MUNICIPALITIES: Public notice and required readings and publication of proposed ordinances. Iowa Code §§ 21.4(1), 380.3, 380.6(1)(a) (2001). Iowa Code section 21.4(1) requires that the council give notice of the time, date, and place of each meeting as well as its tentative agenda, which would include listing of proposed ordinances to be discussed. Iowa Code section 380.3 allows a municipal council to suspend the multiple reading requirements therein and approve an ordinance by affirmative vote at a single meeting. Iowa Code section 380.6(3) requires that proposed ordinances be published after passage. (Biederman to Hardisty, Adams County Atty., 3-2-01) #01-3-1(L)

March 2, 2001

Mr. Earl Hardisty
Adams County Attorney
Courthouse Box 28
Corning, IA 50841

Dear Mr. Hardisty:

You have requested an opinion on a number of questions raised by recent actions of a municipal council in passing a local ordinance. It is our understanding that the ordinance in question was not published prior to passage. Instead, the council listed the proposed ordinance on a meeting agenda and after a first reading moved to waive second and third readings and proceeded immediately to vote for passage. After the vote for passage, the ordinance was published once, with indication that it was now in effect. Your letter questioned the validity of the ordinance in light of these facts and whether, if the ordinance was in fact invalid, it may become valid through passage of time or re-adoption procedures. The facts as you present them do not illustrate the invalidity of the ordinance and therefore we do not reach the latter issues.

There is no requirement that proposed ordinances be published prior to passage although publication is required after passage. Iowa Code § 380.6 (2001). An ordinance only becomes law when published and publication is essential to its validity. State ex rel. Bump v. Omaha & C.B. Ry. & Bridge Co., 113 Iowa 30, 84 N.W. 983, 984 (Iowa 1901). Publication may occur immediately after passage if the ordinance is approved by the mayor. Iowa Code § 380.6(1)(a). If the mayor vetoes the ordinance, publication may take place immediately after the council re-passes the measure. Id. Iowa Code § 380.6(2). If the mayor takes no action, publication can take place "not sooner than fourteen days after the date of passage." Id. Iowa Code § 380.6(3). A city ordinance becomes effective upon publication, unless a subsequent date is specified within the ordinance. Iowa Code § 380.6(1)(a), (b), (c) (2001).

The open meetings law, codified at Iowa Code chapter 21 (2001), covers the issue of the agenda. Prior to passage, the legislative body entertaining proposed legislation must list the item on its agenda to provide adequate public notice of consideration of the issue. Keeler v. Iowa State Bd. of Public Instruction, 331 N.W.2d 110, 111 (Iowa 1983). A governmental body may not meet without giving adequate prior public notice pursuant to section 21.4. Iowa Code § 21.3. Section 21.4 requires that the council give notice of the "time, date, and place of each meeting"

as well as its tentative agenda, which would include listing of proposed ordinances to be discussed. Iowa Code § 21.4(1). Such notice must be posted or published no later than 24 hours prior to the meeting unless there are exigent circumstances requiring a council meeting to be convened in less time. Iowa Code § 21.4(2). Failure to comply with the Open Meetings Law may result in a number of remedies, including but not limited to voiding action taken during the meeting. Iowa Code § 21.6.

Three meetings are generally required for consideration and voting on a proposed ordinance or amendment, "unless this requirement is suspended by a recorded vote of not less than three-fourths of all the members of the council." Iowa Code § 380.3 (2001). If such a vote is recorded, consideration and passage may occur on the same day. Id. City of Bloomfield v. Blakeley, 192 Iowa 310, 184 N.W. 634, 635 (Iowa 1921) (referring to similar code language, then found at Iowa Code section 682). However, such suspension of the three meeting requirement must be the exception rather than the rule. This office has previously addressed a similar question concerning the number of readings required prior to passage of a county ordinance. 1991 Op. Att'y Gen. 21 (#91-4-3). The opinion of this office is that waiver of the three meeting rule should remain an exceptional method of procedure and that, although alternative methods may be permitted by statute, "interests of public notice and participation in the . . . legislative process and governmental accountability demand sparing use of this alternative legislative method." Id.

In summary, though there is no publication requirement prior to passage, ordinances must be published after passage to be valid. Proposed council legislation must be included in the meeting agenda to comply with the Open Meetings Law; there is a separate remedy for failure to do so which does not include invalidating an ordinance. Additionally, although a municipality may waive the three meeting requirement and enact an ordinance in one meeting, such a waiver must be used sparingly in the interests of public notice and participation. If a council has followed statutory requirements for open meetings and publication, the ordinance is presumptively valid.

Sincerely,

Melissa A. Biederman

MELISSA ANNE BIEDERMAN
Assistant Attorney General

COUNTIES; SCHOOL DISTRICTS: County contribution to wellness center; public purpose. Iowa Const., art. III, § 31 (1857); Iowa Code §§ 331.301, 346A.2 (2001). Consistent with the state constitutional requirement that an expenditure of public funds serve a public purpose, a county may contribute money to a regional wellness center, owned and operated by a school district, which will have an aquatic area, track, cardio-respiratory room, and other facilities that promote good health. (Kempkes to Ridout, Emmet County Attorney, 4-27-01) #01-4-2(L)

April 27, 2001

Mr. William B. Ridout
Emmet County Attorney
703 1st Ave. S.
Estherville, IA 51334

Dear Mr. Ridout:

You have requested an opinion on the expenditure of public funds. You ask whether a county may contribute to a regional wellness center, owned and operated by a school district, which will have an aquatic area, track, cardio-respiratory room, and other facilities that promote good health.

I. Applicable law

Under statutory home rule, a county

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

Iowa Code § 331.301(1). *See* Iowa Const. amend. 37 (1978).

II. Analysis

We have discovered no law of the General Assembly that prohibits counties from contributing to a regional wellness center owned and operated by a school district. You have raised a question, however, whether section 31 in article III of the 1857 Iowa Constitution may prohibit such a contribution.

Section 31 provides in part that "no public money or property shall be appropriated for local, or private purposes, unless such appropriation . . . be allowed by two thirds of the members elected to each branch of the [General Assembly]." Case law and prior opinions have applied the principle expressed in section 31 -- known as the "public purpose requirement" or the "public purpose doctrine" -- to counties and other political subdivisions. *See, e.g., Love v. City of Des Moines,* 210 Iowa 90, 230 N.W. 373, 378 (1930); 1998 Op. Att'y Gen. ___ (#98-1-2(L)); 1996 Op. Att'y Gen. 9, 11; 1986 Op. Att'y Gen. 113, 113; *see also Slutts v. Dana*, 138 Iowa 244, 115 N.W. 1115, 1117 (1908) ("county" defined as a public corporation that exists only for public purposes).

"[I]t is impossible to conceive of a public improvement which will not incidentally benefit some private individual engaged in private enterprise for private gain." 15 E. McQuillin, The Law of Municipal Corporations § 39.19, at 39 (1995) (footnote omitted). Accordingly, the public purpose requirement prohibits the expenditure of public funds "strictly for private gratification." 1986 Op. Att'y Gen. 113, 113. We have some doubt that the public purpose requirement, so defined, can encompass a transfer of public money between public entities. For purposes of this opinion, however, we will assume that it does. *Cf.* 1990 Tex. Op. Att'y Gen. JM-1255 (political subdivisions in Texas may assist each other only if the resources and powers donated by one to another "are used for a definite public purpose of the donating subdivision").

The phrase "public purpose" has a flexible and expansive scope. *John R. Grubb, Inc. v. Iowa Hous. Fin. Auth.*, 255 N.W.2d 89, 93 (Iowa 1977); 1990 Op. Att'y Gen. 79 (#90-7-3(L)). It "should not be construed narrowly." 1996 Op. Att'y Gen. 9, 11. Like beauty in the eye of its beholder, a public purpose may take many forms. 2000 Op. Att'y Gen. ___ (#99-6-1(L)). The proper inquiry for the public purpose requirement "is to determine if *a* public interest is served, regardless of whether incidental private purposes exist." 1990 Op. Att'y Gen. 79 (#90-7-3(L)) (emphasis added). In other words, a violation occurs in the absence of *any* public purpose. 1996 Op. Att'y Gen. 9, 11.

A challenger to an expenditure of public funds bears the heavy burden of showing its unconstitutionality beyond a reasonable doubt and negating every reasonable basis in its support. 1998 Op. Att'y Gen. ___ (#98-1-2(L)). The absence of any public purpose "must be so clear 'as to be perceptible by every mind at first blush.'" 1996 Op. Att'y Gen. 9, 11 (citations omitted). As a result, courts generally do not invalidate expenditures. *See* 2000 Op. Att'y Gen. ___ (#99-6-1(L)). Each case, however, "must be decided with reference to the object sought to be

accomplished and to the degree and manner in which that object affects the public welfare." 15 McQuillin, *supra*, at 40 (footnote omitted).

The existence of a public purpose in any given situation typically depends upon an assessment of specific facts and circumstances. *See, e.g.*, 1990 Op. Att'y Gen. 79 (#90-7-3(L)) (public purpose requirement does not *per se* prohibit cities and counties from providing loans to private businesses in order to create jobs). Certain expenditures, however, generate no dispute among reasonable minds about their public purpose. The construction of buildings for education or athletics is a public purpose. 15 McQuillin, *supra*, at 50. The promotion of public health is a public purpose. *Fleming v. Hull*, 73 Iowa 598, 35 N.W. 673, 678 (1887). Indeed, the General Assembly has expressly invested counties with statutory authority to preserve or improve the public welfare, comfort, and convenience as well as the public health. *See* Iowa Code § 331.301(1); *see also* Iowa Code ch. 346A (county may provide health services through health centers). We can therefore conclude as a matter of law that a county may contribute money to a regional wellness center, owned and operated by a school district, which will have an aquatic area, track, cardio-respiratory room, and other facilities that promote good health.

Nevertheless, we advise the county to make findings on the public purpose underlying this contribution, if it occurs, and to take steps to ensure that its money does indeed assist in promoting the public health. *See* 1990 Op. Att'y Gen. 11 (#89-2-6(L)); 1986 Op. Att'y Gen. 113, 119; *see also* 1996 Op. Att'y Gen. 9, 12 ("legislative declaration of public purpose underlying statute controls courts if 'zone of doubt' exists about statute's public purpose"). *Cf.* 1976 Op. Att'y Gen. 604, 605 ("funds appropriated by [a] county to a nonprofit corporation do not constitute an unrestricted gift," but must be applied "to those purposes set out [by] statute"). We have previously explained that

> [i]n determining whether a specific [expenditure] would serve public rather than private purposes, . . . [a court] would review the adequacy of the governing body's findings of public purpose . . . and the reasonableness of [achieving that purpose through the expenditure.] The court would also consider any evidence tending to show that the expenditure is in fact for a private purpose. We recommend that the governing body consider all relevant factors . . . and thus balance the benefits to the public in general along with the costs incurred.

1986 Op. Att'y Gen. 113, 118.

III. Summary

Consistent with the public purpose requirement, a county may contribute money to a regional wellness center, owned and operated by a school district, which will have an aquatic area, track, cardio-respiratory room, and other facilities that promote good health.[1]

Sincerely,

Bruce Kempkes
Assistant Attorney General

[1] For purposes of this opinion, we have not considered or analyzed the preliminary question whether a school district has authority to own and operate a wellness center. We limit opinions to precise legal questions and do not use them to conduct generalized reviews of laws to identify issues. 2000 Op. Att'y Gen. __ (#00-2-1); *see* 61 IAC 1.5(2).

