, 609, 21 S. Ct. 891, ___, 45 L. Ed. 2d 1247, 1253-54 (1901) (supports view by holding that agreement by appointee to accept less compensation than allowed was against public policy). It has also been generally held to be against public policy for a public officer to agree to be paid a salary different than that established pursuant to a statutory salary process. 63A Am. Jur. 2d Public Officers and Employees § 466; 4 E. McQuillan, Municipal Corporation, § 12.191 (1992 rev. ed.).

The Iowa Supreme Court, in Lemper v. City of Dubuque, 237 Iowa 1109, 24 N.W.2d 470 (1946), held unenforceable as contrary to public policy an agreement between a city police matron and the employing city whereby she agreed to accept less than the statutorily authorized salary. In that case, the Court stated:

> . . . In Du Bois v. City of Oskaloosa, 229 Iowa 109, 111-113, 294 N.W. 302, 303, we said: "The court has repeatedly recognized

> that the amount of compensation and the time or times for payment thereof for a public officer are not determined from the contract of employment but solely from the legislative provisions applicable to the payment of such compensation. (Citing decisions.) * * * We have held that a contract, which contemplates the payment of more salary than specified by law, is against public policy. Dodson v. McCurnin, 178 Iowa 121, 160 N.W. 927, L.R.A. 1917C, 1084. We have also held that a contract, which contemplates the payment of less salary than the law specifies, is likewise contrary to public policy. . . .

A 1934 opinion from this office, without discussing any statutory or case authority, concluded that the law in this state did not prohibit county officials from voluntarily reducing their salaries. 1934 Op.Att'yGen. 58. It should be noted that this opinion was issued prior to the decision of the Supreme Court in Lemper v. City of Dubuque. As this earlier opinion appears to be clearly erroneous in light of current case law, it is hereby overruled.

The method by which salaries of a county supervisor and other county officials are determined are set forth in Iowa Code sections 331.215(1) and 331.907(1). The legislature has provided for the appointment of a county compensation board and a statutory process for the determination of county elected officials' salaries. Once this process has been completed, the salary of a county supervisor is established and the payment of a salary less than or different than that established through the statutory process is against public policy and inconsistent with the case law discussed above.

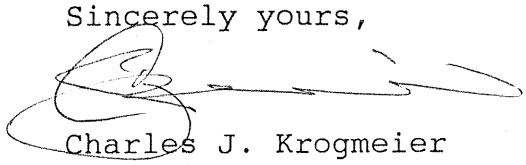
We are aware that candidates for public office may make political promises to the electorate regarding their salary if elected. These statements have certain First Amendment protections. In Brown v. Hartlage, 456 U.S. 45, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982), the Court ruled unconstitutional in violation of the First Amendment application of a corrupt practices statute to prohibit a candidate from promising to reduce the salary of the office for which he was running. Id. at 61, 71 L. Ed. 2d at 754, 102 S. Ct. at 1533. The Court acknowledged that some kinds of promises made by candidates may be declared illegal without constitutional difficulty where there are private arrangements between the candidate and the voter. Factors to be assessed in deciding whether a promise is a private arrangement include the nature of the promise, the conditions upon which it is given, the circumstances under which it is made,

the size of the audience, and the nature and size of the group to be benefited. Id. at 56-57, 71 L. Ed. 2d at 742-43, 102 S. Ct. at 1530-31. A promise to reduce the salary of the office announced openly at a press conference, however, is subject to First Amendment protection. Id. at 57-58, 71 L. Ed. 2d at 743-44, 102 S. Ct. at 1530-31.

It should be noted that elected officials have from time to time decided to return to the public treasury part or all of an annual salary increase that is otherwise awarded by the legislative or statutory process. This act is merely a gift from the individual to the public treasury. Any county official is free to voluntarily make a gift to the county treasury of part or all of their salary increase.

In summary, a member of a board of supervisors may not decline to receive an increase in salary established or provided by law. Any agreement to accept a salary different than that established by law is against public policy.

Sincerely yours,



Charles J. Krogmeier
Executive Deputy Attorney General

SCHOOLS: Suspension of transportation; cancellation of classes. Iowa Code §§ 285.1(1), 285.1(4), 285.1(8) (1993). Iowa Code section 285.1(8) allows a school board to suspend student transportation services only if the board determines that weather, road, or other conditions make running the buses unadvisable and the district schools are closed. (Scase to Connolly, 11-24-93) #93-11-8(L)

November 24, 1993

The Honorable Mike Connolly
State Senator
3458 Daniels Street
Dubuque, IA 52002

Dear Senator Connolly:

You have requested an opinion from this office concerning the authority of a local school board to cancel school due to inclement weather or unsafe road conditions. Specifically, you ask whether Iowa Code chapter 285 "allows a school board to close schools when the school buses cannot run."

