State of Iowa

1968

THIRTY-SEVENTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1968

RICHARD C. TURNER
Attorney General

Published by
THE STATE OF IOWA
Des Moines
C4801

ATTORNEYS GENERAL OF IOWA

1853-1968

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD C. TURNER ..... Attorney General
B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1957; State Senator from Pottawattamie County 1963-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General, 1966.

RICHARD E. HAESEMEYER
Solicitor General and First Ass't. Attorney General
B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Attorney General February 20, 1967.

DON R. BENNETT ..... Special Assistant Attorney General
B. August 28, 1933, Clarinda, Iowa; undergraduate work, S.U.I.; L.L.B., S.U.I.; married, two children; U.S. Navy 1952-1956; App't. Ass't. Atty. Gen. 1965; App't. Special Ass't. Atty. Gen. 1966, 1967.

HENRY L. HOLST ..... Special Assistant Attorney General
B. March 17, 1927, Moline, Illinois; B.A., S.U.I.; M.A., Nebraska U.; J.D., Nebraska U.; married; Chief Trial Examiner, Nebraska Railway Commission 1957-1959; Special Ass't. Atty. Gen., State of Nebraska, 1958-1969; Deputy City Atty., Lincoln, Nebraska 1959-1965; City Atty., Ames, Iowa 1966-1967; App't. Ass't. Atty. Gen. 1967; App't. Special Ass't. Atty. Gen. 1968.

ROGER H. IVIE ..... Special Assistant Attorney General
B. December 19, 1923, Redfield, South Dakota; B.A., J.D., S.U.I., married, three children; App't. Special Ass't. Atty. Gen. 1967.

ROBERT N. MERRILLAT ..... Special Assistant Attorney General
B. July 7, 1934, Indianapolis, Indiana; B.A., Drake University; J.D., S.U.I.; married, three children; App't. Special Ass't. Atty. Gen. January 3, 1967, resigned August, 1, 1968.

GEORGE W. MURRAY ..... Special Assistant Attorney General
B. June 1, 1920, Chicago, Illinois; Coe College 2 years; L.L.B., Drake University; married, one child. App't. Spec. Ass't. Atty. Gen. 1961-1965 and also 1967.

LORNA L. WILLIAMS ..... Special Assistant Attorney General
B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; married, two children; private practice 1941-1967. App't. Special Assistant Atty. Gen. 1967.

OSCAR STRAUSS ..... Assistant Attorney General
B. September 23, 1876, Des Moines, Iowa; Ph.B., U. of Michigan; L.L.B., S.U.I.; married; App't. Ass't. Atty. Gen. 1944-1957; App't. First Ass't. Atty. Gen. 1958, 1959, 1961, 1963, 1965; App't. Ass't. Atty. Gen., 1967.

JOHN I. ADAMS ..... Assistant Attorney General
B. July 11, 1926, Des Moines, Iowa; B.A., L.L.B., S.U.I.; Agent F.B.I., 1953-1955; Legal Department, Continental Western Insurance Company, 1958-1968; App't. Ass't. Atty. Gen. 1968.

ROBERT H. ALVINE ..... Assistant Attorney General
B. January 29, 1944, Moline, Illinois; single; B.A., J.D., Drake University; App't. Ass't. Atty. Gen. 1968.

RAYMOND M. BEEBE ..... Assistant Attorney General
B. May 14, 1942, Council Bluffs, Iowa; B.S., I.S.U.; J.D., S.U.I.; single; private practice 1967-1968; App't. Ass't. Atty. Gen. 1968.

CHARLES O. CAMPBELL ..... Assistant Attorney General
B. October 12, 1936, Clarion, Iowa; B.S., I.S.U.; J.D., S.U.I.; private practice June 1965-March 1967; App't. Ass't. Atty. Gen. April 1, 1967.

DOUGLAS R. CARLSON ..... Assistant Attorney General
B. December 6, 1942, Des Moines, Iowa; B.A., J.D., Drake University; single; App't. Ass't. Atty. Gen., 1968.

WILLIAM A. CLAERHOUT ..... Assistant Attorney General
B. October 4, 1939, Moline, Illinois; B.A., L.L.B., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1967.

G. BENNETT CULLISON, JR. ..... Assistant Attorney General
B. November 26, 1932, Harlan, Iowa; B.A., Grinnell College; L.L.B., Columbia University; private practice 1960-1962; Ass't. District Attorney, New York County 1962-1966; Legislative Ass't. to U.S. Senator, Jack R. Miller, 1966-1967; App't. Ass't. Atty. Gen. 1968.

DAVID A. ELDERKIN ..... Assistant Attorney General
B. June 4, 1941, Cedar Rapids, Iowa; B.B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen., 1967.

JULIAN B. GARRETT ..... Assistant Attorney General
B. November 7, 1940, Des Moines, Iowa; single; B.A., Central College; J.D., S.U.I.; App't. Atty. Gen. 1967.

JAMES E. GRAHAM ..... Assistant Attorney General
B. February 28, 1938, Dubuque, Iowa; B.A. Loras College; J.D., S.U.I.; married, three children; private practice, 1964; App't. Ass't. Atty. Gen., 1965, 1967.

HARRY M. GRIGER ..... Assistant Attorney General
B. March 13, 1941, Des Moines, Iowa; B.A., J.D., S.U.I.; single; App't. Ass't. Atty. Gen., 1967.

DAVID B. HENDRICKSON ..... Assistant Attorney General
B. 1937, St. Ansgar, Iowa; B.A., J.D., S.U.I.; married, three children; App't. Ass't. Atty. Gen., 1967; Resigned June 1, 1968.

JERRY HILTON ..... Assistant Attorney General
B. January 11, 1922, La Crosse, Wisconsin; B.S.C., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen., 1967, Resigned, 1967.

JOHN L. KIENER ..... Assistant Attorney General
B. June 21, 1940, Fort Madison, Iowa; married; B.A., Loras College; J.D., Drake University; private practice, 1965-1968; App't. Ass't. Atty. Gen., 1968.

ROBERT T. LEGO ..... Assistant Attorney General
B. July 29, 1934, Clinton, Iowa; B.A., St. Ambrose College; J.D., S.U.I.; married, four children; Att., U.S. Army Corps of Engineers, 1959-1965; App't. Ass't. Atty. Gen., 1966, 1967.

JAMES R. MARTIN ..... Assistant Attorney General
B. February 13, 1943, Iowa City, Iowa; B.A., J.D., S.U.I.; married; App't. Ass't. Atty. Gen., 1967.

RICHARD C. McLAUGHLIN ..... Assistant Attorney General
B. 1925, Sibley, Iowa; B.A., Morningside College; L.L.B., University of Michigan; App't. Ass't. Atty. Gen., 1967.

ELIZABETH A. NOLAN ..... Assistant Attorney General
B. Des Moines, Iowa; B.S., St. Mary's College, Notre Dame, Ind; J.D., S.U.I.; U.S. Dept. of Interior, 1955-1962; private practice, Washington, D.C., 1962-1963; App't. Ass't. Atty. Gen. 1967.

JAMES F. PETERSEN ..... Assistant Attorney General
B. July 23, 1931, Omaha, Nebraska; B.S., J.D., University of Nebraska; married, four children; U.S. Veterans Administration 1959-1960; Special Assistant Atty. Gen., State of Nebraska, 1960-1968; App't. Ass't. Atty. Gen. 1968.

CLIFFORD E. PETERSON ..... Assistant Attorney General
B. June 30, 1921, Ellsworth, Iowa; B.A., J.D., S.U.I.; married, two children; App't. Ass't. Atty. Gen. 1968.

STEVEN J. PETOSA ..... Assistant Attorney General
B. April 24, 1943, Fort Wayne, Indiana; B.S., Regis College; J.D., S.U.I.; App't. Atty. Gen., 1968.

GERALD R. RALPH ..... Assistant Attorney General
B. July 16, 1938, Denver, Colorado; B.A., Parsons College; L.L.B., S.U.I.; married, one child; House Counsel, Pittsburgh-Des Moines Company, 1965-1966; App't. Ass't. Atty. Gen. 1966, 1967; Resigned March 3, 1967.

STEPHEN C. ROBINSON ..... Assistant Attorney General
B. 1935, Des Moines, Iowa; A.A., Graceland Junior College; B.A., S.U.I.; L.L.B., Drake University; married, two children; App't. Ass't. Atty. Gen January 3, 1967 Resigned May 1, 1967 to become Secretary of the Iowa Executive Council.

DAVID S. SATHER ..... Assistant Attorney General
B. September 17, 1943, Chicago, Illinois; B.S., J.D., Drake University; married, one child; App't. Ass't. Atty. Gen. 1967.

LARRY SECKINGTON ..... Assistant Attorney General
B. January 10, 1942, Rock Port, Missouri; B.A., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen. 1967.

JAMES C. SELL ..... Assistant Attorney General
B. November 21, 1940, Waterloo, Iowa; B.A., J.D., S.U.I.; App't. Ass't. Atty. Gen. 1967.

PAUL H. TATZ ..... Assistant Attorney General
B. 1935, Des Moines, Iowa; L.L.B., Drake University; married, two children; App't. Ass't. Atty. Gen. February, 1968; Resigned October 14, 1968.

JOSEPH W. ZELLER ..... Assistant Attorney General
B. April 10, 1891, Winterset, Iowa; Ph. B., Iowa Wesleyan College; L.L.B., Harvard Law School, married three children; War Labor Board, N.Y., 1943-1946; private practice, 1920-1943, 1946-1961; App't. Ass't. Atty. Gen. 1963, 1965, 1967.

ISABELLE I. FANNING ..... Administrative Assistant

RICHARD C. TURNER
Attorney General

OSCAR STRAUSS, Assistant Attorney General

September 13, 1968, was Oscar Strauss day at the Attorney General's office. A host of friends and former associates from near and far honored Oscar and his charming wife, Phyllis, with a reception and formal dinner on their 50th wedding anniversary. At age 92, Oscar is perhaps the only active public lawyer in the nation who was practicing law before the turn of the century. He still drives his car to work every day as he has under eight attorneys general since 1944. Des Moines attorney and long-time friend, Owen Cunningham, said, in a special tribute: "Oscar is a remarkable man, cut from a special cloth of gold, who follows no ordinary pattern."

The above photograph was developed into an oil portrait which was presented to the Strauss' by their many friends and is displayed in the reception room of the Attorney General's office.

REPORT OF THE ATTORNEY GENERAL

January 31, 1969

The Honorable Robert D. Ray
Governor of Iowa

Dear Governor Ray:

Pursuant to §§13.2(6) and 17.6, Code of Iowa, 1966, I am pleased to submit the following report of the condition of the office of Attorney General, opinions rendered and business transacted of public interest.

OPINIONS

During 1967 and 1968, the Iowa Department of Justice published 607 written legal opinions requested by state officers and departments and county attorneys, pursuant to §13.2(6), Code of Iowa, 1966. During the preceding two years, 385 opinions were issued.

This significant increase in the work load of this office is related to the record breaking length of the regular session of the Sixty-second General Assembly. This Assembly enacted a great number of laws which required clarification and interpretation by the attorney general. Now that the Constitution requires annual sessions, this work load cannot fail to become even heavier.

CONSUMER PROTECTION

During the biennium, there has been a great increase in the number of complaints referred to the consumer protection division of the attorney general's office. The volume of necessary litigation has increased correspondingly.

During 1967 there were 523 new complaints filed, and in 1968 there were 703 new complaints. Of these 1,226 complaints, 959 were processed to a satisfactory conclusion. All of the 523 complaints received in 1967 have been disposed of, as have 436 of the 703 complaints filed in 1968. Only 267 were pending at the end of 1968.

Improved record procedure initiated in 1968 made possible more informative analysis of the disposition of complaints. For example, out of the 436 cases closed in 1968, money refunds or reduction of the amounts owed were obtained for 95 persons who had been victimized. These 95 savings or refunds in 1968 recovered a total of $48,493.73 for the complainants.

During the two year period of 1967 and 1968, the consumer protection division filed 21 actions for violation of the Iowa Consumer Fraud Act; 7 were begun in 1967 and 14 in 1968.

The Consumer Protection Division obtained favorable rulings in 10 of these cases. There are 11 suits still pending.