LAW ENFORCEMENT; POLICEMEN; FIREMEN; SHERIFF: Appointment of reserve peace officers. Iowa Code §§ 80D.1A, 80D.6, 80D.9, 80D.11, 331.903, 362.10 (2001). The maximum age limitations imposed by Iowa Code sections 331.903(6) and 362.10 (2001) upon the service of "deputy sheriffs" and "police officers" in the State of Iowa are applicable to reserve peace officers appointed or employed pursuant to Iowa Code chapter 80D because reserve peace officers perform the same duties and functions as regular deputy sheriffs and police officers. (Lundquist to Shepard, Director, Iowa Law Enforcement Academy, 4-27-01) #01-4-3(L)

April 27, 2001

Mr. Gene Shepard
Director
Iowa Law Enforcement Academy
P.O. Box 130
Johnston, IA 50131

Dear Mr. Shepard:

This letter is in response to your request for an Attorney General's opinion as to the question: "Are the maximum age limits delineated by Iowa Code sections 331.903(6) and 362.10 applicable to reserve law enforcement officers appointed or employed pursuant to Iowa Code chapter 80D?" We conclude that reserve peace officers appointed or employed pursuant to Iowa Code chapter 80D perform the duties and functions of a "deputy sheriff" or a "police officer" as contemplated by Iowa Code sections 331.903(6) and 362.10 and are thus subject to the age limitations imposed by those respective code provisions.

A sheriff may appoint, with the approval of the local board of county supervisors, one or more deputies, assistants, or clerks for whose acts the sheriff is responsible. Iowa Code § 331.903(1) (2001). "The maximum age for a person to be employed as a deputy sheriff appointed pursuant to [Iowa Code section 331.903] is sixty-five years of age." Iowa Code § 331.903(6) (2001). Identical limitations apply to Iowa cities as the

"maximum age for a police officer, marshal, or fire fighter employed for police duty or the duty of fighting fires is [also] sixty-five years of age." Iowa Code § 362.10 (2001). Iowa Code chapter 80D authorizes the governing body of a city or county to supplement its regular law enforcement force by establishing a force of reserve peace officers. Iowa Code §§ 80D.1, 80D.8 (2001).

The phrase "reserve peace officer" as used within Iowa Code chapter 80D means "a volunteer, nonregular, sworn member of a law enforcement agency who serves with or without compensation, has regular police powers while functioning as a law enforcement agency's representative, and participates on a regular basis in the law enforcement agency's activities including crime prevention and control, preservation of the peace, and enforcement of law." Iowa Code § 80D.1A(3) (2001). "Reserve peace officers shall serve as peace officers on the orders and at the discretion of the chief of police, sheriff, or commissioner of public safety or the commissioner's designee, as the case may be." Iowa Code § 80D.6 (2001). "While performing official duties, each reserve peace officer shall be considered an employee of the governing body which the officer represents and shall be paid a minimum of one dollar per year." Iowa Code § 80D.11 (2001).

As stated above, the Iowa General Assembly has established 65 years of age as the maximum age for those who may serve as police officers and deputy sheriffs in the State of Iowa. See Iowa Code § 331.903(6) (deputy sheriffs); Iowa Code § 362.10 (police officers).[1] These particular provisions of the Iowa Code, however, do not expressly address the employment of reserve peace officers. Nonetheless, the age limitations delineated by sections 331.903 and 362.10 are arguably applicable to reserve peace officers because law enforcement agencies often confer identical authority and duties upon their reserve peace officers as they confer upon their regular officers or deputies. See Iowa Code § 80D.6 (2001) ("While in the actual performance of official duties, reserve peace officers shall be vested with the same rights, privileges, obligations, and duties as any other peace officers."). Consequently, the scope of law enforcement

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[1] Although other sections of the Iowa Code restrict peace officer service to those age 65 and under, e.g., Iowa Code §§ 321.477 (DOT enforcement officers), 330A.8(16) (aviation authority officers), 400.17 (police officers subject to civil service), 456A.13 (full-time DNR enforcement officers), the scope of this opinion is limited only to the applicability of Iowa Code sections 331.903 and 362.10 to the employment of reserve peace officers.

personnel subject to the age limitations of Iowa Code sections 331.903(6) and 362.10 is ambiguous. See Lockhart v. Cedar Rapids Community School Dist., 577 N.W.2d 845, 847 (Iowa 1998). ("A statute is ambiguous when reasonable minds differ or are uncertain as to its meaning."); see also State v. White, 545 N.W.2d 552, 555 (Iowa 1996); State v. Green, 470 N.W.2d 15, 18 (Iowa 1991).

When a statute is ambiguous, reliance on rules of statutory construction is appropriate. See State v. Iowa Dist. Court for Mahaska County, 620 N.W.2d 271, 273 (Iowa 2000); State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999). When construing the meaning of ambiguous statutory provisions, one's ultimate goal should be a reasonable interpretation and construction that will best effect the purposes for the statute while limiting absurd results. See State v. Iowa Dist. Court for Mahaska County, 620 N.W.2d 271, 273 (Iowa 2000) (citing State v. Link, 341 N.W.2d 738, 740 (Iowa 1983)). The legislature's intent in enacting a particular statute may be derived by considering "the objects sought to be accomplished and the evils and mischiefs sought to be remedied." Schultz, 604 N.W.2d at 62; see also Iowa Code § 4.6 (2001). An interpretation should be sought that "will advance, rather than defeat, the statute's purpose." Schultz, 604 N.W.2d at 62 (citing Danker v. Wilimek, 577 N.W.2d 634, 636 (Iowa 1998)).

The Iowa Code does not specifically define a "deputy sheriff" or "police officer" within the context of sections 331.903 and 362.10. "In the absence of a legislative definition of a term or a particular meaning in the law, [one should] give words their ordinary meaning." State v. White, 563 N.W.2d 615, 617 (Iowa 1997); see also Arends v. Iowa Select Farms, L.P., 556 N.W.2d 812, 814 (Iowa 1996) ("We may refer to prior decisions, similar statutes, dictionary definitions, and common usage in interpreting a statute."). The phrase "deputy sheriff" encompasses an "officer who, acting under the direction of a sheriff, may perform most of the duties of the sheriff's office." Black's Law Dictionary 1381-82 (7th ed. 1999); see White, 563 N.W.2d at 617 ("The dictionary provides a ready source for ascertaining the common and ordinary meaning of a word."). A "police officer" commonly refers to a "peace officer responsible for preserving public order, promoting public safety, and preventing and detecting crime." Black's Law Dictionary 1178 (7th ed. 1999).

In the State of Iowa, a reserve peace officer is considered an employee of his or her appointing law enforcement agency. Iowa Code § 80D.11 (2001). Reserve peace officers have regular police power and are authorized to participate in the activities of

their employing agency including crime prevention and control, preservation of the peace, and enforcement of the law. Iowa Code § 80D.1A(3) (2001); see also 1980 Op. Att'y Gen. 882 (# 80-12-4 (L)) ("Reserve officers, when acting in their official capacity as such, have all the rights, authority, duty and responsibilities of regular peace officers employed by the same law enforcement agency."). Officers appointed or employed pursuant to Iowa Code chapter 80D are often called upon to perform duties that are synonymous to those tasks typically assigned to regular deputy sheriffs and police officers. Reserve peace officers may carry firearms and other weapons. Iowa Code § 80D.7 (2001). Reserve peace officers wear uniforms that designate them as persons authorized to act on behalf of the appointing agency. Iowa Code § 80D.9 (2001). Reserve peace officers may serve papers and, if properly certified, invoke implied consent. 1980 Op. Att'y Gen. 882 (# 80-12-4(L)); see State v. Wright, 441 N.W.2d 364, 368 (Iowa 1989). Reserve peace officers are subject to the same supervisors and chain of command as their regular counterparts. Iowa Code §§ 80D.6, 80D.9 (2001). Notwithstanding their assigned title, reserve peace officers act as deputy sheriffs and police officers in the performance of their official duties.

An overly narrow interpretation of the persons subject to the age limitations imposed by Iowa Code sections 331.903(6) and 362.10 would unreasonably circumvent the purposes for imposing an age requirement on law enforcement personnel. All persons assigned the authority to perform the functions and tasks of a police officer or deputy sheriff, regardless of that person's official title or position should be subject to the age restrictions. To find otherwise would permit law enforcement agencies to ignore the service age limitations of Iowa Code sections 331.906 and 362.10 simply by manipulating job titles or placing an officer on reserve status without altering that person's duties, assignments, or compensation.

Legislative history provides further evidence that reserve peace officers are encompassed within the limitations of Iowa Code sections 331.903(6) and 362.10. See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp., 606 N.W.2d 359, 365 (Iowa 2000) ("Legislative history is properly considered in interpreting statutory language found to be ambiguous."); State v. McSorley, 549 N.W.2d 807, 809 (Iowa 1996)). The Iowa General Assembly has specifically exempted volunteer firefighters from the age requirements of Iowa Code section 362.10, but no similar exception exists for reserve peace officers. Had the legislature desired to exempt reserve peace officers from the age restrictions delineated in sections 331.903(6) and 362.10, it

could have done so at the same time the volunteer firefighter exemption was created or at various later times when these code provisions were amended. See 1980 Iowa Acts, 68th G.A., ch. 1124 (exempting volunteer firefighters); 1998 Iowa Acts, 77th G.A., ch. 1183, § 112 (adding 331.903(6)); 1998 Iowa Acts, 77th G.A., ch. 1183, § 113 (amending 362.10).

Members of reserve peace officer forces are intended to supplement their appointing authorities' regular law enforcement forces. Iowa Code § 80D.8 (2001). Because reserve peace officers appointed or employed pursuant to Iowa Code chapter 80D are authorized to essentially act as surrogates for regular deputies and officers, it only follows that they be subject to the same age limitations as all other persons appointed to serve as either sheriff's deputies or police officers. Accordingly, we conclude that the maximum age limitations imposed by Iowa Code sections 331.903(6) and 362.10 (2001) upon the service of deputy sheriffs and police officers in the State of Iowa are applicable to reserve peace officers appointed or employed pursuant to Iowa Code chapter 80D.

Sincerely,

JOHN R. LUNDQUIST
Assistant Attorney General

COUNTY AND COUNTY OFFICERS; INCOMPATIBILITY OF OFFICES: County board of supervisors appointing supervisor to county conservation board. Iowa Code section 331.216 (2001) supersedes the common law and permits county supervisors to appoint one of their own members to serve simultaneously on the county's conservation board. Enactment of section 331.216 reverses the conclusions reached in our prior opinions -- *e.g.,* 1980 Op. Att'y Gen. 51 (#79-4-4(L)); 1980 Op. Att'y Gen. 202 (#79-6-5(L)); 1970 Op. Att'y Gen. 27 -- that the common law does not permit a supervisor to serve simultaneously as a member of another county office. (Kempkes to Hansen, Osceola County Attorney, 4-27-01) #01-4-4(L)

April 27, 2001

Mr. Robert E. Hansen
Osceola County Attorney
Courthouse
300 7th St.
Sibley, IA 51249

Dear Mr. Hansen:

You have requested an opinion on the appointment authority of a county board of supervisors. You ask whether the supervisors can appoint one of their own members to serve simultaneously on the county's conservation board.

In Iowa, the common law as well as statutes governs whether a person may simultaneously serve in multiple public offices. *See* 1994 Op. Att'y Gen. 35 (#93-9-1(L)). Courts in several states have held that the common law prohibits a superior board from appointing one of its own members to serve on an inferior board. 3 E. McQuillin, The Law of Municipal Corporations § 12.75, at 403-04 (2001). They describe such an appointment as against public policy. *Id.* at 403. In 1969, this office identified some of the conflicts generated by self-appointment in concluding that the common-law doctrine of incompatibility of offices prohibits simultaneous service by a supervisor on the conservation board:

> Due to the fact that [conservation board members] are appointed by and may be removed for cause by the [supervisors] and the further fact that the [conservation board is required by statute] to file a full report of its receipts, disbursements and the program of work for the period covered and recommendations with the [supervisors,] it is our view that [the offices of supervisor and conservation board member] are incompatible, and no one person should be a member of both boards.