Several provisions of Iowa Code chapter 285 are relevant to resolution of this inquiry. Iowa Code section 285.1(1) (1993) requires the board of directors of every school district to provide transportation, either directly or through cost reimbursement, for all resident pubic elementary school pupils who live more than two miles from their attendance center and all resident public high school students who live more than three miles from their attendance center. Section 285.1(1) further provides that school boards "in their discretion may provide transportation for some or all resident pupils attending public school or pupils who attend nonpublic schools who are not entitled to transportation."

Iowa Code sections 285.10(2) and 285.11 require local school boards to establish, maintain and operate bus routes for the transportation of pupils. Code section 285.1(1), when read in conjunction with sections 285.10(2) and 285.11, obligate a school district which directly provides transportation to its pupils by maintaining and operating bus routes to operate its buses on designated routes when district schools are open.

Subsequent provisions within Code section 285.1 allow school boards to limit or cancel bus services under defined circumstances. Iowa Code section 285.1(4) allows school boards

to order operation of school buses on limited routes as necessary, providing as follows:

> In all districts where unsatisfactory roads or other conditions make it advisable, the board at its discretion may require the parents or guardians of public and nonpublic school pupils to furnish transportation for their children up to two miles to connect with vehicles of transportation. The parents or guardians shall be reimbursed for such transportation by the boards of the resident districts at the rate of twenty-eight cents per mile per day, one way, per family for the distance from the pupil's residence to the bus route.

Iowa Code § 285.1(4) (1993). Section 285.1(8) directly addresses suspension of transportation services, providing as follows:

> Transportation service may be suspended upon any day or days, due to inclemency of the weather, conditions of roads, or the existence of other conditions, by the board of the school district operating the buses, when in their judgment it is deemed advisable and when the school or schools are closed to all children.

Iowa Code § 285.1(8) (1993).

We begin our analysis by noting that school districts are subject to "Dillon's rule." The only powers which may be exercised by a school district are those expressly granted or necessarily implied from the statutes by which they are created and governed. See Pleasant Valley Ed. Assn. v. School District, 449 N.W.2d 894, 897 (Iowa App. 1989); Silver Lake Consol. School Dist. v. Parker, 238 Iowa 984, 990, 29 N.W.2d 214, 217-18 (1947). This office has previously recognized that "a school board has the right and the power to promulgate and enforce rules to ensure safety and welfare of students who are transported to and from school and school activities by the school district." 1984 Op.Att'yGen. 81; see also Iowa Code §§ 274.1, 279.8, 285.10(2) (1993). School boards may not, however, adopt rules which conflict with requirements of state law.

The provisions of chapter 285 require school districts to provide pupils with transportation and set forth specific circumstances under which school boards may limit bus routes or suspend transportation due to inclement weather and road conditions. If a school board determines that portions of the

standard transportation routes are unsafe, bus routes may be temporarily limited pursuant to section 285.1(4). In recent years, conditions of gravel roads have required several districts across the state to limit bus transportation to hard-surface roads on certain days.

School boards may also suspend student transportation services entirely when weather, road or other conditions prevent safe operation of school buses even on limited routes. Section 285.1(8) allows a school board to suspend school transportation services only when the suspension is "deemed advisable" by the board and "the school or schools are closed to all children."

While section 285.1(8), by using the term "may," appears to grant discretion to local school boards to suspend transportation services, this discretion is sharply curtailed by the pre-conditions imposed. "Ordinarily, the word 'and' is used as a conjunctive, requiring satisfaction of both listed conditions." Casteel v. Iowa Dept. of Transportation, 395 N.W.2d 896, 898 (Iowa 1986), citing Ahrweiler v. Board of Supervisors, 226 Iowa 229, 235, 283 N.W. 889, 892 (1939). Applying this basic principle of statutory construction to the clear language of section 285.1(8), we conclude that this subsection allows a local school board to suspend school transportation only if both of the listed conditions are met, the suspension must be deemed advisable and district schools must be closed.

This conclusion is supported by the legislative history of Code chapter 285. The statutory language allowing suspension of transportation services was added to chapter 285 in 1949. 1949 Iowa Acts, ch. 116, § 1. In its original form, this provision allowed for the suspension of bus service when suspension was "deemed advisable" by the school board. Id. In 1957 the legislature added the clause "and when the school or schools are closed to all children" to this statute. 1957 Iowa Acts, ch. 128, §3. We note that in 1957, the use of school buses was restricted to "transporting pupils to and from school and to and from extra curricular activities sponsored by the school." Iowa Code § 285.11(7) (1954). At that time, Code chapter 285 did not allow the transportation of nonpublic school students.