During 1967 and 1968, the consumer protection division challenged many types of questionable practices, by court action and by informal consultation and settlement and agreement. Among the areas in which the division moved against fraudulent practices were: tree service, benevolent associations, septic tank and sewer cleaning, chimney repair, hearing-aid sales, aluminum siding sales, motion picture camera sales, uniform sales, jeep sales, central vacuum cleaning unit sales, land sales, cemetery lot and merchandise sales, sewing machine sales and carpet sales.

Experience during the past two years with various problems arising under the consumer protection law has led the department of justice to conclude that a number of amendments are needed to strengthen and broaden the protections which this law provides to the consumer. A number of measures to accomplish this purpose will be submitted for consideration by the General Assembly.

Still more complaints and a higher incidence of litigation are to be expected in 1969 and 1970. As the public becomes more aware of the protection afforded by the Consumer Fraud Act, the work load of this division will be substantially increased.

TAXATION

The tax commission and its successor, the department of revenue, has been represented by the department of justice in a considerable volume of litigation, and in administrative hearings, involving the corporate and personal income tax, sales and use taxes, property taxes, inheritance taxes, cigarette and beer taxes, motor vehicle fuel taxes, and chain store taxes. The district courts decided 21 of these cases in favor of the State and ruled adversely in 7. Fifteen were settled with the consent of the tax commission or department of revenue. Three cases are under submission in the district courts, and 18 cases are awaiting trial. The Iowa Supreme Court upheld the State in 4 of the tax cases and sustained the taxpayer in 1. Two cases are presently awaiting decision in the Iowa Supreme Court. One other case is to be argued before that court in 1969.

Several of the cases are highly significant. In *Chicago and Northwestern Railroad Company vs. Prentis, et al,* 161 N. W. 2nd 84, decided on September 5, 1968, the Iowa supreme court sustained the tax commission's assessments of the property tax in issue. This ruling secured several millions of dollars.

On November 12, 1968, the supreme court sustained the constitutionality of the Iowa sales and use tax on advertising services in *Lee Enterprises, Incorporated, et al. vs. Iowa State Tax Commission, et al.,* 162 N. W. 2d 730. On December 12, 1968,

the Polk County District Court declared constitutional the Iowa sales and use taxes on construction services, in *Priester Construction Co., et al. vs. Department of Revenue, et al.* The constitutionality of the tax on the services of coin-operated laundry and dry cleaning establishments was upheld in *Rodee, Inc., et al. vs. Iowa State Tax Commission, et al.* These three cases resulted from changes in the sales and use tax laws by the 62nd General Assembly, which extended the sales tax to services.

Other tax law changes by the last legislature, i.e., the new school aid bill, changes in the assessment of real and personal property and the creation of a board of tax review, added substantially to the work of the department of justice. These changes required many opinions, which involved laborious research. Also, many more administrative hearings now are required.

The legislature changed the quadrennial assessment of property from 1969 to 1968 which made this year the year to equalize real property values throughout the state. An equalization order by the Director of Revenue increasing values in approximately seventy-eight taxing districts, cause the affected districts to institute forty-seven law actions which recently were decided adversely to the director by the Polk County District Court.

HIGHWAY COMMISSION

The attorney general's staff assigned to the highway commission has a sharply rising work load due chiefly to an expanding acquisition program. This program will more than double, in dollar cost and in parcels acquired, the highest volume attained in any previous period.

While condemnation appeals and other litigation comprised the greatest part of the legal work, the staff has provided advisory opinions for the commissions, drafted proposed legislation, prepared rules and regulations, implemented new laws (e.g., the Interstate Toll Bridge Act), and furnished counsel in connection with other functions of the commission.

During the biennium 25 highway commission cases went on appeal to the supreme court. The commission prevailed in 14 cases, failed in 2 and 4 have been dismissed. Five appeals still are pending.

There were 237 condemnation appeals on file in the district courts of Iowa during the same period, of which 81 were pending on January 1, 1967. Of these appeals, 28 were tried, 85 settled and 21 dismissed, leaving 103 appeals on January 1, 1969.

In other highway commission litigation, 34 cases were pending on January 1, 1967, and another 55 cases were filed in dis-

trict courts during the biennium, bringing the total number of such cases to 89. Of these cases, 55 were disposed of during the same period, and the remaining 34 cases were pending on January 1, 1969.

ANTI-TRUST

Activity in anti-trust litigation greatly increased during the biennium. During 1968 the attorney general's office filed two suits in the United States District Court for the Southern District of Iowa. In these cases the state of Iowa, its political subdivisions, and certain other claimants asked treble damages, under anti-trust laws of the United States. The state alleged conspiracies to fix unreasonably high prices for various products.

The first action was filed in January, 1968 against the drug manufacturers, Charles Pfizer and Company, American Cyanamid Company, Bristo-Myers Company, Olin-Mathieson Chemical Corporation and the Upjohn Company. These defendants were charged with conspiring to fix the prices of certain antibiotic drugs, particularly tetracycline and its derivatives.

The defendants in the second action, filed on November 27, 1968, were the plumbing manufacturing firms of American Standard, Inc., Kohler Company, Crane Company, Wallace-Universal Corp., Rheem Manufacturing Co., Borg-Warner Corp., Murray Corp., Briggs Manufacturing Co., and the trade association to which all of the defendants belonged, the Plumbing Fixtures Manufacturers Association. These defendants were charged with conspiring to fix the prices of enameled cast iron and vitreous china plumbing fixtures.

In November, 1968 the state of Iowa also entered a third anti-trust case, which was pending in the United States District Court for the Eastern District of Pennsylvania. In this case the defendants were accused of fixing the prices of various brass tubing products.

In addition to the foregoing, the asphalt price fixing suit filed in December, 1966, against 22 major oil companies continues to require a considerable expenditure of time and effort. Because of the large number of parties plaintiff and defendant and the complexity of the issues involved, including two appeals to the U. S. Circuit Court of Appeals, the progress of this case has not been rapid.

TORT CLAIMS

On November 15, 1966, the Iowa supreme court, in *Graham vs. Worthington,* 259 Iowa 845, 146 N. W. 2d 626, upheld the Iowa Tort Claims Act enacted by the 61st General Assembly. Prior to this decision a large number of claims had been filed

but not acted upon, pending the outcome of the Graham case. During the past two years personnel of the tort claims division of the department of justice have disposed of some 291 tort claims filed under the new Act. Many of these claims were settled by this department and the state appeal board.

However, a number of claims were taken to court in the past two years. Thirteen of these have been decided in favor of the state. At the end of 1968 only one judgment was entered against the state under the Tort Claims Act. Ten such lawsuits have been settled at or before trial. Presently awaiting trial are 22 cases.

The department of justice claims section also dealt with 643 non-tort claims against the state under Chapter 25 of the Iowa Code.

SOCIAL WELFARE

The special assistant attorney general appointed to perform and supervise the legal work of the Department of Social Services (formerly State Board of Social Welfare) has handled a total of 142 cases.

Of these, 92 have been disposed of and there are 6 cases submitted and awaiting decisions. There were 44 cases pending on December 31, 1968.

The one year residence requirement of Iowa law for eligibility to welfare has been challenged in the U. S. District Court (Northern Iowa), in *Sheard vs. Department.* The same issue is raised in three causes pending in the United States Supreme Court (*Shapiro vs. Thompson, Washington vs. Harrell, and Reynolds vs. Smith.*)

The attorney general filed briefs in these cases, as amicus curiae, and by special order of the U. S. Supreme Court, counsel for Iowa took part in the oral argument in May, 1968. The cases have not been decided, the court having ordered further hearing and argument.

In addition to court cases, this division of the attorney general's office appeared in 562 estate and conservatorship matters, in connection with sale of real estate, by the filing of formal answers; advised county attorneys concerning the enforcement of the Uniform Reciprocal Support Act, juvenile matters and welfare laws; furnished legal advice to state officials and consulted with federal authorities in the interpretation of cooperative state-federal programs.

Many legal problems have been resolved without recourse to the courts, in conferences with attorneys representing estates of decedents and conservators.

RECIPROCITY

During the past two years the department of justice handled 459 claims by interstate motor vehicle carriers for refund of overpayment of registration fees paid during the years 1960 through 1964. These refund claims were based on the Iowa supreme court's decision in *Consolidated Freightways Corp. vs. Nicholas,* 258 Iowa 115, 137 N. W. 2d 900. The refunds so far total about three and one-half million dollars.

LIQUOR COMMISSION

This office has continually furnished legal assistance to the Iowa Liquor Control Commission whenever necessary. One of the more notable accomplishments in this area was the successful defense in the Iowa supreme court of the local option provision of the Iowa Liquor Control Act. (*Skogman vs. Iowa Liquor Control Commission,* 152 N. W. 2d 155), 1967. This department was directly involved in no less than 20 commission hearings on revocation or suspension, seventeen of which resulted in decisions against the licensee. The commission was also represented by this department in seven appeals at the District Court level, four of these rulings were favorable to the Commission, one was adverse, and the others are still pending. The department of justice has represented the commission in two federal bankruptcy cases against licensee debtors, and assisted the commissioners with legal advice in such areas as personnel, rental agreements, and collection of taxes and penalties due from licensees or their bonding companies.

LABOR STANDARDS

The state of Iowa joined 28 other states in litigation resulting from the 1966 amendments to the Federal Fair Labor Standards Act, which added extended minimum wage coverage to employees of colleges, high schools, elementary schools and state and county owned hospitals, excluding professional and administrative help.

This case was tried before a three-judge federal court, which upheld the Act. On appeal, the United States Supreme Court upheld the right of Congress to enact legislation affecting the wages of certain governmental employees.

PUBLIC SAFETY

During the 1967-68 period, the attorney general's office represented the department of public safety in 366 driver's license suspension cases. In 277 of these (including five of the six cases appealed to the Iowa supreme court), the suspensions were upheld by the court, the licenses were restored in 45 instances, and 44 cases still were pending on December 31, 1968. Two cases involving the department of public safety were dis-

missed by the U. S. District Court, Northern District, Cedar Rapids, Iowa. A third still is pending in the Iowa District Court for Tama County.

The department of labor was represented in two cases, one of which was decided in favor of the department. In the other an adverse ruling of the district court has been appealed to the Iowa Supreme Court.

REAPPORTIONMENT

The inaccurate discription of legislative districts in Johnson County was resolved by the Iowa supreme court, upon application by this department for reopening of the case of *Kruidenier vs. McCulloch,* 158 N. W. 2d 170, with an order correcting the legislative error.

SCHOOLS

Although most school reorganization litigation had been completed prior to the beginning of the last biennium, this department successfully represented the state department of public instruction in 8 such cases in district court and in 5 appeals in the Iowa supreme court. An appearance as amicus curiae was also entered in *Meyer vs. Campbell,* 152 N. W. 2d 617, wherein the constitutionality of attachments made by county boards of education was tested.

PHARMACY DEPARTMENT

The abuse of drugs and narcotics is a major problem in our society, although not yet critical in Iowa. If and when the situation becomes grave, we shall be prepared to some degree, because of the ground work done by the department of justice and the Board of Pharmacy Examiners.

The department has prosecuted numerous violations of the drug and narcotic laws.

The staff has drawn up forms for use of the agents and inspectors of the Board of Pharmacy Examiners in conducting audits and inspections of pharmacies and physicians.

Several seminars have been held in which the attorney general cooperated in advising the officers who enforce drug and narcotic laws.

CONSERVATION

The attorney general represented the state conservation commission in various actions relating to condemnation of real property, damages resulting from death of fish due to pollution, and boundary disputes. Much time has been required by cases involving boundary disputes along the Missouri River and

other meandered rivers and natural lakes, and particularly by *Nebraska vs. Iowa,* which is pending before a Special Master appointed by the U. S. Supreme Court.

WATER POLUTION

The 61st General Assembly created the Iowa Water Pollution Control Commission as an agency of the state government, with broad powers to forbid, abate, or control pollution of the waters of the state. The staff of the attorney general has assisted the commission in formulation of procedures and rules, and has represented the commission in numerous actions before the commission and in district court.

CRIMINAL APPEALS

The criminal appeals division has participated in 252 criminal appeals to the Iowa supreme court from the district and municipal courts of this state. The state prevailed in 244 of these appeals, failed in 7 and 1 was remanded for further proceedings. Five of the appeals were taken by the state. In these, the lower court decisions were all reversed.