1970 Op. Att'y Gen. 27, 28-29. Subsequent opinions involving analogous circumstances reached the same conclusion. *See* 1980 Op. Att'y Gen. 51 (#79-4-4(L)) (supervisor may not simultaneously serve as member of county board of health or county fair board); 1980 Op. Att'y Gen. 202 (#79-6-5(L)) (same).

More than a decade after our 1969 opinion, the General Assembly amended the Iowa Code chapter entitled County Home Rule Implementation. It specifically amended the part that governs supervisors by adding this sentence:

> Unless otherwise provided by state statute, a supervisor may serve as a member of any appointive board, commission, or committee of this state, a political subdivision of this state, or a nonprofit corporation or agency receiving county funds.

1981 Iowa Acts, 69th G.A., ch. 117, § 215. *Cf.* Iowa Code § 23A.1(1) ("political subdivision" includes county for purposes of legislation regulating competition by government with private sector). *See generally* Iowa Code § 4.1(30)(c) (unless otherwise defined, "may" in statute confers a power). Now codified at Iowa Code section 331.216 (2001), this provision lies at the heart of your question.

There is no question that the General Assembly may modify the common law. 1980 Op. Att'y Gen. 202 (#79-6-5(L)); *see American Canyon Fire Prevention Dist. v. Napa County*, 190 Cal. Rptr. 189, 192 (Ct. App. 1983) (legislature may abrogate common-law doctrine of incompatibility "when it considers it necessary or convenient to permit officers to hold incompatible offices"). If it does, we apply established principles of statutory construction only when the statute is ambiguous. *See* Iowa Code § 4.6; *Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995). "A statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning." *In re S.M.D.*, 569 N.W.2d 609, 611 (Iowa 1997).

We discern no ambiguity in section 331.216 under this definition. Section 331.216 supersedes common-law precepts by broadly providing that a supervisor may serve on *any* appointive board of the county unless otherwise provided by statute. *See generally* Black's Law Dictionary 94 (1991) ("any" means an indefinite number of whatever kind and often equates with "every" or "all"). We have discovered no statute providing otherwise. *See generally* Iowa Code chs. 331, 350.

Nevertheless, we point out that a supervisor simultaneously serving on the conservation board may repeatedly encounter conflicts of interest as a supervisor. As we recently explained:

> Although [two public offices may not be incompatible as a matter of law, their statutory duties may] thrust a person appointed to both public offices into situations in which conflicts of interest may

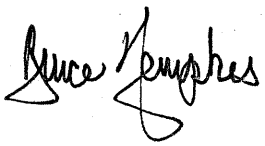
> arise. Our opinions have emphasized the distinction between incompatibility and conflicts of interest. While we do not wish to blur the distinctions that have been drawn, we caution against the appointment of one person to two public offices that will likely confront the person repeatedly with conflicts of interest.

2000 Op. Att'y Gen. ___ (#00-9-1) (citation omitted).

We iterate this caution here, especially in light of the policies underlying the common-law prohibition against self-appointment. If, however, the supervisors proceed to appoint one of their own members to the conservation board, the supervisor *qua* supervisor should refrain from participating in discussions as well as abstain from voting if conflicts of interest arise. *See, e.g.,* 571 IAC 33.21 (member of Natural Resources Commission must refrain from participating in discussions as well as abstain from voting when conflict of interest arises); 1998 Op. Att'y Gen. ___ (#98-5-3) (member of city council who wishes to exercise caution in resolving conflict of interest should refrain from participating in decision-making process as well as abstain from voting).

In summary: Iowa Code section 331.216 (2001) supersedes the common law and permits county supervisors to appoint one of their own members to serve simultaneously on the county's conservation board. Enactment of section 331.216 reverses the conclusions reached in our prior opinions -- *e.g.,* 1980 Op. Att'y Gen. 51 (#79-4-4(L)); 1980 Op. Att'y Gen. 202 (#79-6-5(L)); 1970 Op. Att'y Gen. 27 -- that the common law does not permit a supervisor to serve simultaneously as a member of another county office.

Sincerely,



Bruce Kempkes
Assistant Attorney General

COUNTY AND COUNTY OFFICERS: County attorney; giving legal advice. Iowa Code § 331.756 (2001). A county attorney *qua* county attorney lacks authority to give legal advice to a private, nonprofit corporation that supervises criminal defendants released on probation or parole pursuant to court order. (Kempkes to Holmes, Story County Attorney, 5-17-01) #01-5-3(L)

May 17, 2001

Mr. Stephen H. Holmes
Story County Attorney
Courthouse
Nevada, IA 50201

Dear Mr. Holmes:

You have requested an opinion on the extent to which a county attorney, as county attorney, has authority to give legal advice to a private, nonprofit corporation. You ask whether a county attorney must or may advise the Center for Creative Justice, which, in addition to providing various social services, supervises criminal defendants released on probation or parole pursuant to court order. Although this question might implicate ethical as well as legal principles relating to conflicts of interest, we limit our examination to provisions in Iowa Code chapter 331 (2001).

Chapter 331 is entitled County Home Rule Implementation. Among other things, it sets forth the duties and powers of elected county officers. Sections 331.757, 331.758, and 331.903 identify the powers of a county attorney: to appoint and remove assistants and clerks, and administer oaths and take affirmations. Section 331.756 identifies the duties of a county attorney, who, if serving the county on a full-time basis, must refrain from the private practice of law. *See* Iowa Code § 331.752(1); *see also* 1924 Iowa Op. Att'y Gen. 140, 140 ("county attorney's private practice, if any, is entirely separate and distinct from his official business"). In particular, section 331.756(7) provides in part that a county attorney

> [shall give] advice or a written opinion, without compensation, to the board [of supervisors] and other county officers and to school and township officers . . . 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 . . . .

See generally Iowa Code § 4.1(30)(a) (unless otherwise provided, "shall" in statutes imposes a duty).

Chapter 331 clearly imposes a duty upon a county attorney to give advice to the supervisors, other county officers, township officers, and school officers. Although undefined by section 331.756, the phrase "other county officers" unquestionably includes the principal county officers: the auditor, treasurer, recorder, and sheriff. *See, e.g.,* 1912 Iowa Op. Att'y Gen. 320, 320; *see also In re Assessment of Farmers' Loan & Trust Co. of Sioux City*, 155 Iowa 536, 136 N.W. 543, 544 (1912); *Clark v. Tracy*, 95 Iowa 410, 64 N.W. 290, 291 (1895). The phrase also encompasses certain other county positions or boards. *See, e.g.,* 1990 Iowa Op. Att'y Gen. 7 (#89-2-2(L)) (county conference board, because all its members act in interest and on behalf of county); 1980 Iowa Op. Att'y Gen. 523 (#79-12-3(L)) (county hospital trustee, because elected position); 1962 Iowa Op. Att'y Gen. 131, 131 (county conservation board, because enabling act requires assistance from "other county officials," which includes county attorney); *see also* 1992 Iowa Op. Att'y Gen. 139 (#92-7-1(L)) (listing prior opinions); 1982 Iowa Op. Att'y Gen. 496 (#82-8-6(L)) (county conservation board). *See generally* 1988 Iowa Op. Att'y Gen. 116 (#88-11-3(L)) (county attorney may have additional duties to perform if county enters into agreement, pursuant to chapter 28E, which involves obligations of the county).

The General Assembly has instructed that undefined words and phrases in statutes shall be construed according to approved English usage. *See* Iowa Code § 4.1(38). In common usage, "county officers" means those persons

> whose general authority and jurisdiction are confined within the limits of the county . . . , whose duties apply only to that county, and through whom the county performs its usual political functions. . . . [A "county officer" represents the county] continuously and as part of the regular and permanent administration of public power in carrying out certain acts with the performance of which it is charged in behalf of the public.

Black's Law Dictionary 351 (6th ed. 1991). *Accord Sheboygan County v. Parker,* 70 U.S. (3 Wall.) 93, 96, 18 L.E. 33 (1865); *see* 20 C.J.S. *Counties* § 97, at 299 (1990). This definition clearly excludes the directors or officers of a private, nonprofit corporation that supervises criminal defendants released on probation or parole pursuant to court order. *See* 1990 Iowa Op. Att'y Gen. 60 (#90-1-4(L)) (county attorney has no duty to give advice to county fair society, which, though statutorily created, operates as a nonprofit corporation); *see also* 1999 Ohio Op. Att'y Gen. 028 (county attorney has no duty to represent nonprofit corporation that functions as

county convention and visitor bureau merely because it receives county funds). *Cf.* 1980 Iowa Op. Att'y Gen. 732 (#80-6-21(L)) (director of private, nonprofit organization, which administers community mental health center, does not constitute "public officer" for purposes of common-law doctrine of incompatibility of public office). And, although a county attorney has the duty to institute and try criminal prosecutions in the name and on behalf of the State, that duty certainly does not extend to the giving of legal advice to any entity, public or private, which supervises criminal defendants released on probation or parole. *See generally* Iowa Code chs. 904, 906, 907.

The question remains whether a county attorney has discretion to give legal advice to the Center for Creative Justice. Although two prior opinions have concluded that county attorneys may choose to advise entities or persons lying outside the scope of section 331.756(7) -- joint 911 service boards, 1992 Iowa Op. Att'y Gen. 139 (#92-7-1(L)), and county fair societies, 1990 Iowa Op. Att'y Gen. 60 (#90-1-4(L)) – those opinions do not provide county attorneys with *carte blanche* authority to give legal advice to all entities and persons.

A joint 911 service board constitutes a public entity and clearly serves a public purpose of the county. *See* Iowa Code ch. 34A; 1992 Iowa Op. Att'y Gen. 139 (#92-7-1(L)). Although a private entity, a county fair society exists by virtue of express statutory authority, has a right to public funding, and clearly serves a public purpose of the county. *See* Iowa Code ch. 174; 1990 Iowa Op. Att'y Gen. 60 (#90-1-4(L)). In contrast, the Center for Creative Justice does not constitute a public entity, does not exist by virtue of express statutory authority, and does not have a right to public funding. Even though it may perform the important function of supervising criminal defendants released on probation and parole, the county has no statutory responsibility to supervise them. *See generally* Iowa Code §§ 906.1, 907.2. Such circumstances place the Center for Creative Justice outside the sphere of the county attorney's legal advice.

III. Summary

A county attorney *qua* county attorney lacks authority to give legal advice to a private, nonprofit corporation that supervises criminal defendants released on probation or parole pursuant to court order.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

CASH RESERVE FUND: Iowa Code § 8.56 (2001). The cash reserve fund sets forth separate methods under which money in the cash reserve fund can be disbursed. Subsection 1 authorizes disbursement of money for cash flow purposes which must be returned to the cash reserve fund by the end of the fiscal year in which it was disbursed. Subsection 3 authorizes appropriations from the cash reserve fund for nonrecurring emergencies. (Pottorff & Biederman to Wandro, Director, Iowa Department of Transportation, 6-11-01) #01-6-1(L)

June 11, 2001

Mr. Mark Wandro, Director
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

Dear Mr. Wandro:

You have requested an opinion on whether the State's cash reserve fund may be used to make highway construction contract payments. You point out that the primary road fund may run short of money to pay contractors during the road construction season. Although the primary road fund borrows occasionally from the RISE fund[1] and from the farm to market road fund[2], these sources, too, may be insufficient to make payments to contractors. In view of possible cash shortfalls, you ask whether money from the cash reserve fund may be transferred to the primary road fund to make these payments, as long as the money borrowed from the cash reserve fund is returned by the end of the fiscal year.