Because public school student transportation was the only appropriate use for public school buses in 1957, it is illogical to presume that the buses would run if school was closed. A school board could have, however, under the pre-1957 version of section 285.1(8), decided to suspend transportation while leaving the schools open for students not requiring transportation. It appears that the phrase "and when the school or schools are closed to all children" was added as a second prerequisite to the suspension of bus transportation to prevent this from occurring.

The inclusion of the school closing requirement as a pre-condition to suspending transportation services is a somewhat awkward method of addressing this issue. In its present form, section 285.1(8), while granting school boards the discretion to suspend transportation services, allows this discretion to be exercised only if district schools are closed, even though we can safely assume that the buses do not run when schools are closed. Breaking this process into two steps, the first granting school boards the discretion to suspend transportation when weather or road conditions made bus travel unsafe and the second requiring school boards to close the schools when bus transportation is suspended would seem more logical than making the closing of schools a prerequisite to suspending transportation. This fact does not, however, alter our interpretation of the current statute.

Principles of statutory construction and the legislative history of chapter 285 lead us to conclude that Iowa Code section 285.1(8) allows a school board to suspend student transportation services only if the board determines that weather, road, or other conditions make running the buses unadvisable and the district schools are closed.

Sincerely,

Christie J. Scase

CHRISTIE J. SCASE
Assistant Attorney General

CJS:rd

COUNTIES; LABOR: Overtime Pay; Salaries of Deputy Sheriffs. Iowa Code § 331.904(2) (1993); 29 U.S.C. § 207 (1993); 29 C.F.R. § 553 (1993). Limitations imposed on salaries of deputy sheriffs by Iowa Code section 331.904(2) do not violate the federal Fair Labor Standards Act. State statute providing ceilings on the total annual compensation of deputy sheriffs is not preempted by the overtime pay provisions of the Fair Labor Standards Act because 1) the FLSA specifically contemplates state regulation, 2) it is possible to comply with both, and 3) the state statute does not operate to frustrate or impair the objectives of the FLSA. The limitation on total annual compensation in Iowa Code section 331.904(2) does not provide a defense to FLSA overtime pay violations. Conversely, the FLSA does not provide a defense to a violation of Iowa Code section 331.904(2) in a situation where it is possible to comply with both. (Marek to Gettings, State Senator, 11-29-93) #93-11-9(L)

November 29, 1993

The Honorable Donald E. Gettings
513 Lynwood Circle
Ottumwa, Iowa 52501

Dear Senator Gettings:

You have requested an opinion of the Attorney General concerning the potential conflict between the overtime pay provisions of the federal Fair Labor Standards Act and the limitations imposed on salaries of deputy sheriffs by Iowa Code section 331.904(2). We understand your question to be whether the salary limitations in section 331.904(2) violate the Fair Labor Standards Act. For the reasons that follow, we believe that they do not.

The overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. section 207, were designed to provide minimum protections to individual workers "and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work.'" Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 739, 101 S.Ct. 1437, ____, 67 L.Ed.2d 643, 653 (1980)(quoting 81 Cong 4983 (1937))(message of President Roosevelt). By enacting the FLSA, Congress was protecting workers from "'the evil of overwork as well as underpay."' Id.

Prior to 1985, the FLSA was inapplicable to employees of state and local governments. With the decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 328, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), and the subsequent legislative and administrative amendments to FLSA, local governmental employees became subject to the overtime pay provisions. Regulations were promulgated applying the maximum hour provisions of the FLSA to law enforcement officers for "tours of duty" rather than traditional "work weeks." See 29 C.F.R. § 553.230 (overtime compensation at a rate of one and one half times the base rate applies for hours greater than 171 in a twenty-eight day "tour of duty.") In response to the financial burden placed on local governments by the requirement to pay overtime compensation, the FLSA was further amended to permit limited amounts of compensatory time to accrue in lieu of paid overtime. See 29 C.F.R. § 553.24 (law enforcement officers may accumulate up to 480 hours of compensatory time).

As noted in your request for an opinion, the overtime pay provisions of FLSA have caused financial hardship to local governments attempting to cope with increased crime rates. For many sheriffs' offices in rural counties, however, the increased use of overtime compensation is still less expensive than the hiring of additional deputies to work fewer hours.