In deciding these cases, the supreme court upheld Iowa laws prohibiting the sale of obscene literature, unlawful assembly, and the sale of contraceptives in vending machines. The supreme court reaffirmed the long-standing McNaughton rule as the test for insanity in Iowa.

Before the Iowa supreme court, the criminal appeals division defended the denial of 21 habeas corpus petitions by the Iowa district courts, being sustained by the court in 19 of these cases. In the United States district courts the state was upheld in all of the 35 cases there heard. Five of these rulings were appealed in the United States Court of Appeals for the Eighth Circuit. The state was upheld in 3 cases and 1 was remanded. Of 12 cases taken to the United States Supreme Court on writ of certiorari from various state and federal criminal and habeas corpus decisions, the state prevailed in 9 and was not upheld in 2. One case was remanded.

LAW ENFORCEMENT

In the area of law enforcement, apart from handling the above criminal appeals and habeas corpus actions in the state and federal courts, the attorney general and the entire staff have actively cooperated with law enforcement bodies at all levels of government, through conferences, research and speeches. The law provides that the attorney general, or a person designated by him, is to be a member of the Iowa Law Enforcement Academy Council. The attorney general designated the assistant in charge of the criminal appeals division to serve on such council. That assistant participated actively

in the formation and operation of the Academy. Also, he was a special advisor to the 1968 Iowa Crime Commission and was chairman of its Firearms Committee.

The department of justice prepared and distributed to county attorneys an extensive memorandum on decisions of various courts as a result of the U. S. Supreme Court's decision in *Miranda vs. Arizona,* 384 U. S. 436. Also, the department prepared a comprehensive pamphlet on the laws authorizing riot control, which was distributed to Iowa law enforcement officials. The attorney general and the staff have presented other papers and talks, and led discussions on varying aspects of law enforcement in federal, state and locally sponsored police schools and conferences.

The attorney general currently is a member of the Criminal Law and Law Enforcement Committee of the National Association of Attorneys General. The ever-rising incidence of crime is a problem to which the department of justice has given top priority and, to which the entire staff has devoted maximum effort.

Since the attorney general must furnish legal counsel and assistance to all agencies of government except the commerce commission and employment security commission, the work load of the department inevitably increases as the size and complexity of state government increases. Nevertheless, so far, only a negligible increase in staff has been required. Yet, the department of justice has been able to reduce outside counsel fees by a significant percentage. A comparison of outside counsel fees billed through the executive council for the last six months of the prior administration with the last six months of 1968 show that outside attorneys fees have been reduced from $114,000 to $30,000, a decrease of 74 per cent. At the highway commission during the same period, the fees paid outside attorneys dropped from $77,000 to $18,000, a decrease of 76 per cent.

Respectfully submitted,

RICHARD C. TURNER
Attorney General
State of Iowa

State of Iowa

1968

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THE STATE OF IOWA
Des Moines
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ATTORNEYS GENERAL OF IOWA

1853-1968

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-

PERSONNEL OF THE DEPARTMENT OF JUSTICE

RICHARD C. TURNER ..... Attorney General
B. September 30, 1927, Avoca, Iowa; B.A., J.D., S.U.I.; married, three children; private practice 1953-1957; State Senator from Pottawattamie County 1963-1964; Ass't. Pottawattamie County Attorney 1954-1956; Avoca Town Clerk 1953-1960; Elected Attorney General, 1966.

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B. April 11, 1928, Tipton, Iowa; B.S., University of Illinois; L.L.B., Harvard Law School; married, three children; American Airlines, Inc., N.Y.C., 1956-1962; Monsanto Company, Textile Div. (formerly the Chemstrand Corp.), N.Y.C. 1962-1967; App't. Solicitor General and First Ass't. Attorney General February 20, 1967.

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B. March 17, 1927, Moline, Illinois; B.A., S.U.I.; M.A., Nebraska U.; J.D., Nebraska U.; married; Chief Trial Examiner, Nebraska Railway Commission 1957-1959; Special Ass't. Atty. Gen., State of Nebraska, 1958-1969; Deputy City Atty., Lincoln, Nebraska 1959-1965; City Atty., Ames, Iowa 1966-1967; App't. Ass't. Atty. Gen. 1967; App't. Special Ass't. Atty. Gen. 1968.

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B. July 7, 1934, Indianapolis, Indiana; B.A., Drake University; J.D., S.U.I.; married, three children; App't. Special Ass't. Atty. Gen. January 3, 1967, resigned August, 1, 1968.

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B. February 9, 1915, Gaylord, Kansas; B.A., J.D., Drake University; married, two children; private practice 1941-1967. App't. Special Assistant Atty. Gen. 1967.

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B. November 26, 1932, Harlan, Iowa; B.A., Grinnell College; L.L.B., Columbia University; private practice 1960-1962; Ass't. District Attorney, New York County 1962-1966; Legislative Ass't. to U.S. Senator, Jack R. Miller, 1966-1967; App't. Ass't. Atty. Gen. 1968.

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DAVID B. HENDRICKSON ..... Assistant Attorney General
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B. January 11, 1922, La Crosse, Wisconsin; B.S.C., J.D., S.U.I.; married, one child; App't. Ass't. Atty. Gen., 1967, Resigned, 1967.

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B. July 23, 1931, Omaha, Nebraska; B.S., J.D., University of Nebraska; married, four children; U.S. Veterans Administration 1959-1960; Special Assistant Atty. Gen., State of Nebraska, 1960-1968; App't. Ass't. Atty. Gen. 1968.

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STEPHEN C. ROBINSON ..... Assistant Attorney General
B. 1935, Des Moines, Iowa; A.A., Graceland Junior College; B.A., S.U.I.; L.L.B., Drake University; married, two children; App't. Ass't. Atty. Gen January 3, 1967 Resigned May 1, 1967 to become Secretary of the Iowa Executive Council.

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PAUL H. TATZ ..... Assistant Attorney General
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B. April 10, 1891, Winterset, Iowa; Ph. B., Iowa Wesleyan College; L.L.B., Harvard Law School, married three children; War Labor Board, N.Y., 1943-1946; private practice, 1920-1943, 1946-1961; App't. Ass't. Atty. Gen. 1963, 1965, 1967.

ISABELLE I. FANNING ..... Administrative Assistant

RICHARD C. TURNER
Attorney General

OSCAR STRAUSS, Assistant Attorney General

September 13, 1968, was Oscar Strauss day at the Attorney General's office. A host of friends and former associates from near and far honored Oscar and his charming wife, Phyllis, with a reception and formal dinner on their 50th wedding anniversary. At age 92, Oscar is perhaps the only active public lawyer in the nation who was practicing law before the turn of the century. He still drives his car to work every day as he has under eight attorneys general since 1944. Des Moines attorney and long-time friend, Owen Cunningham, said, in a special tribute: "Oscar is a remarkable man, cut from a special cloth of gold, who follows no ordinary pattern."

The above photograph was developed into an oil portrait which was presented to the Strauss' by their many friends and is displayed in the reception room of the Attorney General's office.

THE
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
FOR
BIENNIAL PERIOD
1967-1968

CONTENTS

January 6, 1967

COUNTY AND COUNTY OFFICERS: Recorder, filing financial statements — §§ 554.9401(b), 554.9402(1), 554.9403(4), 1966 Code. Financing statements listing crops and fixtures may be noted on real estate mortgage index. (1-6-67) S/67/1/1

Mr. L. D. Carstensen, Clinton County Attorney: This is an answer to your letter of December 23, 1966, asking whether the County Recorder is required by the Uniform Commercial Code to index financing statements in the real estate mortgage index if the collateral mentions crops or fixtures.

Section 554.9403(4) applies:

"A filing officer shall mark each [financing] statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and address of the debtor given in the statement."

With regard to a financing statement which specifies crops as collateral you will note that Section 554.9402(1) requires that the statement must contain a description of the real estate concerned and Section 554.9401 requires that the security agreement be filed in the office of the Recorder in the county where the land on which the crops are growing or to be grown is located in addition to the filing in the office of the Recorder in the county of the debtor's residence. Therefore, although the law does not specifically require the Recorder to make such notation on the real estate mortgage index, it would appear to be proper for him to do so.

Likewise, when the collateral is fixtures, the appropriate place for filing the financing statement is in the office where a mortgage on the real estate concerned would be filed or recorded, Section 554.9401(b); the financing statement here too must contain a description of the real estate concerned, 554.9402(1) and it would again be proper to note the filing in the real estate mortgage index although the requirement is not specific and the Uniform Commercial Code imposes no priority between a security interest in the fixtures and the claims of any person who has an interest in the land, Section 554.9313.

This view would also, I believe, be in harmony with Section 558.51 inasmuch as the law has not yet been otherwise defined.

January 10, 1967

STATE OFFICERS AND DEPARTMENTS: Auditor, Conversion from federal to state savings and loan association — §§ 534.3(3), 534.24(2), 1966 Code. Auditor has no discretion with regard to conversions from federal to state savings and loan associations. (1-10-67) S/67/1/2

Mr. Lloyd Smith, Auditor of the State of Iowa: We have reviewed the question submitted to us as to your duties in connection with proposed conversion of a federal savings and loan association to a state savings and loan association.

The issue presented is whether your office and the executive council have any discretion in granting a State Charter where a federal association seeks to convert to a state association.

Section 534.24(2) I. C. A. sets out the procedure for converting from a federal to a state savings and loan association. No regulations have been issued relating to such a conversion.

Section 534.3(3) I. C. A. provides that "for any proposed new association" the proposed Articles of Incorporation shall be submitted to the executive council and provides for certain investigation and exercise of discretion.

Section 534.24(2) does not grant your office or the executive council any discretion in connection with the conversion from a federal to a state savings and loan association. Section 534.3(3) I. C. A. which provides for investigation and the exercise of discretion is limited to new associations.

Therefore the legislature has not delegated any discretion to your office or the executive council in connection with conversions from a federal to a state savings and loan association. Where a federal savings and loan association converts to a state association you should add to the Certificate of Incorporation the phrase indicated in Section 534.24(2) I. C. A. "this association is incorporated by conversion from a federal savings and loan association." The addition of this phrase will indicate that the granting of the state charter was not based upon investigation and exercise of discretion by your office and the executive council but was based upon conversion from an existing federal association.

Therefore, in connection with a conversion from a federal to a state savings and loan association under 534.24(2) I. C. A. your duties are limited to the ministerial duties of seeing that the required documents are filed and that they are in the proper form and there is no area of discretion granted to your office and no reason for submission of the matter to the executive council.

January 17, 1967

MOTOR VEHICLES: Chauffeur's license — § 321.174 — Driver of a 5 ton truck is required to have a chauffeur's license and a non-resident having a valid operator's license (§ 321.176(3)) is not exempt from the provisions of § 321.174 but is required to have a chauffeur's license (§ 327.18). (1-17-67) 67-1-1

Mr. John W. Kellogg, Harrison County Attorney: Upon arrival in the Attorney General's office as a new Assistant Attorney General, I find your request for an opinion dated August 8, 1966, still unanswered. You ask whether Driver "A" should be charged with a violation under the provisions of § 327.18, and not under § 321.174 et seq.

I am of the opinion that Driver "A" could be charged with violation of either section under the following conditions:

Section 321.174 provides as follows:

"No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license."

Section 321.1(43) defines a chauffeur as follows:

"* * * any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, or any such motor vehicle exempt from registration which would be within such gross weight classification if not so exempt * * *."

If Driver "A" is operating such a truck, described above, in excess of five tons, he must have a chauffeur's license.

Section 321.176(3) states:

"A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or county may operate a motor vehicle in this state only as an operator."

Driver "A" is not exempt under this clause; if he is driving a five ton truck he must drive as a chauffeur and not as an operator. He must have a license as chauffeur.

Also under Section 327.18 to which you refer Driver "A" is required to have a chauffeur's license if he is operating a motor truck of the type described in Section 327.1(1).

If you have any further questions about the application of these sections please write me.