The cash reserve fund is part of the State Treasury, but is considered separate and apart from the general fund of the State of Iowa for all purposes except when determining the cash position of the state. Iowa Code § 8.56(1) (2001). It was originally created in 1992 as a special fund as defined by Iowa Code section 8.53, and was established as part of the effort to eliminate the state deficit under generally accepted accounting principles (GAAP). Iowa Code § 8.53. See 1994 Op. Att'y Gen. 137; 1994 Op. Att'y Gen. 86.

Iowa Code section 8.56 includes two separate provisions addressing the manner in which money may be disbursed from the cash reserve fund. Subsection 1 provides that:

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[1] RISE means the revitalize Iowa's sound economy fund created under Iowa Code section 315.2.

[2] The farm to market road fund is created under Iowa Code section 310.3.

> [t]he moneys in the cash reserve fund . . . shall not be transferred, used, obligated, appropriated, or otherwise encumbered except as provided in this section . . . Moneys in the cash reserve fund may be used for cash flow purposes provided that any moneys so allocated are returned to the cash reserve fund by the end of each fiscal year.

Subsection 3 further provides in relevant part that:

> The moneys in the cash reserve fund may be appropriated by the general assembly . . . only in the fiscal year for which the appropriation is made. The moneys shall only be appropriated by the general assembly for nonrecurring emergency expenditures . . .

Your question asks our office to decide whether these subsections should be construed as separate means of disbursement or should be harmonized. That is, may money be transferred from the cash reserve fund for use by a state agency pursuant to subsection 1 as long as the money is returned to the fund by the end of the fiscal year, or may money be transferred from the cash reserve fund only upon an appropriation under subsection 3 which meets all other requirements imposed by section 8.56 - including the requirement in subsection 1 that any money appropriated be returned to the cash reserve fund by the end of each fiscal year?

In order to resolve this issue, we turn to principles of statutory construction. In statutory construction, every effort should be made to ascertain legislative intent. Perkins v. Madison County Livestock & Fair Ass'n, 613 N.W.2d 264, 269 (Iowa 2000). Like the courts, we seek a "reasonable interpretation which will best effectuate the purpose of the statute and redress the wrongs the legislature sought to remedy." Miller v. Westfield Ins. Co., 606 N.W.2d 301, 303 (Iowa 2000). We do not "construe a statute in a way that would produce impractical or absurd results." William C. Mitchell, Ltd. v. Brown, 576 N.W.2d 342, 348 (Iowa 1998). Nor should we construe a statute "to make any part of it superfluous unless no other construction is reasonably possible." Miller v. Westfield Ins. Co., 606 N.W.2d at 305.

Applying these principles, we cannot conclude that the legislature intended subsections 1 and 3 to be harmonized so that an appropriation is the sole method for disbursing money from the cash reserve fund. To harmonize these subsections in that way would effectively condition any appropriation for "nonrecurring emergencies" under subsection 3 on the money being "returned to the cash reserve fund by the end of each fiscal year" under subsection 1. This construction would produce impractical results by limiting an appropriation of the money in the fund to those emergencies for which a state agency would have the resources to repay the appropriation by the end of the fiscal year. Cf. Iowa Code § 8.55(3) ("The moneys in the Iowa economic emergency fund may be appropriated by the general assembly only in the fiscal year for which the appropriation is made. The moneys shall only be appropriated by the general

assembly for emergency expenditures.") Moreover, appropriation bills typically are enacted late in the legislative session when the fiscal year is winding down. This construction would so narrow the time period in which the money must be repaid that the cash reserve fund would be of very limited utility.

Further, restricting use of the cash reserve fund to appropriations for nonrecurring emergencies would render language in subsection 1 superfluous. Subsection 1 prohibits the cash reserve fund from being "transferred, used, obligated, *appropriated*, or otherwise encumbered" except as provided in section 8.56. Iowa Code § 8.56(1) (emphasis added). If the only method of disbursing money from the Fund were by appropriation, the alternative terms prohibiting money from being "transferred, used, obligated . . . or otherwise encumbered" would be meaningless.

In our view, subsections 1 and 3 are construed more reasonably as separate methods under which money in the cash reserve fund can be disbursed. If subsection 1 were construed to authorize disbursement of money for cash flow purposes which must be returned to the cash reserve fund by the end of the fiscal year in which it was disbursed, the fund would function as a reserve from which the State could utilize cash to pay bills on time provided that the State return the cash by the end of the fiscal year from anticipated sources of revenue.[3] Under these circumstances, cash transferred from the cash reserve fund could be used by the State only for purposes for which the legislature has separately appropriated state funds.[4]

Nothing in laws governing the primary road fund prohibits a transfer to the fund from the cash reserve fund. The Iowa Constitution specifically provides for the exclusive use of motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel "for the construction, maintenance and supervision of the public highways" in the state. Iowa Const., art. VII, § 8. These constitutionally defined fees and taxes are deposited into what is designated by statute as the road use tax fund. Iowa Code § 312.1. This fund, in turn, is distributed to various other funds, including the primary road fund. Iowa Code § 312.2. The primary road fund,

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[3]Tax and revenue anticipation notes are a structurally different but conceptually similar method of bridging cash flow, so the State can have access to cash to pay bills on time and repay the cash from anticipated revenues later in the same fiscal year. Iowa Code §§ 12.25, 12.26. See Stanley v. Fitzgerald, 580 N.W.2d 742, 745-48 (Iowa 1998).

[4] The Iowa Constitution provides that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Iowa Const., art. III, § 24. A valid appropriation, in turn, "is authority from the legislature . . . to the officer, to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state."Graham v. Worthington, 259 Iowa 845, 862, 146 N.W.2d 626, 638 (1966).

however, is not limited to these sources and may receive other funds authorized for deposit. Section 313 expressly defines the primary road fund to include "[a]ll other funds which may by law be credited to the primary road fund." Iowa Code § 313.3(3). To the extent that section 8.56(1) authorizes transfer of money into the primary road fund, therefore, the laws governing the primary road fund would not otherwise prohibit this transfer.

In summary, the cash reserve fund sets forth separate methods under which money in the cash reserve fund can be disbursed. Subsection 1 authorizes disbursement of money for cash flow purposes which must be returned to the cash reserve fund by the end of the fiscal year in which it was disbursed. Subsection 3 authorizes appropriations from the cash reserve fund for nonrecurring emergencies.

Sincerely,

JULIE F. POTTORFF
Deputy Attorney General

MELISSA ANNE BIEDERMAN
Assistant Attorney General

SCHOOLS AND SCHOOL DISTRICTS; STATE OFFICERS AND DEPARTMENTS: Pupil transportation. Iowa Code §§ 256.11, 285.1, 285.2, 285.16 (2001). Resident pupils attending accredited college preparatory schools located either within or without the school district of their residences shall be entitled to transportation on the same basis as provided for resident pupils attending public schools. (Kempkes to Veenstra, State Senator, 6-11-01) #01-6-2(L)

June 11, 2001

The Honorable Kenneth Veenstra
State Senator
216 Arizona Ave. SW
Orange City, IA 51041

Dear Senator Veenstra:

In *Silver Lake Consolidated School District v. Parker*, 238 Iowa 984, 992, 29 N.W.2d 214, 218 (1947), the Supreme Court of Iowa held that state law did not then contemplate public funding for the transportation of pupils to and from nonpublic schools. More than fifty years later -- during which time the General Assembly has amended the state law on school transportation -- you have requested an opinion about the availability of public funding for the transportation of pupils to and from the educational institution known as a "college preparatory school."

I. Applicable law

Your question invites examination of Iowa Code chapters 256 and 285 (2001). Chapter 256 is entitled Department of Education. Chapter 285, where the statutory trail begins, is entitled State Aid for Transportation.

Section 285.2 requires school districts to provide transportation services to nonpublic school pupils as provided in section 285.1 when the General Assembly appropriates funds to the Department of Education for paying transportation claims submitted by school districts. Under section 285.1(14), resident pupils attending a nonpublic school located either within or without the school district of their residences shall be entitled to transportation on the same basis as provided for resident public school pupils. *See* 281 Iowa Admin. Code ch. 43 (pupil transportation). Section 285.16 -- which dates from 1978, *see* 1978 Iowa Acts, 67th G.A., ch.

1001, § 12 -- defines "nonpublic school" to mean a nonpublic school "accredited by the [Department of Education] as provided in section 256.11." Iowa Code § 285.16. *See* 281 Iowa Admin. Code ch. 12 (general accreditation standards).

Section 256.11 -- which dates from 1986, s*ee* 1986 Iowa Acts, 71st G.A., ch. 1245, § 1411 -- sets forth twelve subsections detailing requirements for accreditation of schools. It then provides a thirteenth subsection, where the statutory trail ends:

> (13). *Notwithstanding subsections 1 through 12 and as an exception to their requirements*, a private high school or private combined junior-senior high school operated for the express purpose of teaching a program designed to qualify its graduates for matriculation at accredited four-year or equivalent liberal arts, scientific, or technological colleges or universities *shall be placed on a special accredited list of college preparatory schools, which list shall signify accreditation of the school for that express purpose only, if [the school complies with certain standards established pursuant to statute or rule]* . . . .

(emphasis added).

II. Analysis

You have asked about the availability of public funding for the transportation of pupils to and from college preparatory schools.

In attempting to ascertain the intent of the General Assembly on this subject, we initially focus upon the language in chapter 285. Only if that language is ambiguous will we proceed to engage in statutory construction. "A statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning." 2002 Iowa Op. Att'y Gen. __ (#01-4-4(L)) (citations and quotation marks omitted). Under a well-settled rule of statutory construction,

> A statute is not to be read as though open to construction as a matter of course. . . . If the language given its plain and rational meaning is precise and free from ambiguity, no more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered.

Dingman v. City of Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742, 746 (1958).

Turning to chapter 285, we see that accreditation determines the question of public funding for the transportation of pupils to and from "nonpublic schools." *See* Iowa Code

§§ 285.1, 285.2. Section 285.16 specifically defines "nonpublic school" to mean a nonpublic school "accredited by the [Department of Education] as provided in section 256.11."

Subsection thirteen of section 256.11 specifies the standards for accrediting college preparatory schools and adds that any college preparatory school satisfying those standards "*shall be placed on a special accredited list . . . which shall signify accreditation of the school . . .*" (emphasis added). *See generally* Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statute imposes a duty). Accreditation pursuant to section 256.11(13) has consequences for college preparatory schools in at least one other context. *See* Iowa Code § 714.19(9) (exempting accredited college preparatory schools from certain matters relating to theft and fraud). *Cf.* Iowa Code § 299.2(4) (exempting child attending accredited college preparatory school from compulsory attendance law).