A problem arises when the increased use of overtime compensation for deputy sheriffs has the effect of causing the total annual compensation of the deputies to equal or exceed the total compensation of the sheriff. Iowa Code section 331.904(2) provides:

> The annual base salary of a first or second deputy sheriff shall not exceed eighty-five percent of the annual base salary of the sheriff. The annual base salary of any other deputy sheriff shall not exceed the annual base salary of the first or second deputy sheriff except that in counties over two hundred fifty thousand population, the annual base salary of any additional deputies shall not exceed seventy-five percent of the annual base salary of the sheriff. **The total annual compensation including the annual base salary, overtime pay, longevity pay, shift differential pay, or other forms of supplemental pay and fringe benefits received by a deputy sheriff shall be less than the total annual compensation including fringe**

> **benefits received by the sheriff.** As used in this subsection, "base salary" means the basic compensation excluding overtime pay, longevity pay, shift differential pay, or other supplemental pay and fringe benefits.

Iowa Code § 331.904(2)(emphasis added).

The authority of the federal government to regulate working conditions of employees emanates from the commerce clause of the United States Constitution. Where a direct conflict exists between state and federal action affecting interstate commerce, state legislation yields to federal legislation. United Workers v. Laburnam Construction Corp., 347 U.S. 656, 665, 74 S.Ct. 883, ___, 98 L.Ed.2d 1025, 1031 (1954).

To determine if a direct conflict exists between the FLSA and state regulation of workers' wages, courts first consider whether state regulation is constitutionally or statutorily precluded. Doctors Hospital, Inc. v. Recio, 558 F.2d 619, 622 (1st Cir. 1977). State regulation of hours and wages is specifically contemplated by the FLSA, which provides that the FLSA does not excuse non-compliance with state law. See, e.g. 29 U.S.C. § 218(a).

Courts next consider whether it is possible to comply with state law without triggering an FLSA enforcement action. Doctors Hospital, Inc. v. Recio, 558 F.2d at 622. In the case of Iowa Code section 331.904(2), compliance is possible through the regulation of the amount of overtime hours worked on an annual basis.

Finally, courts consider whether the purpose of the state law operates to frustrate or impair the objectives of the FLSA. Id. at 623. The objectives of the FLSA include the elimination of excessive hours and substandard wages. Id. The statutory ceiling on salaries of deputy sheriffs specifically addresses overtime pay restrictions as part of total annual compensation. See Iowa Code § 331.904(2) (definition of total annual compensation). Assuming that wages of deputy sheriffs exceed the FLSA minimum, the ceiling on total annual compensation in Iowa Code section 331.904(2) effectively reduces "excessive hours" without imposing "substandard wages."

Though the Iowa ceiling on the annual compensation of deputy sheriffs may have the effect of both reducing the annual compensation of individual employees and increasing the personnel expenses for county law enforcement, the ceiling does not violate

the overtime pay provisions of the FLSA. Compliance with both provisions is possible by curtailing the total number of overtime hours worked on an annual basis. See Smith v. Batchelor, 832 P.2d 467, 471 (Utah 1992). Compliance with the state compensation ceiling does not frustrate the FLSA goal of "maintaining the minimum standard of living necessary for the health, efficiency, and general well-being of workers." Id.; 29 U.S.C. § 202(a).

This opinion is not meant to suggest that the FLSA and the state ceiling on deputy sheriff compensation may always operate in harmony. If, in a given year, excessive hours are worked by a deputy sheriff so that payment at the overtime rate will cause the total compensation to match that of the sheriff, Iowa Code section 331.904(2) does not provide a defense to a violation of the FLSA overtime pay provisions. To the extent that the state and federal provisions result in a direct conflict in a given situation, the federal FLSA must prevail.

Conversely, the FLSA will not excuse a violation of the compensation ceiling imposed by Iowa Code section 331.904(2). Again, assuming that the wages paid meet or exceed the requirements of the FLSA, 29 U.S.C. section 218(a) specifically provides that the FLSA does not excuse non-compliance with state law.

The practical effect of this opinion is that county sheriffs may be required to hire more deputies to work regular hours rather than hiring fewer deputies to work greater amounts of overtime hours. In your request for an opinion, you specifically cite the example of a sheriff with three deputies who is facing financial hardship because of attempts to comply with the mandates of state and federal law. The FLSA provides an exemption from overtime pay provisions for law enforcement agencies with fewer than five employees, excluding the elected official. 29 C.F.R. § 553.200.

In summary, the deputy sheriff salary limitations in Iowa Code section 331.904(2) do not violate the federal Fair Labor Standards Act. State statute providing ceilings on the total annual compensation of deputy sheriffs is not preempted by the overtime pay provisions of the Fair Labor Standards Act because 1) the FLSA specifically contemplates state regulation, 2) it is possible to comply with both, and 3) the state statute does not operate to frustrate or impair the objectives of the FLSA. The limitation on total annual compensation in Iowa Code section 331.904(2) does not provide a defense to FLSA overtime pay violations. Conversely, the FLSA does not provide a defense to a

violation of Iowa Code section 331.904(2) in a situation where it is possible to comply with both.