January 17, 1967

CONSTITUTIONAL LAW: Seat of Government — Article XI, § 8. Location of hall of house of representatives is not controlled by Constitution of Iowa except that it must be located in Des Moines and can be changed to any location in Des Moines by appropriate legislation. (1-17-67) S/67/1/4

The Honorable Leroy S. Miller, House of Representatives: In response to your request with reference to the location of the Inaugural Ceremonies under the laws of Iowa, I submit the following:

Article XI, Sec. 8, Constitution of Iowa, establishes the seat of government in Des Moines, Polk County, Iowa.

Chapter 72 from a 1913 Reprint of the Laws of the Fifth, Fifth Extra and Sixth General Assembly (1855) is a law establishing the location of Capitol buildings, acquisition of ground therefor and construction of buildings. I quote from that act, "When buildings are prepared for the accommodation of the general assembly and officers of the state, which in the opinion of the governor, are suitable therefor, he shall issue his proclamation to that effect, and from that time the general assembly shall meet, and the officers of the state keep their offices at such new seat of government."

Section 19.15 grants to the executive council control of the assignment of rooms in the capitol building.

Section 2.33 requires the general assembly to meet in joint session on the day the assembly first convenes in January, or as soon thereafter as both houses have organized after the biennial election, canvass the votes for governor and determine the election. Under this section, the oath of office is immediately administered to the persons elected and the governor then delivers to the assembly any message he deems expedient.

Section 2.31 states, "Joint Conventions of the general assembly shall meet in the hall of the house of representatives . . ."

In my opinion, the location of the hall of the house of representatives is not controlled by the Constitution of Iowa except that it must be located in Des Moines, but rather by statute and can therefore be changed by appropriate legislation of the general assembly to any location in Des Moines. Such change need not be permanent.

January 17, 1967

MOTOR VEHICLES: Safety standards — §§ 321.391, 321.444, 321.428, 1966 Code. Equipment safety standards for state equipment must be determined by the Dept. of Public Safety and not by approval of American Association of Motor Vehicle Administrators. (1-17-67) S/67/1/3

Office of the Commissioner, Department of Public Safety: This is in answer to your letter of October 28, 1966. You asked the opinion of the Attorney General as to whether you should enter into an agreement for uniform approval of motor vehicle safety equipment. Your questions are as follows:

1. "Under existing state law can I accept equipment certificates of approval issued by the American Association of Motor Vehicle Administrators, of which we are a member, as a basis for state equipment approval now required by law?

2. Can I base cancellation of my previously issued certificates of approval on cancellation by AAMVA of its certificates of approval?

3. Can I endorse, accept and/or adopt AAMVA certificates of approval as state approvals in lieu of issuance by me of state certificates of approval?

4. If permitted to endorse, accept and/or adopt AAMVA approvals in lieu of approvals by the state, will cancellation of a certificate of approval by AAMVA constitute a cancellation by the state?

5. If the answer to any question is No, what statutory changes would be needed to permit it?"

I have read the statutes requiring your approval of certain equipment, i.e.:

1. Lighting devices (321.428), Code 1966.
2. Safety glass (321.444), Code 1966.
3. Reflectors (321.391), Code 1966.
4. Seat belts (Acts of 61st G. A., Chapter 291).

I am of the opinion that you cannot accept standards of the American Association of Motor Vehicle Administrators (AAMVA) as final, nor should you enter into the proposed agreement with AAMVA.

Section 321.428 (lighting devices) provides that you shall issue and enforce regulations establishing standards and specifications for approval of lighting devices. It also states:

"Such regulations shall correlate with and, so far as practicable, conform to the then current standards and specifications of the society of automotive engineers applicable to such equipment."

It is clear, therefore, that the standards of the society of automotive engineers are applicable to such equipment rather than the standards adopted by the AAMVA. It is your duty to finally determine these standards and you cannot transfer this job to another. Of course, you may take into consideration certificates of approval issued by the AAMVA, if the standards are the same.

Safety Belts, (Acts of 61st G. A., Chapter 291). Under this act all safety belts installed for use in any motor vehicle shall be of any approved type and shall be installed in a manner approved by the Commissioner. You may refer to the AAMVA to determine whether these belts are of an approved type but you also may use other tests. You alone should determine whether they are installed in a manner approved by *you.*

The same questions apply to safety glass, (Section 321.444) and reflectors, (Section 321.391). You cannot delegate your responsibility. You should take evidence of safety standards from such sources as you consider most realistic and in making your decisions you may rely heavily on tests taken by AAMVA, but their recommendations should not be final. Accordingly, I would answer questions 3 and 4 with a no.

As to item 5, I do not think that the legislature can delegate its powers of approval or disapproval to the AAMVA.

January 19, 1967

CITIES AND TOWNS: Apportionment of road use tax fund, liquor control fund — §§ 26.6, 123.50, 312.3(2), 362.20, 1966 Code. Cities and towns may have one federal census taken each decade to be used in apportionment of road use tax fund and liquor control fund. (1-19-67) S/67/1/5

Honorable Paul Franzenburg, Treasurer of the State of Iowa: Your letter of January 11, 1967, requested an opinion on the following questions:

1. What provisions, if any, can be found in the law to take into account the population gain due to annexation and particularly its relevancy to Sections 312.3 [apportionment of road use fund] and 123.50 [liquor control fund]?

2. Must annexation gains be reported as part of the special census under Section 312.3 and 123.50?

3. What reporting to the Secretary of State must take place by a city or town annexing territory?

The law, prior to 1965, was that cities and towns were entitled to receive an apportionment of the road use tax fund and the liquor control fund in the ratio which the population thereof, determined by the last general federal census, had to the population of all other municipalities in the state. *Harp v. Abrahanson* 248 Iowa 222, 80 N. W. 2d 505 (1957).

In 1965, the 61st General Assembly enacted a law permitting the taxing of *one* special federal census each decade for the purpose of apportioning funds under Sections 312.3 and 123.50, Code 1962:

"A city or town may have one special federal census taken each decade, and the population figure thus obtained shall be used in apportioning amounts under this subsection beginning the calendar year following the year in which the special census is certified by the secretary of state." Acts 1965 (61 G. A.) Ch. 336 § 2 and 3).

If a city has annexed territory after taking advantage of the special census provision, any population increase achieved by such annexation cannot be included in fixing the ratio for the apportionment of the funds until after the next general federal census.

However, the Code also provides that when two cities or towns consolidate, the population, for the purpose of distribution of funds, shall be the total population of the combined cities or towns taken from the last decennial census. § 362.21, 1966 Code. In the event that cities or towns thus consolidated had a special federal census before the consolidation, then the special census figure authorized by the 1965 Act would govern the distribution of the road and liquor funds.

If a city or town has annexed territory since the last general federal census but prior to having a special federal census, the population figure used in fixing the apportionment ratio shall be the figure shown for the city or town in the last general federal census and such figure remains constant until a new population figure is obtained by general or special federal census certified by the Secretary of State. § 26.6, 1966 Code.

If a city or town avails itself of the provisions permitting a special federal census after annexing territory, the result of the census should include any population gain by reason of the annexation.

In answer to question 3, the clerk of a city or town is required to file a certified copy of the whole proceedings for the annexation with the Secretary of State and in the recorder's office for the county. § 362.20, 1966 Code.

January 20, 1967

CITIES AND TOWNS: Assessor, Code of Iowa and session laws — §§ 16.24(16), 441.54, 1966 Code. City assessors are not entitled to free copies of the Code of Iowa and session laws. (1-20-67) S/67/1/7

Mr. E. A. Burrows, Jr., Chairman, Iowa State Tax Commission: You have requested an opinion as to whether a city assessor is entitled to a copy of the Code of Iowa and a copy of the session laws without cost under Chapter 16, Code of Iowa 1966.

§ 16.24(16) of the code provides that the "county assessor" is entitled to a copy of the code and a copy of the session laws without cost, but no mention is made of the city assessor. Expressio unius est exclusio alterius.

§ 441.54, Code of Iowa, 1966, provides that "whenever in the laws of this state, the words 'assessor' or 'assessors' appear, singly or in combination with other words they shall be deemed to mean and refer to the county or city assessor, *as the case may be.*" (Emphasis added.) In my opinion § 441.54 does not broaden § 16.24(16) to include the city assessors. "County" assessors are specifically mentioned rather than merely "assessors."

Accordingly, there is no statutory authority under which free copies of the code and session laws could be furnished to the city assessors.

January 26, 1967

STATUTORY CONSTRUCTION: Legislative Research Committee — § 2.50, Code 1966. Powers and duties of Legislative Research Committee do not include power to introduce or present bills. Statute only authorizes recommendation of bills. (1-26-67) S/67/1/8

The Honorable Richard L. Stephens, State Senator: This is in reply to your recent letter, reading as follows:

"I respectfully request an opinion on the legality of the following procedure:

"Regarding the powers granted to the Legislative Research Committee by the 1967 rules of the Iowa State Senate, and amendment was adopted to Senate Rule 17 which states that the Legislative Research Committee is granted authority to introduce bills in the Iowa House and Senate.

"While the amendments to Chapter 2 of the Code passed last session gave broader powers to the Legislative Research Committee, the question has arisen as to whether the Legislative Research Committee, as a committee, has legal authority."

The powers and duties of the Legislative Research Committee are set forth in Section 2.50, Code 1966, which provides as follows in subparagraph 5:

"To conduct studies and evaluate reports of studies assigned to study committees and make recommendations for legislative or administrative action thereon. Recommendations shall include such bills as the research committee may deem advisable.

"The committee may co-operate with other states to discuss mutual legislative and governmental problems."

Since the statute only authorizes recommendation of bills, it does not include the power to introduce or present the bills in the Iowa Senate. It is strictly limited by the language of the statute.

The familiar rule of statutory construction is that the express mention of one thing impliedly excludes others. The Latin maxim is:

"expressio unius est exclusio ulterius"

The legislative intent is expressed by omission as well as by inclusion.

State v. Flack, (1960) 101 N. W. 2d 535, 251 Iowa 529, at 533, which also cites 82 C. J. S. Statutes, § 333a.

February 2, 1967

STATE OFFICERS AND DEPARTMENTS: Public Instruction — Proposed rules of Department of Public Instruction which recognize only organizations whose policies prohibit all star games are invalid and void on the ground that they do not implement § 275.25(9), Code of Iowa. (2-2-67) S/67/2/9

The Honorable William J. Reichardt, State Senator: This is in reply to your letter of January 20, 1967, requesting an opinion on the question of whether the Department of Public Instruction has rule making power to prohibit all star games and other athletic contests.

The proposed rules to be included in Title VII, Inter-scholastic Competition, Chapter 9 Extra-curricular Inter-scholastic Competition, require that the constitution and bylaws of organizations sponsoring contests reflect policies which prohibit: 1) "All Star" games, 2) participation by selected individuals in competitions except in individual sports and music and speech activities, 3) participation in out-of-state events which are not regularly scheduled inter-scholastic activities, 4) support of interstate contests between individuals, 5) financial subsidies for insurance for participants.

The proposed regulations also require that organization constitution place responsibility for chaperoning all teams and contestants on the school district.

These proposed rules were among many reviewed and approved as to form and legality by the Attorney General's office on December 16, 1966. We do not lightly overrule opinions of Attorneys General of this state, which, when carefully considered, are entitled to weight and recognition by later Attorneys General as stare decisis. However, it does not appear that your specific question was presented or that the Attorney General rendered any opinion on the particular issue involved. His approval of these rules along with others is considered in the nature of obiter dictum, rather than an opinion on this issue.

§ 257.25(9), Code of Iowa, 1966, provides:

"After July 1, 1966, no public school shall participate in or allow students representing such public school to participate in any extracurricular interscholastic contest or competition which is sponsored or administered by an organization as defined in this subsection, unless such organization (a) is registered with the state department of public instruction, (b) files financial statements with the state department in the form and at the intervals prescribed by the state board of public instruction, and (c) is in compliance with rules and regulations which the state board of public instruction shall adopt for the proper administration, supervision, operation, eligibility requirements, and scheduling of such extracurricular interscholastic contests and competitions and such organizations. For the purposes of this subsection 'organization' means any corporation, association, or organization which has as one of its primary purposes the sponsoring or administration of extracurricular interscholastic contests or competitions; but shall not include any agency of this state, any public or private school or school board, or any athletic conference or other association whose interscholastic contests or competitions do not include more than twenty schools."