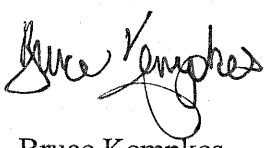
We believe that section 256.11(13) clearly and unambiguously places accredited college preparatory schools within section 285.16 as nonpublic schools "accredited by the [Department of Education] as provided in section 256.11." We see no reason to exempt subsection 13 from the scope of "section 256.11." *Cf. Fernandez v. Comm'r*, 114 T.C. 324, 331 (2000) (Congress intended "section" in tax statute to encompass all its subsections). Just as we may not inflate the terms of a statute under the guise of construction, *see Marcus v. Young,* 538 N.W.2d 285, 289 (Iowa 1995), we may not shrink them. In this vein, we note that the General Assembly passed section 285.16 some years after it passed section 256.11(13). Had the General Assembly intended to preclude public funding for the transportation of pupils to and from college preparatory schools, it could have easily done so, for example, by limiting the definition of "nonpublic school" in section 285.16 to "a nonpublic school accredited by the Department of Education as provided by *subsections one through twelve* in section 256.11." *See generally* Iowa R. App. P. 14(f)(13) (statutory construction focuses upon what legislature wrote, not what it should or might have written); *Dingman v. City of Council Bluffs*, 90 N.W.2d at 746 (impermissible to write into statute "words which are not there").

Moreover, by publicly funding pupil transportation, the General Assembly purportedly sought to encourage enrollment and attendance at schools – whether public or nonpublic – which comply with the standards for accreditation. *See generally Luthens v. Bair*, 788 F. Supp. 1032, 1039 (S.D. Iowa 1992) (public has interest in encouraging children to attend institutions that meet state educational requirements for accreditation). It thus appears reasonable for the General Assembly to provide public funding for the transportation of pupils attending a college preparatory school so long as it complies with the accreditation standards set forth in section 256.11(13). *See generally* Iowa Code § 4.2 (statute shall be liberally construed to promote its object), § 4.4(3) (legislature presumably intends just and reasonable result in passing statute), § 4.6(1) (statutory construction may take into account legislative object).

III. Summary

Resident pupils attending accredited college preparatory schools located either within or without the school district of their residences shall be entitled to transportation on the same basis as provided for resident pupils attending public schools.

Sincerely,



Bruce Kempkes
Assistant Attorney General

EMINENT DOMAIN; MUNICIPALITIES; SCHOOLS: City condemning school property. Iowa Const. art. IX (2nd part), § 1 (1857); Iowa Code §§ 6A.4, 297.1, 306.2, 306.19 (2001). Absent a clear showing of fraud, bad faith, or arbitrary abuse of discretion, a city may condemn property owned by a school district to use as right-of-way for a street. (Kempkes to McKean, State Senator, 7-31-01) #01-7-1(L)

July 31, 2001

The Honorable Andy McKean
State Senator
509 S. Oak St.
Anamosa, IA 52205

Dear Senator McKean:

The phrase "eminent domain" signifies the lawful taking, or condemning, of property for a public use. Black's Law Dictionary 523 (6th ed. 1990). You have requested an opinion on the taking of public property for a different public use. You ask whether a city can condemn property owned by a school district to use as right-of-way for a major arterial street.

I. Applicable law

Your question invites examination of Iowa Code chapters 6A, 6B, 297, and 306 (2001) as well as the state constitution.

Chapter 306 is entitled Establishment, Alteration, and Vacation of Highways. It allocates jurisdiction and control over primary and secondary roads, streets, and parkways. The "primary road system" means "those roads and streets both inside and outside the boundaries of municipalities," Iowa Code § 306.3(6), and falls within the jurisdiction and control of the Iowa Department of Transportation (DOT), Iowa Code § 306.4(1). The "municipal street system" means "those streets within municipalities that are not primary roads." Iowa Code § 306.3(5). *See generally* Iowa Code § 306.3(8) (defining "'road' or 'street'"). Pursuant to section 306.4(3), the municipal street system falls within the jurisdiction and control of "the governing body of each municipality; except that the [DOT] and the municipal governing body shall exercise concurrent jurisdiction over the municipal extensions of primary roads in all municipalities."

Chapter 306 also addresses the acquisition of right-of-way by an agency. "Public road right-of-way" means "an area of land, the right to possession of which is secured or reserved by the state or a governmental subdivision for roadway purposes." Iowa Code § 306.3(7). "Agency" means "any governmental body which exercises jurisdiction and control over any road as provided in section 306.4." Iowa Code § 306.2(1). Section 306.19 specifically provides:

> (1). In the maintenance, relocation, establishment, or improvement of any road, including the extension of such road within cities, the agency having jurisdiction and control of such road shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor.
>
> . . . .
>
> (4). Proceedings for the condemnation of land for any highway shall be under the provisions of chapter 6A and 6B. . . .

See Black's Law Dictionary 728 ("highway" means a free and public roadway or street). *See generally* Iowa Code § 4.1(38) (undefined words in statutes shall be construed according to context and approved English usage).

Chapter 6A is entitled Eminent Domain Law (Condemnation). It confers the power of eminent domain upon cities "for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon cities." Iowa Code § 6A.4(6).

Chapter 6B is entitled Procedure under Eminent Domain. It sets forth detailed procedures for condemning property pursuant to the power of eminent domain.

The state constitution invests the General Assembly with control over school lands. Iowa Const. art. IX (2nd part), § 1 (1857). Pursuant to that authority, the General Assembly enacted chapter 297, entitled Schoolhouses and Schoolhouse Sites. It provides in part:

> The board of each school district may fix the site for each schoolhouse, which shall be upon some public highway already established or procured by such board and not in any public park, and except in cities and villages, not less than thirty rods from the residence of any landowner who objects thereto.

Iowa Code § 297.1.

II. Analysis

You have asked whether a city can condemn property owned by a school district to use as right-of-way for a major arterial street. We limit our opinion to this narrow question and, in doing so, assume that jurisdiction and control over the street rests exclusively with the city. *See generally* Iowa Code §§ 306.3(5), 306.4(3).

In 1896, the Supreme Court of Iowa observed:

> [I]t is not true that property devoted to one public use cannot be subjected to another. It is within the power of the [General Assembly] to make the same property subservient to different public uses, or even to take it from one public use and devote it to another.

Chicago, M. & St. P. Ry. Co. v. Starkweather, 97 Iowa 159, 66 N.W. 87, 88 (1896). *See* Iowa Att'y Gen., *Eminent Domain in Iowa* 2 (1962); Annot., "Condemnation – Of Public Entity's Land," 35 A.L.R.3d 1293 (1971); Annot., "Condemnation of Public Property," 91 L. Ed. 221 (1947); 26 Am. Jur. 2d *Eminent Domain* § 100, at 534 (1996). A public entity taking property devoted to a public use for a different public use could not supersede or materially interfere with the pre-existing use unless its enabling statute authorized that power in express language or by necessary implication. *Chicago, M. & St. P. Ry. Co. v. Starkweather*, 66 N.W. at 88.

The supreme court applied these well-established principles in subsequent cases when municipalities sought to condemn railway property. *See, e.g., Connolly v. Des Moines & Central Iowa Ry. Co.*, 246 Iowa 874, 68 N.W.2d 320, 326 (1955); *Town of Alvord v. Great N. Ry. Co.*, 179 Iowa 465, 161 N.W. 467, 469 (1917); *Chicago, G.W. Ry. Co. v. Mason City,* 155 Iowa 99, 135 N.W. 9, 10 (1912); *see also* 1928 Iowa Op. Att'y Gen. 255, 256. Other jurisdictions applying the principles have specifically upheld condemnations of school property by municipalities. *See, e.g., In re Borough of Edgewood*, 178 A. 383, 383-84 (Pa. 1935); *Roberts v. City of Seattle*, 116 P. 25, 26 (Wash. 1911).

Iowa cases on this subject all predate 1968, when Iowa voters ratified a state constitutional amendment providing for municipal home rule. As a result of the amendment, "[m]unicipal corporations may enact any law not inconsistent with [state statutes] to determine their local affairs and government." Iowa Const. amend. 25 (1968). The General Assembly thereafter declared in section 364.1 that a city

> may, *except as expressly limited by the Constitution, and if not inconsistent with [state statutes]*, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to

> preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

(emphasis added). Thus, under section 364.2(2), a city "may exercise its general powers subject only to limitations expressly imposed by a state or city law."

In *Oakes Construction Co. v. Iowa City*, 304 N.W.2d 797, 808 (Iowa 1981), the supreme court held that constitutional home rule provides cities with the power to establish streets and condemn rights-of-way and that statutory provisions merely augment this power. *See Bechtel v. City of Des Moines*, 225 N.W.2d 326, 333 (Iowa 1975). It explained that a city has

> broad discretion of a legislative nature to determine whether a street or road shall or shall not be established, initially or by extension, and . . . courts cannot interfere with this legislative function except in a clear case of fraud, bad faith, or arbitrary abuse of discretion.

Oakes Constr. Co. v. Iowa City, 304 N.W.2d at 808. *Accord* 1994 Iowa Op. Att'y Gen. 142 (#94-9-4(L)); *see* 1970 Iowa Op. Att'y Gen. 125, 127; *see also* Iowa Code § 6A.4(6) (cities may exercise power of eminent domain for public purposes that are "reasonable and necessary").

Oakes Construction Co. v. Iowa City thus limits our inquiry. We see nothing in chapter 306 that detracts from the home rule power of a city to condemn property for use as right-of-way. If anything, chapter 306 affirms that power. *See* Iowa Code § 306.19(1) (city "shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor"). *Cf.* Iowa Code § 384.24(3)(a) ("essential corporate purpose" of city which wishes to issue general obligation bonds includes opening, widening, and extending rights-of-way).

III. Summary

Absent a clear showing of fraud, bad faith, or arbitrary abuse of discretion, a city may condemn property owned by a school district to use as right-of-way for a street.

Sincerely,

Bruce Kempkes
Assistant Attorney General

JUVENILE LAW: Delinquents at juvenile home. Iowa Code §§ 218.4, 232.52, 232.102, 233B.3, 233B.5, 233B.7 (2001). The Iowa Juvenile Home may admit juvenile delinquents adjudicated as children in need of assistance. (Kempkes to Davis, Scott County Attorney, 10-10-01) #01-10-3(L)

October 10, 2001

Mr. William E. Davis
Scott County Attorney
416 W. Fourth St.
Davenport, IA 52801

Dear Mr. Davis:

You have requested an opinion on the admission of residents into the Iowa Juvenile Home. Pointing to an administrative rule promulgated by the Iowa Department of Human Services (DHS), you ask whether the home may admit juvenile delinquents adjudicated children in need of assistance. This question primarily requires an examination of Iowa Code chapters 218, 232, and 233B (2001).

I. Applicable law

Chapter 218 is entitled Institutions Governed by Human Services Department. These institutions include the Iowa Juvenile Home. Section 218.4 provides for the promulgation of rules "not inconsistent with law as [such institutions] may deem necessary for . . . the admission of residents thereto . . . ."

Chapter 233B is entitled Juvenile Home. Section 233B.1 provides:

> The . . . home shall be maintained for the purpose of providing care, custody and education of such children as are committed to the home. Such children shall be wards of the state. Their education shall embrace instruction in the common school

> branches and in such other higher branches as may be practical and will enable the children to gain useful and self-sustaining employment. . . .

See Iowa Code § 233B.7. *See generally* Iowa Code § 218.1(8). Under section 233B.3,

> Admission to the home shall be granted to resident children of the state under seventeen years of age, as follows, giving preference in the order named:
>
> (1). *Neglected or dependent children committed by the juvenile court.*
>
> (2). *Other destitute children.*

(emphasis added). *See generally* Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statutes imposes a duty). Section 233B.5 governs transfers of children to the home from other institutions, and section 233B.7 governs expulsions of children from the home.

Chapter 232 is entitled Juvenile Justice. Section 232.52(2)(e) permits the DHS to place juvenile delinquents "in the state training school or other facility . . . ." Section 232.102(3) specifies that a court may enter an order transferring the guardianship of a child in need of assistance to the DHS "for purposes of placement in the Iowa juvenile home . . . ."