Sincerely,

Douglas R. Marek

DOUGLAS R. MAREK
Assistant Attorney General

COURTS; INTEREST: Interest charges on fines and criminal court costs. Iowa Code § 909.6 (1993), 1993 Iowa Acts, ch. 110, § 13. Interest accrues only on unsatisfied fines imposed by a judge. Interest does not accrue on unpaid criminal court costs or on unpaid scheduled fines. (Humphrey to Vander Hart, Buchanan County Attorney, 12-2-93) #93-12-1(L)

December 2, 1993

Allan W. Vander Hart
Buchanan County Attorney
P. O. Box 68
Independence, Iowa 50644

Dear Mr. Vander Hart:

You have requested an opinion of the Attorney General regarding interest charges under section 13 of Senate File 370, 75th G.A., 1st Sess. (Iowa 1993), now published as 1993 Iowa Acts, ch. 110. Section 13 of chapter 110 amended Iowa Code section 909.6 as follows:

> Sec. 13. Section 909.6, Code 1993, is amended by adding the following new unnumbered paragraphs:
>
> NEW UNNUMBERED PARAGRAPH. If a court imposes a fine on an offender, the court shall impose interest charges on any amount remaining unsatisfied from the day after sentencing at the rate provided in section 535.3.
>
> NEW UNNUMBERED PARAGRAPH. At the time of imposing sentence, the court shall inform the offender of the amount of the fine and that the judgment includes the imposition of a criminal surcharge, court costs, and applicable fees. The court shall also inform the offender of the duty to pay the judgment in a timely manner and that interest will be charged on unsatisfied judgments. (Emphasis added.)

You have presented three issues for consideration:

1) Whether ch. 110, § 13, requires, as a condition before interest can run on an unpaid fine, that there must be a "court imposed" fine as opposed to a "statute imposed" scheduled fine;

2) Whether interest accrues on unpaid scheduled fines; and

3) Whether interest accrues on unpaid court costs when there has been no fine imposed by the court.

The polestar of statutory construction is legislative intent. Office of Consumer Advocate v. Iowa State Commerce Comm'n., 376 N.W.2d 274 (Iowa 1985). The goal in construing a statute is to ascertain the intent and give it effect. Spilman v. Board of Directors of Davis County Community School Dist., 253 N.W.2d 593 (Iowa 1977). An interpretation of a statute must begin with the language of the statute. Mallard v. U.S. Dist. Court for Southern Dist. of Iowa , 488 U.S. 19, 109 S.Ct. 278, 102 L.Ed.2d 186 (1989). If fairly possible, unreasonable or absurd consequences should be avoided. Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968). In interpreting a statute, consideration must be given to the entire act, and the statute should be given a sensible, practical, workable and logical construction. Barkema v. Clement Auto and Truck, Inc., 449 N.W.2d 348 (Iowa 1989). Finally, statutory language, unless it would frustrate the intent of the legislature, is to be given its usual and ordinary meaning. State v. Bartusek, 383 N.W.2d 582 (Iowa 1986).

When the amendments to Iowa Code section 909.6 are read along with the other parts of chapter 110, it is clear that the legislature intended to collect interest on unsatisfied criminal judgments in order to encourage timely payment of any fine(s) ordered in the judgment and impose an additional interest cost on those who fail to make timely payments of money owed the state.

Your first question whether there is a legal difference between a court imposed fine and a statute imposed or scheduled fine. The Iowa Supreme Court has said that a fine is a pecuniary punishment, a sentence, pronounced by the court for the violation of a criminal law. See Marquart v. Maucker, 215 N.W.2d 278, 282 (Iowa 1974). The amount of the fine may be fixed by law or left in the discretion of the court. Id.

Iowa Code section 909.1 provides that a court may impose a fine upon a verdict or plea of guilty of any public offense from

which a fine is authorized. Iowa Code section 909.6 provides that a court imposed fine is a judgment.

Iowa Code section 805.9(1) provides that in cases of scheduled violations, the defendant may sign the admission of violation on the citation and such admission constitutes a conviction. Under Iowa Code section 805.9(3), if a defendant admits the violation, the admission constitutes a judgment in the amount of the scheduled fine. We found no authority to support a conclusion that there is a legal difference between a court imposed fine and a scheduled fine imposed by statute. Both result in judgments in favor of the state.