It is our view that the proposed rules are invalid and void on the ground that they do not implement the administration of Section 275.25 subsection 9. These rules are an arbitrary and capricious limitation and abuse of discretion under the statute.

The Supreme Court of Iowa in *Lewis Consolidated School District v. Johnston*, 256 Iowa 236, 127 N. W. 2d 118, 1964, at page 126, has pointed out that administrative bodies "must be required to follow some sort of pattern designed by the legislature." In the Lewis case supra, the court further states at page 248.

"* * * The end does not always justify the means; in fact it never does, if constitutional precepts must be disregarded to reach it. Nor will we torture the Constitution out of any fair construction or meaning to promote or permit what may be thought to be a beneficial result. More harm will come from such procedure, which in effect sets aside basic safeguards, than will be gained by the supposed desirable end to be achieved beyond the Constitution in the particular case."

The rule making power conferred upon an administrative authority is not the power to make law, but only the power to carry into effect the will of the lawmaker as expressed by the statute:

". . . the delegation of power to make rules and regulations cannot extend to the making of rules which subvert the statute reposing such power, or are contrary to existing laws, or which repeal or abrogate statutes." 42 Am. Jur., Public Administrative Law § 48.

The administrative officer's power to make regulations must be exercised within the framework of the provision bestowing regulatory powers on him *and the policy of the statute which he administers.* 42 Am. Jur. 359.

It is our opinion that the proposed rules have misinterpreted the legislative intent expressed by the enactment of § 275.25 subsection 9 which authorizes rules "for the proper administration, supervision, operation, eligibility requirements and scheduling of such extracurricular interscholastic contests and competitions . . ." and that on this ground they are illegal and an unconstitutional exercise of legislative authority.

In conclusion, the power to regulate does not include the power to prohibit. The Department of Public Instruction has no power to prohibit "all star" games.

February 3, 1967

HEALTH: Qualifications of Deputy Medical Examiners — §§ 339.2 and 339.8 — A deputy medical examiner must be a licensed doctor of medicine and surgery, or an osteopathic physician or osteopathic physician and surgeon, licensed to practice in Iowa. (2-3-67) S/2/67/10

Mr. David E. Schoenthaler, Jackson County Attorney: We are in receipt of your letter, requesting opinion of this office, as follows:

"I have been consulted by the Jackson County Medical Examiner regarding the necessary qualifications, if any, of Deputy Medical Examiners. For various reasons, there are no medical doctors or osteopaths in Jackson County, or the surrounding counties, who are willing to serve as deputies under the present medical examiner.

"Section 339.2 of the Code sets forth the qualifications of the medical examiner, but Section 339.8 does not state any qualifications for the deputy.

"I would appreciate a written opinion at your earliest convenience advising as to the qualifications, if any, of deputy medical examiners."

Section 339.2 and Section 339.8, Code of Iowa, 1966, provide:

"339.2 Qualifications — lists submitted. Each county medical examiner shall be licensed in Iowa as a doctor of medicine and surgery, or licensed in Iowa as an osteopathic physician or osteopathic physician and surgeon as defined by law. He shall be appointed by the board of supervisors from lists of two or more names submitted by the component medical society and the osteopathic society of the county in which he is a resident. If no list of names is submitted by either society, the board of supervisors shall appoint a county medical examiner from the licensed doctors of medicine, or licensed osteopathic physicians or osteopathic physicians and surgeons of the county. If no qualified appointee can be found in the county, the board of supervisors shall appoint the medical examiner from another county.

"If, for good cause, a county medical examiner is unable to serve in any particular case or for any period of time, he shall promptly notify the chairman of the board of supervisors who shall then designate some other qualified person to serve in his place."

"339.8 Facilities and assistants provided. Each county board of supervisors is hereby authorized to provide or arrange, and pay for, such laboratory facilities, such deputy medical examiner or examiners and such other professional, technical, and clerical assistance as may be recommended and required by the county medical examiner in the performance of the duties imposed by this chapter."

Section 339.2 specifically requires that a medical examiner must be a licensed doctor of medicine and surgery or osteopathic physician, or physician and surgeon, thus limiting such examiner to these qualifications to perform the duties required under the law. A deputy must be qualified to perform the same duties and it follows must possess the same qualifications.

In construing these sections of the law, we must advert to the rule of construction, viz., "Expressio unius est exclusio alterius" as pronounced in the early case of District Twp. of City of Dubuque v. City of Dubuque, 7 Iowa 262, wherein it was stated that if by the language used, a thing is limited to be done in a particular form or manner, it induces a negative that it shall not be done otherwise.

Express mention in statute of one thing implies exclusion of other things. (See North Iowa Steel Co. v. Staley, 112 N. W. 2d 364, 253 Iowa 355; Archer v. Board of Education, 104 N. W. 2d 621, 251 Iowa 1077; Dotson v. City of Ames, 101 N. W. 2d 711, 251 Iowa 467.

If the medical examiner is unable to serve, the chairman of the board of supervisors then designates some other *qualified person to serve in his place.* (Section 339.2). The County Board of Supervisors, upon recommendation of the medical examiner, may provide and pay for such *deputy medical examiner as required in the performance of the duties imposed by the law.* (Section 339.8).

A "deputy" is one authorized to exercise the office or rights which the officer possesses, for and in place of the latter, and where principal is unable to perform the *duties* of his office, it devolves on *deputy* to do so. (Wilbur v. Office of City Clerk of City of Los Angeles, 300 P. 2d 84, 143 C. A. 2d 636).

A "deputy" is a person appointed or authorized to act for another or others or a person appointed or elected as assistant to a public official, serving as successor in event of a vacancy. (Behringer v. Parisi, 175 N. Y. S. 2d 862, 6 A. D. 2d 188).

A "deputy" of an officer is one appointed as the substitute of another and empowered to act for him, in his name or on his behalf; one who is appointed, designated, or deputed to act for another; one who by appointment exercises an office in another's right. The position of a "deputy," as the word implies, is that of a subordinate. A "deputy" has power to do every act which his principal might do, but a "deputy" may not make a deputy. (See "Deputy," Words & Phrases; Woodman Acc. Co. v. Dist. Court, 219 Ia. 1326, 260 N. W. 713, 98 A. L. R. 1431; Bowman v. Overturff, 229 Ia. 329, 294 N. W. 568.)

A deputy medical examiner, under the law, must be qualified to serve in the place of the medical examiner, in the performance of the duties imposed by said law. Therefore a deputy medical examiner is such a public official as defined above.

Therefore, by the clear, unambiguous language of the statute, a deputy medical examiner must be a licensed doctor of medicine and surgery, or an osteopathic physician or osteopathic physician and surgeon, licensed to practice in Iowa.

February 6, 1967

CONSTITUTIONAL LAW: Constitutional amendments — Art. X, § 2 — Proposed amendment (SJR 21, 61 GA) changing length of term of office of governor and lieutenant governor and combining governor and lieutenant governor into one voting bracket instead of present two is unconstitutional as being two amendments not of necessity connected or related. (2-6-67) S/67/2/11

The Honorable Seeley G. Lodwick, State Senator: In your letter of January 24, 1967, you inquire as follows:

"Is Senate Joint Resolution 21 as passed by the Sixty-first General Assembly (and introduced in the Sixty-second General Assembly as Senate Joint Resolution 3) constitutional?

"I ask your written opinion because some persons feel two subject matters are included, and those persons feel only one subject matter should be included in a constitutional amendment."

"The possible two subject matters are: (1) changing length of term of office of governor and lieutenant governor; (2) combining the governor and lieutenant into one voting bracket instead of the present two."

Article IV, Section 2, of the present Constitution of Iowa provides that the Governor shall be elected at the time and place of voting for members of the General Assembly and that his term shall be two years.

Article IV, Section 3, of said present constitution, provides that the Lieutenant Governor be elected to a two year term at the same time as the Governor and that "In voting for Governor and Lieutenant Governor, the electors shall designate for whom they vote as Governor, and for whom as Lieutenant Governor."

The proposed amendment (SJR 21, 61st GA) would change present Article IV, Section 2, in substance, to provide a four year term for the Governor. At the same time, it would also change Article IV, Section 3, in substance, to provide a four year term for the Lieutenant Governor and that "In voting, the electors shall designate for whom they vote for Governor and Lieutenant Governor by casting one (1) vote for both offices on a ballot which shall place the Governor and Lieutenant Governor together on the ballot so that one (1) vote shall be cast for both and said vote shall thereafter be counted as a vote for each." Changes to other sections of Article IV, proposed by SJR 21 are not deemed material to the question you raise.

Article X, Section 2, of the present constitution provides:

"If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately."

In *Lobaugh v. Cook*, 1905, 127 Iowa 181, 102 N. W. 1121, the Iowa Supreme Court held:

"The evident purpose of this section (Article X, Section 2) is to exact the submission of each amendment to the Constitution on its merits alone, and to secure the free and independent expression of the will of the people as to each. The importance of this cannot be too strongly stated. It excludes incongruous matter and that having no connection with the main subject from being inserted, and thereby obviates the evil of loading a meritorious proposition with an independent and distinct measure of doubtful propriety. The elector, in voting for or against, is limited to ratifying or rejecting the proposition in its entirety, and cannot be put in a position where he may be compelled, in order to aid in carrying a proposition his judgment approves, to vote for another he would otherwise oppose. * * *"

"* * * We think amendments to the Constitution, which (Article X, Section 2) requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separte purposes, not dependant upon or connected with each other. (Citations)"

In my opinion, the proposed amendment is really two amendments, each having a different object and purpose. The amendment to increase the terms is not, of necessity, connected or related to the amendment providing that these officials be elected as a team or slate.

Accordingly, SJR 21, 61st GA, is unconstitutional under Article X, Section 2, Constitution of the State of Iowa.

February 8, 1967

HEALTH: Mental Therapist — § 146.22 — A person with a B.A. and M.A. in social work alleged to be a "Mental Therapist" cannot be licensed to practice as such within the field of healing arts as defined under the laws of this state and cannot hold himself out to the public as a diagnostician and treater of mental conditions and actually engage in such practice. (2-8-67) 67-2-1.

Mr. Roger F. Peterson, Black Hawk County Attorney: This is in reply to request of recent date for an opinion upon the following question:

"I am requesting an opinion as to the application of Section 146.22 of the Code of Iowa to a person holding a B.A. and an M.A. Degree in Social Work who proposes to diagnose and treat mental conditions in persons referred to him.

"* * * My question, therefore, is whether or not such a person can hold himself out to the public as a diagnostician and treater of mental conditions and actually engage in diagnosis and treatment of mental conditions under the governing laws of this State."

As we understand the facts involved in the question, the above referred to person, intends to practice a healing art designated as a "mental therapist." He proposes to open an office and hold himself out to the public for the diagnosis and treatment of mental conditions in persons referred to him in the community.

Section 146.2 (2) Code of Iowa 1966 defines "healing art" thus:

"The practice of the healing art shall mean holding one's self out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or *mental condition* and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical or *mental condition.*"

In this regard it was stated in the case of Steinback et. al. v. Metzger et. al. 63 Fed 2 74, 76 that:

"It relates to the art of relieving and curing human ills, which is commonly referred to as the "healing art," of which the plaintiffs admit themselves to be members. This is a generic expression and ordinarily embraces the whole art of healing and its many theories and practices. As it extends to all personal citizens of a state, it falls very clearly under its police powers. These a state may exercise by promulgating a system of regulations and control which if not unreasonable and arbitrary, is lawful and is binding upon every one in the state."

From the facts stated, it would appear that the person in question would be engaged in the practice of medicine, as one, "who publicly profess to assume the duties incident to the practice of medicine and surgery." (See Sec. 148.1 Code of 1966)

One of the duties incident to the practice of medicine, is to diagnose and treat; which is precisely what said person intends to do. It is immaterial that no medicines will be prescribed.

In the case of State v. Hughey, 208 Ia. 842, 226 N. W. 371, at Page 846 it was said:

"The term 'practice of medicine' is defined by section 2538. (Now Sec. 148.1) It is not confined to the administering of drugs. Under this statute, one who publicly professes to be a physician and induces others to seek his aid as such is practicing medicine. Nor is it requisite that he shall profess in terms to be a *physician*. It is enough, under the statute, if he publicly professes to assume the duties incident to the practice of medicine. What are 'duties incident to the practice of medicine?' Manifestly, the first duty of a physician to his patient is to diagnose his ailment. Manifestly, also, a duty follows to prescribe the proper treatment therefor. If, therefore, one publicly profess to be able to diagnose human ailments, and to prescribe proper treatment therefor, then he is engaged in the practice of medicine, within the definition of section 2538."