II. Analysis

You have asked whether the Iowa Juvenile Home may admit juvenile delinquents adjudicated as children in need of assistance.

The DHS has rule-making authority regarding admissions to the home. *See* Iowa Code § 218.4. Promulgated pursuant to section 218.4, a DHS administrative rule provides: "No children adjudicated to have committed a delinquent act shall be admitted to the . . . home." 441 Iowa Admin. Code 101.9(3).

We, like courts, must "give appropriate deference to the view of [an] agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(c). Nevertheless, the doctrine of *ultra vires*, *Hiserote Homes, Inc. v. Riedemann*, 277 N.W.2d 911, 913 (Iowa 1979), as well as section 218.4 itself, prohibits an administrative body such as the DHS from having a view on the eligibility of children for admission to the home that "is inconsistent with" legislatively enacted provisions.

Against this background, the question arises whether the DHS administrative rule precludes admission to the home of all juvenile delinquents or, instead, whether it permits admission of juvenile delinquents who have been adjudicated children in need of assistance.

We have a duty to interpret statutes in ways consistent with constitutional provisions and a similar duty to interpret administrative rules in ways consistent with statutory provisions. *See generally* Iowa Code § 4.4 (courts presume constitutionality of statute), § 4.6(5) (courts take into account the consequences of a particular statutory interpretation in determining legislative intent). In other words, we strive to avoid interpreting statutes and rules in such a way that would lead to their invalidation. That principle necessarily leads to the conclusion that the DHS administrative rule, placed against the background of chapter 233B, does not preclude the home from admitting juvenile delinquents who have been adjudicated as children in need of assistance.

The General Assembly in chapter 233B has specified which children can reside at the home. Section 233B.5 prohibits transfers of any child "who [suffers from] mental illness or mental retardation, or who is incorrigible, or has any vicious habits, or whose presence in the home would be inimical to the moral or physical welfare of the other children within the home . . . ." Section 233B.7 permits the expulsion of any child "for disobedience and refusal to submit to proper discipline." Under section 233B.3, the home shall admit resident children of the state, under seventeen years of age, who are "[n]eglected or dependent children committed by the juvenile court" and "[o]ther destitute children." We believe that this language clearly encompasses children in need of assistance. *See* Webster's Ninth New Collegiate Dictionary 302, 762 (1979) ("dependent" means relying upon another for support; "destitute" means lacking possessions and resources, suffering from extreme want; "neglected" suggests something receiving little attention, disregarded, or unattended to). *See generally* Iowa Code § 4.1(38) (undefined words in statutes shall be construed according to context and approved English usage). Section 232.102(3) dispels any doubt on this matter by providing that a court may enter an order transferring the guardianship of a child in need of assistance to the DHS "for purposes of placement in the Iowa [Juvenile Home] . . . ."

Section 233B.3 clearly permits the home to admit children adjudicated in need of assistance. Section 233B.3, in conjunction with sections 233B.5 and 233B.7, establishes the parameters of eligibility for admission to and continued residency in the home. None of these statutes necessarily precludes residency by a "child who has committed a delinquent act" or by a "juvenile delinquent," phrases they do not employ.

We note that the foregoing analysis of chapter 233B comports with the home's practice to admit juvenile delinquents adjudicated as children in need of assistance. *See* Annual Report: Iowa Juvenile Home/ Girls Training School 5 (2001) (of the 167 children admitted to the home in 2001, 71 had been adjudicated in need of assistance and 47 had committed a delinquent act). *See generally* Iowa Code § 4.6(6) (courts may take into account administrative construction of statute in determining legislative intent). We also note that, in the distant past, the home

admitted such children. *See* 1920 Iowa Op. Att'y Gen. 108, 109; *see also* 1982 Iowa Op. Att'y Gen. 321 (#82-1-2(L)).

III. Summary

The Iowa Juvenile Home may admit juvenile delinquents adjudicated as children in need of assistance.

Sincerely,

Bruce Kempkes
Assistant Attorney General

LAW ENFORCEMENT; COUNTIES AND COUNTY OFFICERS: Use of special deputies. Iowa Code § 331.652 (2001). County sheriffs may not use special deputies on a regular, ongoing basis to assist in performing official duties. They may only appoint them to assist in handling an emergency. (Kempkes to Goodlow, Monroe County Attorney, 10-17-01) #01-10-4(L)

October 17, 2001

Mr. Steven E. Goodlow
Monroe County Attorney
108 Washington Ave. East
Albia, IA 52531

Dear Mr. Goodlow:

Iowa has long-authorized its county sheriffs to use private citizens, untrained in law enforcement, to assist in the performance of official duties. *See Stickney v. Stickney*, 77 Iowa 699, 42 N.W. 518, 519 (1889). Twenty years ago, however, the General Assembly backed away from the tradition by passing legislation that provided for the establishment and training of reserve deputies to assist county sheriffs and their regular deputies. *See* 1980 Iowa Acts, 68th G.A., ch. 1191. *See generally* 1984 Iowa Op. Att'y Gen. 86 (#84-2-6(L)).

You have requested an opinion on the use of private citizens to assist in the performance of official duties at a time when county sheriffs may, due to budget constraints, have relatively few regular or reserve deputy sheriffs at their disposal. You ask whether county sheriffs may use private citizens as "special deputies" on a regular, ongoing basis. This question implicates an examination of Iowa Code chapters 80D and 331 (2001).

I. Applicable law

Chapter 331 is entitled County Home Rule Implementation. Section 331.652 provides in part:

> (1). The sheriff may call upon any person for assistance to:
>
> (a). Keep the peace or prevent the commitment of crime.
>
> (b). Arrest a person who is liable to arrest.
>
> (c). Execute a process of law.

> (2). The sheriff, when necessary, may summon the power of the county to carry out the responsibilities of office.

Chapter 80D is entitled Reserve Peace Officers. Section 80D.1 permits the establishment of a force of reserve deputy sheriffs to assist the county sheriff and any regular deputy sheriffs in performing official duties. Section 80D.1A(3) defines a reserve deputy sheriff as a volunteer, non-regular, sworn member of the sheriff's office who serves with or without compensation, has regular police powers while functioning as a deputy sheriff, and "participates on a regular basis" in the activities of the county sheriff's office.

II. Analysis

Section 331.652 authorizes county sheriffs to appoint special deputies, *viz.*, "persons who would not otherwise be classified as regular or reserve deputies." 1984 Iowa Op. Att'y Gen. 119 (#84-2-6(L)). You have asked whether they may use special deputies on a regular, ongoing basis to assist in performing official duties.

In 1939, this office concluded that the precursor to section 331.652 only sanctioned the temporary appointment of these volunteers. *See* 1940 Iowa Op. Att'y Gen. 564, 565; *see also* 1980 Iowa Op. Att'y Gen. 882 (#80-12-4(L)) (county sheriff may summon assistance of individual or *posse comitatus* "on an ad hoc basis"). *Cf.* 1982 Iowa Op. Att'y Gen. 148, 149 (county sheriff has authority to appoint "irregular, special deputies" who may have such duties and powers as keeping the peace, preventing crime, arresting persons liable thereto, and executing process of law); 1898 Iowa Op. Att'y Gen. 101, 101 (county sheriffs may summon a *posse comitatus*, but counties lack authority "to aid in having an effective *posse comitatus* always subject to call").

In 1984, we answered the question whether special deputies can serve as permanent employees of the county sheriff's office:

> [A]ny exercise of [the appointment authority in section 331.652(1)] should be limited to dire emergency situations in which the sheriff is required to exercise [that] authority . . . because of the impossibility of calling upon regular or reserve deputies. Once the emergency has passed, however, the sheriff would be required to comply with [chapters 80D or 331] if he or she wishes to appoint a special deputy to a more permanent position as [a] regular or reserve deputy . . . . [T]he sheriff should resort to appointment of special deputies . . . only in very unusual circumstances.

1984 Iowa Op. Att'y Gen. 119 (#84-2-6(L)) (quotation marks omitted).

Our 1984 opinion accurately summarizes current law and governs your question. Accordingly, we conclude that county sheriffs have no authority under section 331.652 to use special deputies on a regular, ongoing basis. Any other conclusion would tend to subvert the legislative intent underlying chapter 80D, which provides for the establishment and training of reserve deputy sheriffs. *See generally* Iowa Code ch. 80B (imposing mandatory training upon regular peace officers), ch. 80D (setting standards and placing limits on scope of authority of reserve peace officers).

We recognize that a regular, ongoing force of special deputies may, as a matter of fact, significantly assist a county sheriff who must contend with a manpower shortage that accompanies a tight budget and a county that elects not to take advantage of chapter 80D. Your question, however, rests squarely on a matter of law, and, as a matter of law, section 331.652 limits the use of special deputies to assist in emergencies. *See* 1984 Iowa Op. Att'y Gen. 119 (#84-2-6(L)). Emergencies are specific, sudden and unexpected, temporary, and require immediate responsive action. Black's Law Dictionary 522-23 (6th ed. 1991); Webster's Ninth New Collegiate Dictionary 368 (1979).

III. Summary

County sheriffs may not use special deputies on a regular, ongoing basis to assist in performing official duties. They may only use them to assist in handling an emergency.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CIVIL SERVICE; COUNTIES; SHERIFF: Office reorganization. Iowa Code §§ 20.7, 331.323, 331.652, 331.903, 341A.6, 341A.8, 341A.12 (2001). Acting in good-faith and for the purpose of economy or efficiency, county sheriffs can eliminate a lieutenant's position in reorganizing their offices and effectively demote the lieutenant having the least seniority. They may not undertake such a reorganization for the purpose of avoiding the civil service laws. (Kempkes to Martin, Cerro Gordo Attorney, 10-31-01) #01-10-5(L)

October 31, 2001

Mr. Paul L. Martin
Cerro Gordo County Attorney
220 N. Washington Ave.
Mason City, IA 50401

Dear Mr. Martin:

You have requested an opinion on the scope of authority of county sheriffs over their offices. You ask whether a sheriff, in reorganizing his office, may eliminate a lieutenant's position and effectively demote a lieutenant.

With the appointment of a civilian as jail administrator, the sheriff says he no longer has any need for a lieutenant in charge of headquarters, a position only created in 1997. He proposes reducing the number of lieutenants in his officer from three to two and returning the lieutenant having the least seniority to his former position of deputy sheriff.

I. Applicable law

In answering your question, we focus upon Iowa Code chapters 20, 331, and 341A (2001).

Chapter 20 is entitled Public Employment Relations (Collective Bargaining). Among other things, it provides that public employers "shall have, in addition to all powers, duties, and rights established by constitutional provision, statute, ordinance, charter, or special act, the exclusive power, duty, and the right to . . . [h]ire, promote, demote, transfer, assign and retain public employees in positions within the public agency," to "[m]aintain the efficiency of governmental operations," and to "[r]elieve public employees from duties because of lack of

work or for other legitimate reasons." Iowa Code § 20.7(2), (4), (5). *Cf.* Iowa Code § 20.9 (public employers and employees may enter into contract that provides *inter alia* for "procedures for staff reduction").

Counties have home rule authority under the state constitution. *See* Iowa Const. art. III, § 39A (amend. 37). In essence, counties may exercise any power and perform any function they deem appropriate for improving the general welfare of their residents so long as their actions do not offend state law. Chapter 331 is entitled County Home Rule Implementation. Section 331.301(3) provides that counties may exercise their general powers subject only to limitations "expressly imposed" by state law. Section 331.323(2)(g) provides that the county supervisors shall establish the number of deputies, assistants, and clerks in the sheriff's office. Section 331.652(7) provides: "Subject to the requirements of chapter 341A and section 331.903, the sheriff may appoint and remove deputies, assistants, and clerks." Section 331.903(1) similarly provides that the sheriff may appoint, with the approval of the county supervisors, one or more deputies, assistants, and clerks and that the county supervisors shall determine the number of deputies, assistants, and clerks.