However, when construing statutes we must search for the legislative intent as shown by what the legislature actually said, rather than what it should or might have said. Iowa R. App. P. 14(f)(13). In re Clay, 246 N.W.2d 263 (Iowa 1976); State v. Bond, 493 N.W.2d 826 (Iowa 1992) [Courts may not, under the guise of construction, extend or enlarge the terms of a statute.]; State v. Pilcher, 242 N.W.2d 348 (Iowa 1976); Cartee v. Brewer, 265 N.W.2d 730 (Iowa 1978) (failure to provide for subject matter in express terms) [The rule of construction favoring liberal interpretation of remedial legislation must yield to the clear language of the statute.]; Luter v. State, 343 N.W.2d 490, 493 (Iowa 1984) [In enacting a statute, a body is presumed to know the usual meaning ascribed by the courts to language and to intend that meaning unless the context shows otherwise.]; State v. Wilson, 287 N.W.2d 587 (Iowa 1980).

The plain language of amended section 909.6 provides that "the court" shall impose interest on unsatisfied judgments. "The words 'court' and 'judge,' or 'judges,' are frequently used in statutes as synonymous. When used with reference to orders made by the court or judges, they are to be so understood." Black's Law Dictionary 353 (6th ed. 1990). Consequently, the phrase "the court shall impose interest" has legal significance since it is synonymous with the phrase "the judge shall impose interest."

Thus, in answer to your first question, it is our opinion that amended section 909.6 requires, as a condition precedent to the accrual of interest on an unpaid fine, that there must be a "court imposition" of such fine.

A fortiori, the answer to your second question is no. Since scheduled fines are self executing, a "judge" does not impose the fine. Moreover, the legislation expressly states that the court shall inform the offender that interest will be charged on

unsatisfied judgments. It is our opinion that this notice provision requires the court's involvement. Therefore, an unpaid scheduled fine does not accrue interest under chapter 110, section 13.

Lastly, it is our opinion that interest does not accrue on unpaid court costs when there has been no fine imposed by the court. While the language of amended section 909.6 states that a criminal judgment includes court costs and also states that interest will be charged on unsatisfied judgments, other provisions in the same legislation indicate that court costs and other applicable fees are separate from fines for purposes of determining interest and priority of payment.

Section 8 of chapter 110 creates a new Code section 602.8107 relating to the collection of fines, penalties, fees, court costs, surcharges, interest and restitution. Subsection 2 of new Code section 602.8107 provides:

> 2. Payments received under this section shall be applied in the following priority order:
>
> a. Fines or penalties plus any interest due on unsatisfied judgments and criminal penalty surcharges plus interest due on unsatisfied amounts.
>
> b. Victim restitution.
>
> c. Court costs.
>
> d. Court-appointed attorney fees or public defender expenses.

This priority order for application of funds received by district court clerks clarifies the distinction between interest on unsatisfied judgments and court costs. It thus appears that the legislature intended that court costs, while part of the judgment entered in a criminal case, are nonetheless not included in the judgment for purposes of computing and collecting interest. Thus, it does not appear that interest accrues on court costs when no fine has been imposed.

In summary, it is our opinion that interest accrues only on unsatisfied fines imposed by a judge. Interest does not accrue on unpaid criminal court costs or on unpaid scheduled fines.

Sincerely,

R. ANDREW HUMPHREY
Assistant Attorney General

RAH:kap

STATE OFFICERS AND DEPARTMENTS; AREA AGENCIES ON AGING: Instrumentalities of the State Defined. Iowa Code §§ 12B.10, 12B.10A, B, C, 12C.1, 12C.4 and 231.32(2) (1993). Private, nonprofit entities designated as area agencies on aging are both "instrumentalities of the state" and "quasi-public state entities" within the definition of "public funds" set forth in Iowa Code section 12C.1(2)(b) (1993), and, as such, are subject to the investment standards and restrictions set forth in chapter 12B and the depository provisions set forth in chapter 12C. (Senneff to Murphy, State Representative, 12-7-93) #93-12-3(L)

December 7, 1993

The Honorable Pat Murphy
State Representative
Thirty-Sixth District
1770 Hale Street
Dubuque, IA 52001

Dear Representative Murphy:

You have requested an opinion of the Attorney General as to whether the public funds investment standards and deposit restrictions of Senate File 2036, now codified as Iowa Code chapters 12B and 12C (1993), apply to area agencies on aging. Specifically, you raised the following questions:

1. Does Senate File 2036 (1992 Acts ch. 1156) apply to Iowa area agencies on aging that are private, non-profit corporations?

2. If so, does Senate File 2036 apply to deposits of funds received from the federal government or to funds from contributions by meal recipients, or does it apply only to funds appropriated by the Iowa legislature for the area agencies on aging?

3. If applicable, does Senate File 2036 prohibit deposit of agency funds in non-Iowa chartered banks or other types of financial institutions outside the State of Iowa, even if such deposits are insured by agencies or instrumentalities of the federal government?