Whatever theraputic agency will be used in the treatment of the patients, by the alleged "mental therapist," is not revealed by the facts. Even so the alleged practitioner, under the qualifications stated, viz., the holding of two degrees a B.A. and a M.A. in Social Work, will not meet the requirements of our statutes to practice any of the healing arts defined in our laws.

In State v. Collins, 178 Ia. 73, 159 N. W. 604, at Page 78, the court said:

"We agree with appellant that statutes regulating the practice of medicine and providing penalties for failure to comply with conditions impossed upon such practice include all who practice the *art of healing, whatever the theraputic agency employed,* * * *." (Emphasis ours) (See cases cited)

Our statutes define the various types of professions that can be licensed in the field of the healing arts, and the qualifications required before one can be so licensed. A "mental therapist" as such, is not included in said professions of the healing arts.

Speaking of a so-called healing art, and designated as "Naprapathy," our Supreme Court in the case of State v. Howard 216 Ia. 545, 245 N. W. 871, 873, said:

"Our statute gives no recognition to such system. No recognition therefore can be given to it by the courts, nor by the administrative officers of the state. It must be deemed as a mere name and an evasion of the statute. To recognize the legality of the defendant's practice under such a name would defeat all the legislation that we have for the regulation of the practice of medicine and surgery."

The rationale of our statutes was well stated in the case of State v. Boston, 226 Ia. 429 284 N. W. 143, where the court stated on Page 144, in a case involving the practice of chiropracty:

"The reason for all laws restricting this and other professions is the protection of the public, and to that end the legislature has seen fit to enact laws and provide means for enforcing the regulations governing the practice of the various forms of the art of healing, permitting each practitioner to follow his profession according to its established principles. Each may have its merits; but those persons who are authorized to practice one form of the art may not encroach upon another form for which they have no authority from the state."

Therefore, it is our considered opinion, that the person in question, an alleged "mental therapist," cannot be licensed to practice as such, within the field of the healing arts as defined under the laws of this state, and cannot hold himself out to the public as a diagnostician and treater of mental conditions and actually engage in such practice.

If the said party undertook to engage in such practice, it is our opinion, he would be subject to the penalties of the law, as stated in Sections 146.22 and 147.86, or restrained by permanent injunction as provided in Sec. 147.83.

February 10, 1967

ELECTIONS: Contest Committee, notice mandatory — §§ 57.1, 57.5, 59.1, 62.5, 1966 Code. Filing of notice of contest within the prescribed time is mandatory to give the committee jurisdiction. (2-10-67) S/67/2/12

Honorable Lester L. Kluever, Chairman, Elections Contest Committee: This replies to your letter of January 30, 1967, in which you submitted the following questions concerning the election contest between George D. Fischer, contestant and James Middleswart, incumbent:

"1. Under Section 59.1, does the House have jurisdiction to decide this matter since the incumbent was served with Notice on December 22, 1966, which would be less than twenty days prior to the Session.

"2. If it is your opinion that the House does not have the jurisdiction, does Section 57.5, overrule this and entitle the Contestant to have the ballots counted.

"3. Does the Notice of Contest comply with Chapter 57, as to grounds and stating sufficient facts to give the House jurisdiction and authority to decide the Contest."

In answer to question one, we advise that failure to file timely notice is fatal under Section 59.1, Code of Iowa, 1966, and no jurisdiction exists in the committee to entertain this contest. The language of the statute is mandatory that the contestant file his notice within thirty days after the incumbent is declaired elected . . . and if no such deposition [of illegal votes] is taken then twenty days before the first day of the next session.

A study of the history of § 59.1 shows that the provisions have remained substantially unchanged since the code of 1851 and that prior to that (Rev. St. 1843 Terr. Ch. 68 § 20) a candidate had 35 days after the election to give notice of contest and the time fixed for taking depositions could not exceed 40 days from the date of election. It was also provided that if witnesses failed or refused to appear at the time specified in the notice, their testimony might be taken at any time before the next session by giving 5 days notice to the party whose election is contested.

The first code of the State of Iowa in 1951, § 381, contains the cutoff of 20 days which is in the present statute, but the statute then read "20 days before the hearing." This language was carried into the 1860 Code and the present language appears in 1873 and thereafter. However, we have found no case which requires the House of Representatives or any other contest tribunal to take jurisdiction of a contest where the notice was not filed in accordance with the provisions of the statute.

The case of *Marsh v. Huffman,* 199 Iowa 788, 202 N. W. 581, can be distinguished on the facts, for there the contestant for the office of sheriff filed a notice accompanied by a bond within the prescribed statutory time and the contest court was held to have acquired jurisdiction of the subject matter because the contestant "had completed his duties under the statute." Ibid p. 583. In that case jurisdiction over the incumbent was also acquired because he participated in the trial and was held to have waived his complaint of want of proper notice.

In *Haas v. Contest Courts,* 221 Iowa 150, 265 N. W. 373, the contest was over a judgeship and did not involve the 20 day cutoff provision of § 59.1. However, after filing notice and bond before the canvass of votes, the contestant refiled in order to comply with the statute.

In support of the view that the contestant's failure to file timely notice precludes the Contest Committee from taking jurisdiction over this matter, we point out 18 Am. Jur. Elections § 290 which states:

"The compelling of prompt action in hearing and disposition of election contests, to the end that a decision may be reached before the term has wholly or in a great part expired, seems to be the policy of the law. A provision for the commencement of the proceeding within a designated time is usually regarded as *mandatory and must be complied with in order to confer jurisdiction of the case . . .*" [Emphasis added].

In reply to question 2, it is our opinion that the provisions of § 57.5 do not override a determination that the tribunal lacks jurisdiction to determine a contest so as to provide a recount of the ballots in spite of the contestant's failure to comply with the requirements of the statute as to the giving of notice of contest of the election.

Question 3 relates to the sufficiency of facts and grounds alleged in the statement filed by the contestant.

In the Haas case, supra, the court stated at page 155:

"The real purpose of the filing of this statement is to make of record the objections and complaints that the contestant has, and to make a showing of why the incumbent is not entitled to hold the office to which he has been declared elected."

In our opinion, if the statement of intent to contest the election informs the incumbent of the grounds by reference to a subsection of § 57.1, such notice, if it otherwise complies to §§ 59.1 and 62.5, would be sufficient.

February 14, 1967

CONSTITUTIONAL LAW: State University — Art. IX, § 11, Art. XI, § 8. The articles of the constitution relating to the State University of Iowa do not prohibit the renaming of any other institution. (2-14-67) 67-2-2.

Hon. Elmer F. Lange, State Senator: This replies to your letter of February 8, 1967 requesting an opinion as to whether Senate File 151 which is a bill for an Act to change the name of "State College of Iowa" to "Iowa Northern University" and other related matters violates Article IX, Section 11 and Article XI, Section 8 of the Constitution of the State of Iowa.

The sections of constitutional articles referred to above pertain only to the State University of Iowa located at Iowa City and do not prohibit the renaming of any other institution.

In 1959, the name Iowa State College of Agriculture and Mechanical Arts at Ames was changed by statute to Iowa State University of Science and Technology. (Ch. 74, Laws 58 G. A.) In 1961, the name of the Iowa State Teachers College at Cedar Falls was changed to "State College of Iowa" (Ch. 153, Laws 59 G. A.) Apparently, the constitutional question raised at this time was not then regarded as a barrier to such legislation and we are of the opinion that the proposed bill is not in conflict with the provisions of the state constitution cited herein.

February 15, 1967

GENERAL ASSEMBLY — **Expense of legislators** — Leased WATS telephone line — Constitution, Article III, § 25. Legislature has authority to install a WATS line for use by members of legislature on official business. The furnishing of such service would not constitute an increase in compensation prohibited by Article III, § 25 of Constitution. 2-15-67 67-2-3.

Hon. Joseph Coleman, State Senate: With reference to your request as to the legality of the House and Senate by appropriate legislation authorizing the installation of a WATS telephone line it is my opinion that the legislature does have authority to authorize the installation of such a line for use by the members of the legislature on official business.

In the case of Gallarno vs. Long, 214 Iowa 805, 243 N. W. 719, the court distinguished between official and personal expenses and held that an allowance to legislators for the personal expenses amounted to an increase in compensation and was, therefore, in contravention of Sec. 25, Article III of the Constitution of Iowa. In describing the "legislative expense" the court stated as follows:

"To illustrate such legislative expense reference is made to stationery, pencils, ink, codes, stenographers, clerks, telephone and telegraph charges for public business, office rent for state purposes, and other items of a similar nature."

Later in the decision the court also stated as follows:

"Personal expenses are those incurred for rooms, meals, laundry, communications with their homes, and other things of like character."

The court then cites with approval and as authority for the proposition in the Gallarno case a citation from an Arkansas case which reads as follows:

"Each house (of the legislature) may provide conveniences such as stationery, pencils, ink, telephone and telegraph, and other things for the use of the members, and pay for the same out of contingent expenses, but it is quite another thing to attempt to make an allowance of funds to a member to be used at will. One is the payment of a legitimate expense and the other is an allowance placed at the disposal of the member to be used at his own discretion and will. One is the payment of necessary expenses of the house itself and the other is an allowance to the member in spite of the provision of the Constitution to the contrary."

The Gallerno case from which the above quotations are taken is still the leading case law in Iowa on the subject matter and on March 4, 1959, was cited in an Attorney General's opinion as authority for the proposition that an enactment of the Fifty-seventh General Assembly purporting to grant to the Lieutenant Governor actual and necessary expenses as incurred by the said Lieutenant Governor when required by reason of his office to leave the county of his residence on official business did not entitle the Lieutenant Governor to be paid for his hotel, meals and other similar expenses while in Des Moines during the legislative session.

This opinion quoted from the Gallerno case as follows:

"* * * As will soon be shown and as already has been indicated there is a marked distinction between legislative or governmental expenses and mere personal expenses of the legislators * * *."

It is my opinion that based on the language of the Gallerno case the legislature would have authority to install or authorize the installation of a WATS telephone line for the use by its members on official business.

February 20, 1967

CONSTITUTIONAL LAW — Agriculture. Uniform application of law denied. House File 144, requiring bonds for packing companies, violates Article 1, §6, of the Iowa Constitution by exempting small operators. 2-20-67, Zeller to State Rep. Wm. H. Harbor. 67/3/10

Honorable William H. Harbor, State Representative: You have asked my opinion concerning a proposed bill relating to the bonding of operators of slaughterhouses buying cattle, hogs or sheep. This bill is marked as House File 144. This bill applies to packers, as described in the federal "Packers and Stockyards Act, 1921." Your question is whether the proposed state act is constitutional in its requirements and in its classification of persons who shall be bonded.

It is clearly within the police power of the state to regulate packers in activities which have not been dealt with in the federal act. Packing companies and their agents are not required to register and give bonds, under §203 and §204 of the Packers and Stockyards Act, although stockyard dealers and market agencies, dealing in livestock, are required to register and give bonds. This matter is therefore still subject to state regulation if the classification of packers, subject to these requirements, is reasonable and not arbitrary.

There is, however, a question in regard to the provision of this bill which imposes the duty to register and give a bond only upon those persons or corporations buying cattle, hogs or sheep in excess of twenty-five animals per day. The purpose of the act is to give sellers of livestock to Iowa meat packers similar protection to that now provided by the federal act in dealings with stockyards and market agencies. But there is no such classification in the federal act limiting it to market agencies buying livestock in excess of twenty-five animals per day. The federal law applies to all stockyards and market agencies, regardless of size or daily volume of business. There would seem to be an equally valid reason to require bond of any buyer of livestock for slaughter who is buying only fifteen or twenty animals per day. Any farmer or shipper dealing with the small buyer or packer would run a like risk of a default in payment.

Article I, §6, of the Constitution of the State of Iowa provides as follows:

"All laws of a general nature shall have a uniform operation; * * *."