Chapter 341A is entitled Civil Service for Deputy County Sheriffs. Section 341A.6(9) authorizes civil service commissions to "classify deputy sheriffs and subdivide them into groups according to rank and grade which shall be based upon the duties and responsibilities of the deputy sheriffs." Under section 341A.8, no person in the classified civil service "shall be reinstated in or transferred, suspended, or discharged from any such place, position, or employment contrary to the provisions of [chapter 341A]." Section 341A.12 provides that no person in the classified civil service "who has been permanently appointed or inducted into civil service . . . shall be removed, suspended, or demoted except for cause . . . ."

II. Analysis

You have asked whether sheriffs have authority to reorganize their offices and, if not, whether civil service commissions may approve reorganizations that eliminate a lieutenant's position and effectively demote a lieutenant. We assume that chapter 341A encompasses this position, *see* Iowa Code § 341A.7, and that the reorganization complies with the terms of any collective bargaining agreement, *see generally* Iowa Code ch. 20.

Nothing in chapters 20, 331, and 341A requires a sheriff's office to have lieutenants or a specific number thereof. Chapter 341A only prohibits the removal, transfer, or demotion of a person within the classified civil service, except for cause. *See* Iowa Code § 341A.12; *Burmeister v. Muscatine County Civil Serv. Comm'n*, 538 N.W.2d 877, 878 (Iowa App. 1995). We do not believe that this prohibition overrides the sheriff's prerogative to achieve reductions in force made in good faith. *See generally* Iowa Code § 20.7; 1980 Iowa Op. Att'y Gen. 523 (#79-12-4(L)) (sheriff has authority to appoint deputies in number approved by county supervisors and has sole authority to terminate them); 1982 Op. Att'y Gen. 58, 58-59 (public

entity seeking to achieve reduction in force can terminate employee protected by veteran preference statute, which permits removal for incompetency or misconduct; it would be incorrect to "surmise that an eligible veteran who occupies a covered position could only be removed for misconduct or incompetency [and not for any] other cause").

This office recently addressed the analogous question about a city's authority to consolidate positions in a fire department. *See* 2000 Iowa Op. Att'y Gen. __ (#00-2-2). We explained:

> As a matter of logic, the authority to create and abolish positions includes the authority to consolidate them. Cities possess this authority even though the persons affected by its exercise enjoy civil service status. Cities "are not bound to keep [civil service employees] upon the payrolls if it is decided, in good faith, that the positions should be abolished, either because of financial necessity or the dictates of good and economical business management."
>
> That cities may make good-faith modifications in the civil service for the purpose of economy or efficiency comports with their authority, in general, to exercise full control over all their officers and employees. Courts have viewed the creation or abolition of a position in city government as something more than a mere administrative act. The abolition of a position in the budgetary process is a "quintessential legislative function, reflecting [a governing body's] ordering of policy priorities in the face of limited financial resources." Civil service legislation thus does not completely restrict city government in the areas of personnel and fiscal management. We have observed:
>
> > Although Civil Service statutes are designed to protect and safeguard against arbitrary actions of superior officers in removing employees, the overriding concern is always the protection of the public. As such, Civil Service legislation is not designed to prevent a department from being reorganized in the interest of efficiency and economy. Any reclassification, therefore, which conforms the civil structure to the realities of the agency prior to the reclassification is valid.

2000 Iowa Op. Att'y Gen. ___ (#00-2-2) (citations omitted).

We believe that our 2000 opinion governs your question. Accordingly, we conclude that the sheriff can eliminate a lieutenant's position in reorganizing his office and effectively demote the lieutenant having the least seniority and that the civil service commission lacks jurisdiction over such reorganization. This caveat from our 2000 opinion, however, bears repeating:

> We [caution] against merely establishing a title and moving individuals into newly consolidated positions in order to establish a pay differential: "It should be shown that there is a substantial difference in the work performed and that the reorganization accords with realities." A similar caveat was issued by the court in *Helgevold v. Civil Service Commission*:
>
> > There are limits upon actions the city may take for administrative reasons. The municipality may not avoid the dictates of the civil service laws by merely labeling an action administrative. Reclassification or reorganization will not be permitted when its purpose is to avoid civil service laws. . . .
> >
> > . . . .
> >
> > Therefore, [a] court must balance the interests involved; those of the city in controlling the functions and administration of the [city], and of the employee in serving without threat of demotion or removal for improper or partisan reasons. The fulcrum in balancing these interests is the public good.
>
> The limitations mentioned by these caveats would require factual findings. The opinion process cannot resolve disputed issues of fact, and this opinion does not purport to do so.

2000 Iowa Op. Att'y Gen. ___ (#00-2-2).

III. Summary

Acting in good-faith and for the purpose of economy or efficiency, county sheriffs can eliminate a lieutenant's position in reorganizing their offices and effectively demote the

lieutenant with the least seniority. They may not undertake such a reorganization for the purpose of avoiding the civil service laws.

Sincerely,

Bruce Kempkes
Assistant Attorney General

OPEN MEETINGS LAW; SCHOOLS: Board member absent during closed session. Iowa Code § 21.5 (2001). A school board member, absent during a closed session of the board, may subsequently obtain and review the minutes and tape recording of the closed session. (Kempkes to Shey, State Representative, 11-19-01) #01-11-1(L)

November 19, 2001

The Honorable Patrick Shey
State Representative
State Capitol
LOCAL

Dear Representative Shey:

You have requested an opinion about the consequences of a governmental body conducting a meeting in closed session. You ask whether school board members, absent during a closed session of the board that they had a right to attend, may subsequently obtain and review the minutes and tape recording of the closed session. This question primarily requires an examination of Iowa Code chapter 21 (2001).

I. Applicable law

Chapter 21 is entitled Official Meetings Open to Public (Open Meetings). It provides for meetings conducted in open and closed session. For open sessions, section 21.3 provides that "[t]he minutes shall be public records open to public inspection." *See generally* Iowa Code ch. 22 (open records law). For closed (or "executive") sessions, section 21.5(4) imposes different requirements:

> A governmental body shall keep detailed minutes of all discussions, persons present, and action occurring at a closed session, and shall also tape record all of the closed session. *The detailed minutes and tape recording of a closed session shall be sealed and shall not be public records open to public inspection.* However, upon order of the court in an action to enforce this

> chapter, the detailed minutes and tape recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question . . . .

(emphasis added).

II. Analysis

You have asked whether school board members, absent during a closed session of the board that they had a right to attend, may subsequently obtain and review the minutes and tape recording of the closed session.

A school board constitutes a "governmental body" subject to the provisions of chapter 21. 1972 Iowa Op. Att'y Gen. 158, 158; *see* Iowa Code § 21.2(1). It may, under certain circumstances, hold a closed session. Iowa Code § 21.5. When it does, it has a duty to keep detailed minutes and shall tape record all of it, Iowa Code § 21.5(4), and its members have a duty to keep confidential matters confidential, *Gabrielson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996).

Section 21.5(4) provides that the detailed minutes and tape recording of a closed session "shall be sealed and shall not be public records open to public inspection" absent a court order. Iowa Code § 21.5(4). *See generally* 1998 Iowa Op. Att'y Gen. ___ (#97-10-1(L)) ("[a] public record is not necessarily an open record"). In preceding "inspection," the adjective "public" has significance. *See* 1998 Iowa Op. Att'y Gen. ___ (#98-4-4(L)) ("[w]e cannot presume that the General Assembly inserted meaningless language into [a statute]"); *see also Head v. Colloton,* 331 N.W.2d 870, 874 (Iowa 1983). A specific prohibition against public inspection does not necessarily prohibit "nonpublic" inspection by, for example, a member of the governmental body which held the closed session. *See generally District Township v. City of Dubuque*, 7 Iowa 262, 275-76 (1858) (affirmative words "may, and often do, imply a negative of what is not affirmed, as strongly as if expressed"; if "a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise"); 1994 Iowa Op. Att'y Gen. 96, 97.

In *Head v. Colloton,* 331 N.W.2d 870, 873-74 (Iowa 1983), the Supreme Court of Iowa considered a request by a leukemia victim for access to public hospital records which would reveal the name of a potential bone marrow donor. In denying access, it indicated a different situation might exist if the victim had standing as a public officer or employee:

> Chapter [21] is Iowa's freedom of information statute. Its purpose is "to open the doors of government to public scrutiny – to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." . . .
>
> Because chapter [21] defines the right of the general public to access to public records, the exemptions [from disclosure in chapter 21] delineate exceptions only to the same general right. For example, they do not preclude access by an agency vested with investigative authority and subpoena power. Nor do they preclude access by a public officer granted subpoena authority pursuant to statute or rule. In the present case, however, plaintiff has no standing to seek access other than as a member of the public generally.

Id. at 874 (interpreting Iowa Code ch. 66A (1983)) (citations omitted). *See Tausz v. Clarion-Goldfield Community School Dist.*, 569 N.W.2d 125, 127 (Iowa 1997) ("the sealing of the record of a closed session pursuant to section 21.5(4) only serves to deny access to inspection by members of the general public"); 1996 Iowa Op. Att'y Gen. 24 (#95-6-6(L)) (public records law targeted toward providing general public with general right of access rather than limiting the right of individuals to examine their own confidential public records).

Subsequently, in *Gabrielson v. Flynn*, 554 N.W.2d 267, 275 (Iowa 1996), the supreme court did not decide the broad question whether "any member of a governing body has an inherent right to access public and confidential records." It did, however, hold that school board members

> generally should be allowed access to both public and private records that are necessary for the proper discharge of their duties. We agree that "members of the Board of Education occupy a fiduciary position and are under a duty to make detailed inquiry into any matter which appears to be wrong." This duty necessarily implies that school board members should have access to records and documents of the district, subject to the legal constraints of chapter 22, in order to give effect to the authority granted them by statute.

Id. (citations omitted).

These cases indicate that section 21.5(4) does not prohibit board members from obtaining and reviewing records of meetings that they had a right to attend. Indeed, allowing access permits absent board members to know what they missed during the closed session (which has

importance if subsequent meetings deal with the same or related issues) and provides them with an opportunity, before the next meeting, to study or take other action on the issues addressed in the closed session. *See generally* Iowa Code § 4.4(3) (statutory construction presumes that legislature intended a just and reasonable result), § 4.6(5) (statutory construction may take into account consequences of a particular construction). Although the underlying case involved a statute worded significantly different than section 21.5(4), one court has observed:

> The following example illustrates the hindrance that could occur to a public body if [its members not present at executive sessions are not allowed access to the records of those sessions.] A, B and C are members of a public body and meet in executive session. Two months later, D, E and F are elected to replace A, B and C. If a question arises concerning a topic known to have been considered in executive session by A, B and C, should D, E and F be precluded from access to that information? To forbid them access, and require that they make an independent determination uninformed as to their predecessors' action or declining to act, hamstrings a public body. We believe that . . . public policy opts for opening the executive session to [the newly elected members] . . . .

Picture Rocks Fire Dist. v. Updike, 699 P.2d 1310, 1311 (Ariz. App. 1985) (holding that member absent from executive session entitled to copy of minutes under statute providing that minutes of executive session "shall be kept confidential except from members of the public body which met in executive session").