4. If applicable to federal funds and/or contributions, does Senate File 2036 unconstitutionally interfere with interstate commerce; with respect to federal funds received by area agencies on aging, is Senate File 2036 preempted by federal regulations on the financial management of recipients of funds under the Older Americans Act?

In order to determine whether the amendments set forth in Senate File 2036, now codified as Iowa Code chapters 12B and 12C (1993), are applicable to area agencies on aging, it is necessary to first look at the definition of the term "public funds." "Public funds" is defined in Iowa Code Section 12C.1(2)(b) (1993) as follows:

> *"Public funds"* and *"public deposits"* mean the moneys of the state or a political subdivision or instrumentality of the state including a county, school corporation, special district, drainage district, unincorporated town or township, municipality, or municipal corporation or any agency, board, or commission of the state or a political subdivision; any court or public body noted in subsection 1; a legal or administrative entity created pursuant to chapter 28E; an electric power agency as defined in section 28F.2; and federal and state grant moneys of a quasi-public state entity that are placed in a depository pursuant to this chapter. [Emphasis added.]

Under the statutory definition, moneys of an "instrumentality of the state" and of a "quasi-public state entity" would constitute public funds and thereby be subject to the investment and depository restrictions in the Code. Thus, the underlying issue in all your questions is whether a private, nonprofit area agency on aging is either an "instrumentality of the state" or a "quasi-public state entity."

In 1976, the Attorney General's office reviewed whether a community action agency constituted an instrumentality of a governmental unit. 1976 Op.Att'yGen. 823. The opinion, while noting that "we are not able to state one definition of an instrumentality or agency of a governmental unit," did identify various criteria which might be considered in making such a determination. Id. at 830. Common factors to be considered include whether the entity is created by the government, is primarily engaged in the furtherance of a governmental goal or in the performance of some essential governmental function, is under the direct control and regulation of the government and whether the government has delegated some of its functions to the entity. Id. at 828-29.

In order to determine whether area agencies on aging are instrumentalities of the state, it is necessary to review the makeup and functions of these agencies. Area agencies on aging are

designated by the Iowa Department of Elder Affairs. The Department of Elder Affairs is a state agency established by the Elder Iowans Act, Iowa Code ch. 231 [formerly Iowa Code ch. 249D], to implement the federal Older Americans Act of 1965, 42 U.S.C. §§ 3001, et seq. Iowa Code §§ 231.14 and 231.21 (1993); see also 42 U.S.C. § 3024(a)(1). The policymaking body for the department is the commission of elder affairs. Iowa Code §§ 231.11 and 231.14 (1993). In order to plan and deliver services statewide, the state is required to be divided into distinct areas. Iowa Code § 231.14(4) (1993); see also 42 U.S.C. § 3024(a)(1)(E). The commission, with the department's assistance, is then required to "[d]esignate for each planning and service area a public or private nonprofit agency or organization as the area agency on aging for that area." Iowa Code § 231.14(5) (1993). See Iowa Code §§ 231.23(2) and (5); § 231.32(2)(d) (1993); see also 42 U.S.C. § 3024(a)(2)(A). In all, thirteen area agencies on aging are to be designated by the commission. Iowa Code § 231.32(1) (1993).

In designating area agencies, the commission must select between:

> a. An established office of aging which is operating within a planning and service area designated by the commission.
>
> b. Any office or agency of a unit of a political subdivision, which is designated for the purpose of serving as an area agency by the chief elected official of such unit.
>
> c. Any office or agency designated by the appropriate chief elected officials of any combination of political subdivisions to act on behalf of the combination for such purpose.
>
> d. Any public or nonprofit private agency in a planning and service area which is under the supervision or direction for this purpose of the department of elder affairs and which can engage in the planning or provision of a broad range of supportive services or nutrition services within the planning and service area.

Iowa Code § 231.32(2) (1993); see also 42 U.S.C. § 3042(b). Once designated, area agencies are required to develop and administer area plans on aging. Iowa Code §§ 231.31(1), 231.32(2) and 231.33(1) (1993); see also 42 U.S.C. § 3042(c). The other duties of area agencies are detailed in Iowa Code § 231.33. See also 42 U.S.C. § 3024(c)(4).

The status of area agencies on aging has been the subject of several opinions of the Attorney General's office. A 1984 opinion addressed the issue of area agencies being created by the government. In deciding that an area agency was a "governmental body" within the meaning of the open meetings law, the opinion noted:

> 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 the 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.

1984 Op.Att'yGen. 140 (#84-7-4(L)). Thus, the Attorney General's office has already opined that area agencies are a creation of a governmental body.