And Amendment 14, §1, of the Federal Constitution provides as follows:

"* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

Any law which extends immunities and privileges to one portion of a class and denies them to others of like kind by unreasonable or arbitrary subclassification violates the constitutional prohibition against class legislation. The following decisions give effect to this fundamental law:

Collins vs. State Bd. of Social Welfare, 1957, 248 Iowa 369, 81 N.W. 2d 4.

Chicago & N.W. Ry. Co. vs. Fachman, 1964, 255 Iowa 989, 125 N.W. 2d 210.

And indeed the checks or drafts of the publicly-owned and nationally-advertised packers, whose earnings are published quarterly and certified annually by well-known accounting firms, would seem to provide more security than ordinarily available to the small operator buying less than twenty-five animals per day. It is my opinion that the bill in its present form amounts to class legislation and that applying the bonding requirement to buyers in excess of twenty-five animals per day is unreasonable and arbitrary.

February 22, 1967

COURTS: Habeas Corpus — Attorney Fees. There is no authority in § 663.44, 1966 Code of Iowa, for the payment of attorney's fees incurred by a petitioner. (Turner to Lodwick, 2-22-67) S67-2-14

The Honorable Seeley G. Lodwick, State Senator: This will acknowledge receipt of your letter requesting the opinion of this office in regard to the following:

Does Chapter 433, Acts of the 61st General Assembly, allow payment of attorney's fees?

§ 663.44, 1966 Code of Iowa, as amended, provides:

"If the plaintiff is discharged, the costs shall be taxed to the defendant, unless he is an officer holding the plaintiff in custody under a warrant of arrest or commitment, or under other legal process, in which case the costs shall be taxed to the county. If the plaintiff's application is refused, the costs shall be taxed against him, and, in the discretion of the Court, against the person who filed the petition in his behalf.

However, where the plaintiff is an inmate of any State institution, and is discharged in habeas corpus proceedings or where the habeas corpus proceedings fail and costs and fees cannot be collected from the person liable to pay the same, such costs and fees shall be paid by the county in which such State institution is located. The facts of such payment and the proceedings on which it is based, with a statement of the amount of fees or costs incurred, with approval in writing by the presiding Judge appended to such statement or endorsed thereon, shall then be certified by the Clerk of the District Court under his seal of offi to the State Executive Council. The Executive Council shall then review the proceedings and authorize reimbursement for all such fees and costs or such part thereof as the Executive Council shall find justified, and shall notify the State Comptroller to draw a warrant to such County Treasurer on the State general fund for the amount authorized." (That portion of the above provision which is italicized constitutes the amendment of Chapter 433, Acts of the 61st General Assembly.)

The expression "costs and fees" as used in statutes has been defined in a number of cases. The general rule distinguishes between them.

"'Costs' are the expenses incurred by the parties in the prosecution or defense of a suit, whereas 'fees' are compensation to an officer for services rendered in the progress of a cause." *In re Terry*, 123 N. Y. S. 258, 260.

"The terms 'fees' and 'costs' are often used interchangeably as having the same application, but, accurately speaking the term 'fees' is applicable to the items chargeable between an officer and a person whom he serves, while the term 'costs' has reference to the expenses of litigation as between litigants." *Bohart v. Anderson*, 103 P. 742, 744, 24 Okl. 82, 20 Ann. Cas. 142.

We have other authorities in 16 Words and Phrases, Permanent Edition, at page 525.

It is to be observed that prior to the amendment by the 61st General Assembly, previously exhibited, only the costs were authorized to be taxed to the county. The provision for the payment of costs and fees as the responsibility of the county appears in that section for the first time in the foregoing designated amendment to § 663.44. There is no express mention therein that an attorney's fees incurred by the petitioner are within the terms thereof.

Even assuming that the term as there used included fees for services performed by an officer, the explanation attached to House File 364, being the amendment to § 663.44, shows no intention therein that the word "fees" has significance other than the announced general rule. The design of the amendment was to relieve any county where any of the State institutions are involved, from the burden of these costs and fees.

In another aspect of this statute, to resolve any ambiguity therein, it is to be observed also that the 61st General Assembly amendment is couched in substantially the same language as § 337.12, 601.130 and 789.20 of the 1966 Code of Iowa.

In § 601.130 it is stated:

"The fees contemplated in § 601.128 and 601.129, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit . . ."

These are statutory fees which justices of peace and constables are entitled to charge according to these statutes.

§ 789.20 states as follows:

"All costs and fees incurred in any criminal case brought against an inmate of any state institution for a crime committed while confined in such institution shall be paid out of the state treasury from the general fund in case the prosecution fails, or where such costs and fees cannot be made from the person liable to pay the same, the facts being certified by the clerk of the district court under his seal of office to the state comptroller, including a statement of the amount of fees or costs incurred, such statement to be approved by the presiding judge in writing appended thereto or indorsed thereon."

§ 337.12 provides:

"In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same . . . the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury. . . ."

The applicable rule which defined similar legislation to determine the intention of the legislature is supported by § 6102 of Sutherland Statutory Construction, 3rd Edition, Volume 3, where it is stated at page 157:

"On the basis of analogy a number of decisions hold that a doubtful application of a statute will be controlled by the express language of one or several other statutes which are wholly unrelated, but apply to similar persons, things or relationships. Primarily, the rule is based upon public policy. By referring to other similar legislation the court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and logical system of law. It follows that the usefulness of the rule is greatly enhanced where analogy is made to several statutes or a statute representing a general course of legislation."

These fees provided for in the foregoing statutes for payment out of public funds are by these statutes authorized to be charged by public officers for services performed. Thus, these statutes place the fees as used in House File 364, Acts of the 61st General Assembly, which amends § 663.44, under the general rule heretofore exhibited. The term "fees" as so used neither expressly or impliedly includes attorney's fees incurred by a petitioner as defined in Chapter 433. Thus, there is no authority in § 663.44.

In the recent case of *Roach v. Bennett*, decided February 7, 1967, the Iowa Supreme Court recognized the existence of the problem, has said:

"This appeal, indirectly at least, raises the interesting question as to whether appellant had a constitutional right to the assistance of state-appointed counsel in the prosecution of his habeas corpus action. While it may in the future be a recognized right in criminal matters, neither this court nor the United States Supreme Court has yet made such an announcement. We do not do so now. However, in connection with that problem, we may point out there is no provision in our present laws for compensating such appointed counsel by the State, and it would seem quite unfair to require counties where custodial institutions are located to assume such an obligation and burden hereafter."

February 27, 1967

TAXATION: Sales Tax — Chapter 422, Code of Iowa, 1966. Sales Tax may be imposed on service contracts which are included as a part of the sale of colored television sets, but where service contracts are a separate item on a sales invoice for a colored television set, no sales tax may be imposed for mere service.

Senator Charles F. Balloun, Senator Francis Messerly, State Capitol:

This is to acknowledge receipt of your letter of February 16, 1967, in which you pose the following questions:

"First, under the provision of Chapter 422, may a sales tax be imposed on service contracts included as a part of the sale of colored television sets. Second, may a sales tax be charged on service contracts as a separate item on a sales invoice for a colored television set."

Section 422.43, Code of Iowa, 1966, provides in part:

"There is hereby imposed, beginning the first day of April, 1937, a tax of two percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares or merchandise, except as otherwise provided in this division, sold at retail in the state to consumers or users: . . ."

Section 422.42(5), defines retailer as follows:

"5. 'Retailer' includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events as provided in this division or operating amusement from which revenues are derived; provided, however, that when in the opinion of the commission it is necessary for the efficient administration of this division to regard any salesmen, representatives, truckers, peddlers, or canvassers, as agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain tangible personal property sold by them irrespective of whether or not they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers, or persons, the commission may so regard them, and may regard such dealers, distributors, supervisors, employers, or persons as retailers for the purposes of this division."

Section 422.45 provides for exemptions from sales tax. Statutes exempting property from taxation must be strictly construed and any doubt must be resolved against exemption and in favor of taxation. *Community Drama Ass'n of Des Moines vs. Iowa State Tax Commission*, 252 Iowa 854, 109 N.W. 2d 23 (1961). Therefore, all retail sales in Iowa of tangible personal property, consisting of goods, wares, or merchandise except as specifically exempted by Section 422.45, to consumers or users are subject to sales tax. *Schemmer vs. Iowa State Tax Commission*, 254 Iowa 315, 117 N.W. 2d 420 (1962).

Rule 22.2 of the Tax Commission's Rules and Regulations, 1966, I.D.R. p. 19, specifically provides for retail sales tax on merchandise at a fixed price to which an additional service charge is added:

"Where merchandise is sold at a fixed price and there is added thereto an additional fee or charge called, service or handling charges or any other name by which the same may be called, the commission holds that such fees and charges are part of the selling price of the article and retail sales tax should be computed on the gross receipts from the sale of such property including service, handling and other like charges."

Therefore, the answer to the first question is that sales tax may be imposed on service contracts included as a part of the sale of colored television sets. This answer is consistent with the strict construction applied to tax exemption statutes since the service charge can be reasonably deemed a part of the sales price of tangible personal property, to wit, colored television sets.

Where the service contracts are a separate item and not included in the sales price for a colored television set, no sales tax should be charged for mere services but sales tax should be charged on that portion of taxable television parts which are involved in the service contract. Section 422.43 imposes sales tax upon gross receipts from the sale or service of gas, electricity, water, heat, and communication service. However, it is unlikely that this Section is broad enough to encompass service charges in connection with service contracts as a separate item on a sales invoice for a colored television set. This especially is true in view of the well recognized rule that a statute imposing a tax is construed strictly against the taxing authority and in favor of the taxpayer. *Morrison-Knudsen Co. vs. State Tax Commission*, 242 Iowa 33, 44 N.W. 2d 449 (1950).

It is the opinion of this office that the answer to your first question is yes and that the answer to the second question is that no sales tax may be charged for mere services on service contracts as a separate item on a sales invoice for a colored television set.

February 28, 1967

BONDS OF STATE OFFICERS: Superintendent of Printing, §§ 16.1, 16.2(8), 64.6(21) — Where the State Printing Board failed to appoint a Superintendent of Printing in accordance with the provisions of § 16.1 of the 1966 Code of Iowa, but instead appointed an individual as Assistant Superintendent of Printing who thereafter performed all of the duties of the Superintendent of Printing, such individual was the acting and *de facto* Superintendent of Printing and should have given the bond required by §§ 16.2(8) and 64.6(21) of the 1966 Code of Iowa. (2/28/67) 67-2-4.

Honorable Lloyd R. Smith, Auditor of State: By your letter of February 23, 1967, you have requested our opinion with respect to the following question:

Where the State Printing Board failed to appoint a Superintendent of Printing in accordance with the provisions of § 16.1 of the 1966 Code of Iowa but instead appointed an individual as Assistant Superintendent of Printing who thereafter performed all of the duties of the Superintendent of Printing should such Assistant Superintendent of Printing have given a bond in accordance with § 16.2, subsection 8, and § 64.6, subsection 21 of the 1966 Iowa Code.

In our opinion under the circumstances set forth above the individual appointed as Assistant Superintendent of Printing was the *de facto* Superintendent of Printing and consistent with the intent of the provisions of the code requiring bonds of state officers should have given the bond ordinarily required of the Superintendent of Printing.

§ 16.1 provides:

"Appointment. The printing board shall, by a majority vote, appoint some person having the same qualifications as the appointive members of the board who shall be officially known as superintendent of printing. Said superintendent shall serve during the pleasure of the board."

Instead of appointing a Superintendent of Printing the State Printing Board allowed the office to remain vacant and instead appointed an individual to the newly created post of Assistant Superintendent of Printing who thereafter performed all of the duties of the Superintendent of Printing set forth in § 16.2 except for the requirement of subsection 8 thereof to:

"8. Be responsible on his official bond for the public property coming into his possession."

§ 64.6 of the 1966 Code of Iowa states in relevant part as follows:

"State officers shall give bonds in an amount as follows: * * *

21. Superintendent of printing, five thousand dollars."

To all intents and purposes the Assistant Superintendent of Printing was the acting and *de facto* Superintendent of Printing although not officially known by that title. He performed the duties of the Superintendent of Printing and was appointed by and directly responsible to the State Printing Board. Under the circumstances the failure of the Assistant Superintendent of Printing to furnish a bond was inconsistent with the intent and obvious purpose of the statutory requirement that the Superintendent of Printing furnish an official bond and be responsible on such bond for the public property coming into his possession.