We therefore conclude that section 21.5(4) merely prohibits members *of the public* from gaining access to the minutes and tape recording of a school board's closed session unless they obtain a court order. *Cf.* 1979 Ariz. Op. Att'y Gen. I79-304 (statute providing that minutes of executive session "should be kept confidential except from members of the public body which met in executive session" permits those members to reveal information pertaining to executive session "to other, non-present members of the [public] body"). Had the General Assembly intended a prohibition of disclosure applicable to all persons, including board members, it could have simply provided that the detailed minutes and tape recording of a closed session shall be sealed "and shall not be open to inspection" absent a court order. *See Palmore v. United States*, 411 U.S. 389, 395, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973) (noting that Congress could have chosen different statutory language if it had actually intended a particular meaning). *See generally* Iowa R. App. P. 14(f)(13) (statutory construction focuses upon what legislature wrote, not what it should or might have written).

School boards thus have an obligation to provide members absent from closed sessions with access to the detailed minutes and tape recordings of those sessions. If school boards do not

comply with this obligation, then absent members may seek court orders to provide them access to the information. Although section 21.5(4) permits district courts to unseal the detailed minutes and tape recordings and to examine them *in camera* "in an action to enforce [chapter 21]," the supreme court in *Dillon v. City of Davenport*, 366 N.W.2d 918, 921-22 (Iowa 1985), held that this provision does not, in all cases, prevent members of the general public from obtaining access to confidential records outside the context of enforcement actions. Moreover, as we have explained, section 21.5(4) only pertains to members of the general public. It does not encompass members of school boards who have a right to attend closed sessions and who have a duty to keep confidential matters confidential. We therefore conclude that absent board members may seek orders from district courts to compel school boards to provide them with the minutes and tape recordings of closed sessions when their proper requests for access have gone unheeded.

III. Summary

School board members, absent during a closed session of the board that they had a right to attend, may subsequently obtain and review the minutes and tape recording of the closed session.

Sincerely,

Bruce Kempkes
Assistant Attorney General

CIVIL SERVICE; COUNTY AND COUNTY OFFICERS: Appointment of jailer. Iowa Code §§ 331.652, 331.903, 341A.7, 341A.8, 341A.14, 356.1 (2001). The civil service laws for deputy sheriffs, Iowa Code ch. 341A, do not *per se* apply to the position of jailer. Whether they apply to a jailer in a particular county constitutes a matter of fact, which falls outside the proper scope of an opinion and rests upon an analysis of job duties. Although a written certificate of appointment from the civil service commission to county officials should precede their payment of compensation to a properly appointed jailer for services rendered, they may pay compensation in the absence of such certificate. (Kempkes to TeKippe, Chickasaw County Attorney, 12-19-01) #01-12-2(L)

December 19, 2001

Mr. Richard P. TeKippe
Chickasaw County Attorney
206 N. Chestnut
P.O. Box 129
New Hampton, IA 50659

Dear Mr. TeKippe:

You have requested an opinion on the scope of the civil service laws for deputy sheriffs. You ask whether county sheriffs must comply with those laws in appointing a jailer and, if so, whether a written certificate of appointment from the civil service commission to county officials must precede their payment of compensation for services rendered to a properly appointed jailer. These questions require an examination of Iowa Code chapters 331, 341A, and 356 (2001).

I. Applicable law

Chapter 356 is entitled Jails and Municipal Holding Facilities. Section 356.1 provides that the jails in the several counties "shall be in charge of the respective sheriffs . . . ." *See* 1984 Iowa Op. Att'y Gen. 167, 171-72 (county sheriffs primarily responsible for the hiring and supervising of jailers). *See generally* Iowa Code § 80B.11A (providing for jailer training standards), § 356.5 (identifying duties of "keeper of [the] jail").

Chapter 331 is entitled County Home Rule Implementation. Section 331.652(7) and section 331.903(1) provide that county sheriffs may make at-will appointments of deputies, assistants, and clerks, subject to the requirements of chapter 341A. *Norton v. Adair County*, 441 N.W.2d 347, 361 (Iowa 1989).

Enacted in 1973, chapter 341A is entitled Civil Service for Deputy County Sheriffs. Violation of any of its provisions constitutes a simple misdemeanor. Iowa Code § 341A.21.

Chapter 341A requires county sheriffs to make all appointments and promotions to "classified civil service positions" only after the holding of competitive examinations and the making of impartial investigations. *See* Iowa Code § 341A.8; 1980 Iowa Op. Att'y Gen. 523 (#79-12-4(L)). *See generally* Iowa Code § 341A.10 (identifying requirements for civil service applicants). Section 341A.7 provides in part that "classified civil service positions . . . shall include persons actually serving as deputy sheriffs . . . ."

Section 341A.14 provides:

> No treasurer, auditor, or other officer, or employee of any county subject to this chapter shall approve the payment of or be in any manner involved in paying, auditing, or approving salary, wage, or other compensation for services to any person subject to the provisions of this chapter, unless a payroll, estimate, or account for such salary, wage or other compensation containing the names of the persons to be paid, the amount to be paid to each person, the services on account of which same is paid, and any other information which, in the judgment of the civil service commission should be furnished on such payroll, bears the certificate of the civil service commission, or of its personnel director or other duly authorized agent. The certificate shall state that the persons named therein have been appointed or employed in compliance with the terms of this chapter and the rules of the commission, and that the payroll, estimate, or account is, insofar as known to the commission, a true and accurate statement. The commission shall refuse to certify the pay of any public officer or employee whom it finds to be illegally or improperly appointed, and may further refuse to certify the pay of any public officer or employee who, willfully or through culpable negligence, violates or fails to comply with this chapter or with the rules of the commission.

II. Analysis

(A)

You have asked whether county sheriffs, in appointing a jailer, must comply with the civil service laws for deputy sheriffs.

There are deputy sheriffs, and there are jailers. *See McDonald v. Woodbury County*, 48 Iowa 404, 405 (1878). Nothing in chapters 356 and 341A requires jailers to come from the ranks of deputy sheriffs. A county who wishes to appoint a deputy sheriff as jailer may properly make "a conscious decision . . . to have a sheriff's deputy serving in that capacity rather than a civilian." *Buchanan County Supervisors v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998).

Nothing in chapter 341A suggests that it applies to jailers *per se*. Rather, chapter 341A applies to "those deputies who are required to perform the duties of a deputy sheriff" and does not apply to "those employees . . . who may be designated as deputy sheriffs, but who do not actually perform law enforcement duties." 1974 Iowa Op. Att'y Gen. 193, 196. *Accord* 1984 Iowa Op. Att'y Gen. 119 (#84-2-6(L)). Duties of deputy sheriffs include "the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals . . . who by the nature of their duties may be required to perform the duties of a peace officer." 1974 Iowa Op. Att'y Gen. 193, 196. *Accord* 1984 Iowa Op. Att'y Gen. 119 (#84-2-6(L)). *See generally* Iowa Code § 801.4(7)(a) (defining "peace officer"); 1982 Iowa Op. Att'y Gen. 392 (#82-4-13(L)) ("peace officer" does not necessarily include jailer).

As the language of section 341A.7 indicates, the question whether an appointee to "is a civil service deputy [covered by chapter 341A] or is an employee in the sheriff's office not covered by [chapter 341A]" constitutes a matter of fact and falls outside the proper scope of an opinion. 1986 Iowa Op. Att'y Gen. 86 (#86-2-9(L)). *Accord* 1984 Iowa Op. Att'y Gen. 119 (#84-2-4(L)). *See generally* 61 Iowa Admin. Code 1.5(3)(c). Such a case-by-case determination rests upon an analysis of job duties and would ultimately fall upon the judiciary. *See, e.g., Norton v. Adair County*, 441 N.W.2d at 361 ("jailer/dispatcher" did not come within the scope of chapter 341A, because evidence showed that she actually performed duties of clerk or assistant and not that of deputy).

(B)

Assuming that chapter 341A applies to the position of jailer in a particular county, you have asked whether a written certificate of appointment from the civil service commission to county officials must precede their payment of compensation for services rendered to a properly appointed jailer. Section 341A.14 provides that no county official "shall approve" payment of compensation to appointees unless the civil service commission forwards written certificates that, among other things, include the amount of their compensation.

We see no ambiguity in section 341A.14 requiring us to apply principles of statutory construction. *See generally State v. Iowa Dist. Ct.*, 630 N.W.2d 838, 840 (Iowa 2001) (courts have no occasion to apply principles of statutory construction to unambiguous statute). The use of "shall" in section 341A.14 clearly imposes duties upon civil service commissions and county officials. *See* Iowa Code § 4.1(30)(a) (unless otherwise defined, "shall" in statutes imposes a

duty). "When addressed to a public official the word 'shall' is ordinarily mandatory, excluding the idea of permissiveness or discretion." 1982 Iowa Op. Att'y Gen. 190, 192 (citation omitted). "If . . . a thing is prohibited [by statute] . . . such prohibition cannot, without judicial legislation, be disregarded." *Hill v. Wolfe*, 28 Iowa 577, 580 (1870).

A more difficult question, however, remains: What consequences result when a county sheriff properly appoints a jailer, but the civil service commission fails to comply with the requirements of section 341A.14? We believe that the answer lies with the characterization of section 341A.14 as "directory" rather than "mandatory."

"It is . . . well established that some statutory provisions are directory, rather than mandatory, meaning that performance may be delayed or even omitted without fatal effect." 1981 Ga. Op. Atty. Gen. 51 (# 81-21). "The mandatory-directory dichotomy does not refer to whether a statutory duty is obligatory or permissive but instead relates to whether the failure to perform an admitted duty will have the effect of invalidating the governmental action which the requirement affects." 1982 Iowa Op. Att'y Gen. 190, 192 (citation omitted).

"There is no simple test to determine whether a statutory requirement is mandatory or directory." 3 *Sutherland Statutory Construction* § 57:3, at 12 (2001). Such a question depends upon legislative intent. *Id.* at 16-17.

Three principles of statutory construction aid in determining the legislative intent regarding a civil service commission's noncompliance with section 341A.14. (1). "[If a statute] merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory." *Id.* at 24. Section 341A.14 does not prescribe the results following the payment of compensation in the absence of a written certificate. (2). "In cases where no apparent or actual injury results to anyone from the failure to adhere to the provisions of a statute, a directory construction usually prevails in the absence of facts indicating that a mandatory construction was intended." *Id.* at 22-23. No apparent or actual injury results to anyone from paying compensation in the absence of a written certificate to a person properly appointed as jailer by the county sheriff. (3). "The resulting consequences of alternate constructions are often a deciding factor [in characterizing a statute as mandatory or directory]." *Id.*, § 57:7, at 32. Construing section 341A.14 as mandatory would impinge upon the right of a properly appointed jailer, an innocent party, to receive compensation for services rendered. *See Solen Public Dist. No. 3 v. Heisler*, 381 N.W.2d 201, 204 (N.D. 1986) (construing statute as directory "is premised on grounds of public policy and equity to avoid harsh, unfair, or absurd consequences when a mandatory construction may do great injury to a party not at fault").

Application of these three principles, we believe, leads to the classification of section 341A.14 as directory. Although county officials may thus pay compensation in the absence of a written certificate from the civil service commission to a person properly appointed as jailer for services rendered, the civil service commission should nevertheless comply with the

requirements of section 341A.14 in order to fulfill the legislative mandate of checks and balances in the civil service process.

III. Summary

The civil service laws for deputy sheriffs, Iowa Code ch. 341A, do not *per se* apply to the position of jailer. Whether they apply to a jailer in a particular county constitutes a matter of fact, which falls outside the proper scope of an opinion and rests upon an analysis of job duties. Although a written certificate of appointment from the civil service commission to county officials should precede their payment of compensation to a properly appointed jailer for services rendered, they may pay compensation in the absence of such certificate.

Sincerely,

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