Prior opinions also address the element of governmental control in favor of a finding that an area agency is an "instrumentality of the state." A 1979 opinion concluded:

> Area Agencies on Aging are subject to the direct supervision and control of the [commission of elder affairs]. The [commission of elder affairs] is vested with the authority to receive all funds on behalf of the Area Agencies. Distribution of funds to Area Agencies is solely through the [commission of elder affairs], after the approval by the Commission of the Area Agency's area plan. The Area Agencies are bound by the fiscal policy as formulated by the [commission of elder affairs].

1980 Op.Att'yGen. 51. In reaching that conclusion, the opinion noted:

> [T]he federal Act requires a scheme of a community-based delivery of services that is under the direct supervision and control of a centralized State Agency. Such a scheme is manifested in [chapter 231], and the Administrative Rules promulgated thereunder, in [321 Iowa Admin. Code ch. 4, 6 and 7].

Id. A similar prounouncement is contained in another opinion which declared:

> [A]rea agencies on aging are subject to supervision and control by the [commission of elder affairs] with respect to all activities related to the purposes of the Older Americans Act. The Commission supervises area agency program planning by approving the area plan. The Commission also supervises execution of the area plan by monitoring and evaluating such execution.

1980 Op.Att'yGen. 371. The control referred to in the earlier opinions remains evident in the federal law, 42 U.S.C. §§ 3001 et seq., the state statutes, see, e.g., Iowa Code § 231.33, and the administrative rules regulating area agencies. 321 IAC 4, 6 and 7. Accordingly, area agencies on aging fit within the definition of an "instrumentality of the state."

In a 1979 opinion, this office concluded that area agencies on aging also function as quasi-state agencies, 1980 Op.Att'yGen. 317 (#79-8-2(L)). The opinion noted:

> However, because the law states that the area agencies are subject to the supervision and control of the Commission on the Aging, and because the commission is a "state agency", the area agencies may often find themselves bound by restrictions prescribed in laws affecting state agencies. This situation arises because the Commission coordinates fiscal and programming policy for the area agencies, and the Commission must abide by statutes that bind State agencies.

The opinion, in its summary, stated:

> Although area agencies on aging should not be regarded as "state agencies" per se, the area agencies will often be bound by laws prescribing restrictions for state agencies. This result occurs by virtue of the fact that the Commission on the Aging is a "state agency" and must heed laws that bind state agencies while it coordinates the activities of the area agencies.

A similar pronouncement is contained in a more recent opinion, which declared:

> 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.

1988 Op.Att'yGen. 1 (#87-1-1(L)).

Thus, area agencies on aging are instrumentalities of the state since they are created by the government, are primarily engaged in the performance of an essential governmental function delegated to them by the government, and operate under the direct control and supervision of the government. Furthermore, area agencies on aging also function as quasi-state agencies, as they possess some of the features of both a public and a private entity.

You ask generally whether the 1992 amendments unconstitutionally interfere with interstate commerce. In the absence of a specific legal question which focuses on particular language in the statute, we are unable to anticipate the nature and scope of your inquiry. For this reason, we do not utilize the opinion process to review the constitutionality of statutes in the abstract. This policy is in accord with decisions of the Iowa Supreme Court which state that a constitutional challenge to legislation or agency action must be specific and point out with particularity the details of the claimed transgression. See, e.g., McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 184 (Iowa 1980).

A review of the federal Older Americans Act of 1965, 42 U.S.C. §§ 3001, et seq. and regulations issued in connection therewith indicates that there are not any restrictions on investing and depositing federal funds that conflict with the restrictions set

forth under Iowa law. Therefore, there is no obvious issue under the Supremacy Clause. Should a question arise as to a specific provision of federal law which arguably conflicts with state restrictions, it should be brought to the attention of the lawyer advising the agency.

In summary, private, non-profit entities designated as area agencies on aging are both "instrumentalities of the state" and "quasi-public state entities" within the definition of "public funds" set forth in § 12C.1(2)(b), 1993 Code of Iowa and, as such, are subject to the investment standards and restrictions set forth in chapter 12B and the depository provisions set forth in chapter 12C. Thus, area agency deposits are prohibited in financial institutions not located in the State of Iowa, even if insured by the federal government. The investment and depository restrictions apply to all funds received by such agencies in connection with elder affairs programs, including contributions from meal recipients. The federal Older Americans Act of 1965 and regulations issued in connection therewith do not contain provisions which conflict with the provisions of Iowa Code chapters 12B and 12C (1993) concerning limitations on investing and depositing of public funds.

Sincerely,

Donald G. Senneff

Donald G. Senneff
Assistant Attorney General

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