March 1, 1967

TAXATION: Motor Vehicle Fuel Tax — Waiver of Penalty. (Sec. 324.64, Code 1966). State Treasurer cannot waive penalty and interest, under statute in question, the penalty being mandatorily fixed by statute.

Mr. Wayne J. Fullmer, Director, Motor Vehicle Fuel Tax Division: Receipt is acknowledged of your favor of recent date requesting opinion of this office reading as follows:

"An audit was made on the City Transit Lines, Inc., Council Bluffs, Iowa, License Holder, No. 78-23, covering the period January 1, 1965 to September 1, 1966, for taxable and non-taxable gallons of diesel used in buses.

"The City Transit Lines, Inc. paid the fuel tax due in the amount of $1,692.64 and have asked that consideration be given their request to have the penalty and interest in the amount of $343.17 waived.

"We respectfully ask your opinion whether or not penalty and interest can be rescinded."

§324.64, Code 1966, imposes a penalty if a licensee fails to file a required report,

"or if a licensee or other person fails to pay to the treasurer an amount of fuel taxes when due, a penalty of ten percent of the tax *unpaid and due* shall be added, the unpaid tax and penalty shall immediately accrue and thereafter shall bear interest at the rate of one-half of one percent per month until paid."

A similar penalty provision was contained in the early statutes, (§5093-f9, Code 1935), wherein the Attorney General ruled that the State Treasurer of any distributor, who fails to remit within cmfwypta ocmfwyptaoi urer is without authority to remit or cancel penalties imposed by statute upon failure of any distributor, who fails to remit within the time prescribed by statute. (See OAG 1938, p. 294).

The present provisions of the law were construed by our Supreme Court in the case of Miller Oil Company vs. Abrahamson, Treasurer of State, 252 Ia. 1058, 109 NW 2d 610; wherein the court, speaking through Justice Larson, said:

"(5) 11. In purely equitable claims equity will grant or refuse relief at its discretion, but when the claim is a legal claim or when the penalty is mandatorily fixed by statute, equity will as a rule apply the requirement of the statute and not relieve the claimant. Swartz v. Atkins, Tenn., 315 S.W. 2d 393. The rule is well stated in 85 C. J. S., Taxation, section 1031c, page 599: 'Although it has been held that the courts may, in the exercise of their equitable powers, abate or remit tax penalties under meritorious conditions, the more general rule is that, in the absence of statutory authorization, the courts have no power to relieve delinquent taxpayers from penalties incurred by violations of the statutes providing therefor.' In 51 Am. Jur., Taxation, section 975, page 852, it is stated: 'The penalty is imposed for failure to pay taxes when due, and the rule in most jurisdictions is that even though one in good faith litigates his liability to a tax until after it is due and payable, he is liable for the penalty or interest imposed upon delinquent taxpayers if the decision is adverse to him.'

"Also see Camden Fire Ins. Assn. v. Johnson, 42 Cal. App. 2d 528, 109 P. 2d 447, 448; Texas Co. v. Dyer, supra, 179 Miss. 135, 174 So. 80."

"(6) Although the question is troublesome, we think the better rule is that where the penalty, as here, is by statute made a part of the tax, and there is no authority given to rebate or waive the penalty, courts have no power to forgive the same."

All justices concurred in the holding of the Miller Oil Company case, which also cited in support thereof from the case of Lamont Savings Bank vs. Luther, County Treasurer, 200 Ia. 180, 204 N.W. 430, wherein the court held that a court cannot set aside plain mandate of statute, fixing penalties on delinquent taxes, and fact that taxpayer will suffer hardship by reason of payment of penalty does not authorize annulment or limitation of penalty.

Therefore, in answer to your question, it is quite clear from the above authorities that the State Treasurer cannot waive penalty and interest, under the statute in question, the penalty being mandatorily fixed by statute.

March 2, 1967

ARTICLE IX, §11, CONSTITUTION OF IOWA. Part 1 is and remains a part of the constitution, notwithstanding the fact the 10th G.A. under the authority of §15, Article IX, of the constitution, abolished the then Board of Education and House Joint Resolution 18 is needed if a substitute for Article IX, §11 is desired.

The Honorable Russell D. Clark, The Honorable James T. Klein, The Honorable Minnette Doderer, State Representatives: This will acknowledge receipt of yours of the 27th inst. in which you submit the following:

"I am requesting an Attorney General's opinion on H. J. R. 18, and would also like to know whether they really need this amendment? I am referring to the Sections one to fifteen inclusive in Article 9 of the Iowa Constitution in the Iowa Official Register.

"Hoping to have an opinion by the end of the week, * * *."

In reply thereto, at the outset I would advise you that Article IX of the Constitution of Iowa consists of two parts, designated as #1 and #2. Part #1 thereof contains Sections 1 to 15 and these sections, including Section 11 remain and exist as part of the Constitution of Iowa. Repeal of any of them has not been affected and their constitutional status can only be changed by repeal. House Joint Resolution 18 which accompanied your letter, is needed to effectuate this repeal if it is your desire to legislate substitute for Article IX, Section 11.

The reference to the footnote at the bottom of Page 509, of the 1966 Official Register, is a voluntary conclusion of the Iowa Official Register arising out of action of the 10th G.A. in 1864 by Section 1, Chapter 52 of Acts, under the authority of Section 15, Article IX, abolishing the then Board of Education and making other provisions for the educational interests of the state, represented now as Title XII, Chapter 257, et seq of the Code of 1966.

March 2, 1967

CHAPTER 48, Code of 1966, does not authorize the use of emergency card to enable the elector to vote in the event his name does not appear on the precinct registration list.

Mr. Edward N. Wehr, County Attorney, Scott County: This will acknowledge receipt of yours of the 14th inst. in which you submitted the following:

"Because of some confusion in Scott County concerning the use of emergency voting cards, I am enclosing, herewith, the type of emergency card used by you to the city of Bettendorf, and also the city of Davenport, Iowa, which is part of our Permanent Voter Registration Law.

"During the election in November of 1966, the Democratic Scott County Auditor called the City Clerks for both Davenport and Bettendorf and said that these cards were "illegal" even though they had been in use since 1956. Both clerks were somewhat disturbed about this and when asked the basis for his "Ruling," he stated that the State Chairman of the Democratic party had so informed him.

"Later on, he called and said that the Democratic Secretary of State had also "ruled" that these emergency voting cards were "illegal."

"In order to resolve all doubts in connection with the use of the cards, and to avoid any and all political implications, I request an opinion from you as to the legality of the same.

"I am sure the cards are quite self-explanatory, and are used to cover the situation where there is, in fact, a registered voter, but because of some inadvertent error, the voter's card does not appear at the precinct when he or she attempts to vote. Your attention to this matter at the earliest possible moment will be appreciated."

and as a part of your request enclosed a copy of the emergency voting card under consideration.

EMERGENCY VOTING CARD
NOTICE TO JUDGES OF ELECTION

"On Election Day some instances may be brought to your attention where a voter has registered under the permanent registration law, but, through some misunderstanding as to his address, or through other error, his duplicate registration card is not in the filing case containing the cards for your precinct. If a voter states that he registered under the new law, if his address is in your precinct, and his card is not in your filing case, telephone the office of the Commissioner of Registration. If the voter is a registered voter you will be advised to that effect, and instructed to permit him to vote. In that case, fill out and sign this card. Do this ONLY upon instructions from the office of the Commissioner of Registration.

"Township ..... Precinct .....

"Name .....

"Residence .....

"The undersigned Judges of Election hereby certify, that the above named voter was permitted to vote in this precinct at the ..... Election held ..... pursuant to instructions from the Commissioner of Registration; it appearing that said voter is a duly registered voter, that h..... Original Registration Card is on file in the office of the Commissioner of Registration, but that the duplicate card is not among the cards of the registered voters residing in this precinct.

.....

.....

.....
Judges of Election

.....
Signature of Voter."

In reply to your request I advise:

1. There is no authority in Chapter 48 to supply the name of a voter registered or not, by means of the emergency voting card herein before exhibited. His name appears upon the registered list or it does not. There is no alternative. Chapter 48, Code of 1966 contains no express provision for the existence of such a card and no express provision for its use. Nor do I find any implied existence, nor any implied power of its use. Therefore, the commissioner of registration exceeds his authority in making use thereof. On the other hand his duty as far as the election register is concerned prescribed in §48.8, Code of 1966, as follows:

"The commissioner shall compile and shall deliver to the judges of election in each precinct the duplicate registration list of the voters in that precinct, which shall be known as the election register. Such register shall contain the name and address of every registered voter in that election precinct, * * *."

2. In addition, it appears that there is no authority in the judges of election to permit voters appearing to vote by means of such emergency card. The election judges, as far as their duty is concerned in offering a ballot to a voter as prescribed by §48.21, Code of 1966:

"In municipalities having permanent registration for elections, before any person offering to vote receives the ballots from the judge or is permitted to enter the voting machine, a certificate containing the following information shall be signed by the applicant:

CERTIFICATE OF REGISTERED VOTER

I hereby certify that I am a qualified voter duly registered under the permanent registration act of 1927 in the ..... precinct, ... ward, city of ....., county of ....., Iowa.

Party affiliation (if primary election) .....

Signature of voter .....

Address .....

Approved:

.....,
Judge or Clerk of Election.

"The certificate of registration shall be approved by a judge or clerk of election if the signature of the voter on the certificate of registration and the signature on the registry list appear to be the same." * * *."

In order to perform his duty, the election judge must have the name of such person on the registery list.

In view of the foregoing, I am of the opinion that use of the emergency voting card is unauthorized and illegal.

March 4, 1967

MOTOR VEHICLE FUEL TAX — Exemption — Urban Transit Companies or Systems. (§386B.2, §386C.3, §324.3, §§324.34 & 324.35). A Transit system acquired by a municipal corporation is exempt from the motor vehicle fuel taxes imposed by §§324.3 and 324.34.

Mr. Don R. Naber, Superintendent, Motor Vehicle Fuel Tax Division: Your letter of recent date, has been received as follows:

"Your opinion is respectfully requested on the following:

"Shall a transit system as acquired by a municipal corporation under section three eight six B point two (Section 386B.2 Code of 1966 be subject to section three two four point three (Section 324.3) and section three two four point three five (Section 324.35) Code of 1966?"

"I request your opinion due to the fact some Urban Transit Companies in Iowa may be taken over by the municipal corporations in which they are now franchised."

The question of tax liability of a municipal corporation is controlled by Chapter 386C which defines urban transit companies and also defines urban transit systems. §386C.1 provides as follows:

"An urban transit company" is one which operates buses or trolley cars or both, primarily upon the streets of cities and towns over well-defined routes between certain termini, for the transportation of passengers for a uniform fare, and which accepts for passengers all who present themselves for transportation without discrimination up to the limit of the capacity of each vehicle. Included are street railways, plants, equipment, property and rights, used and useful in the transportation of passengers.

* * *

The physical property and operation herein described shall be known as 'an urban transit system.' "

When a municipal corporation acquires "an urban transit *company*" or "an urban transit *system*" as defined in §386C.1, Code of Iowa 1966, it qualifies for any and all exemptions from tax liability, as intended under the provisions of §386C.3 of the Code.

Such exemption arises by reason of the controlling force of the special statute, §386C.3 over the general statutes, §§324.3 and 324.35 of the Code. The legislature's intent is controlling element in interpretation of statutes.

A specific statute controls a general statute, but they must be construed together in order that neither shall be made ineffective, unless necessary. (Great Western Acc. Ins. Co. vs. Martin, 183-1009, 166 N.W. 705)

Tax laws are to be interpreted liberally in favor of taxpayers, and doubt in respect to the meaning and scope of language imposing a tax must be resolved in favor of taxpayer. (Phillips Pet. Co. v. Nelson 232-246, 5 N.W. 2d 1.)

All statutes relating to the same subject matter shall be construed together. (U. S. v. Babbit, 66 U. S. 55, 17 L. Ed. 94; Wright Const. Co. v. City of Des Moines, 202-661 210 N.W. 809)

We are dealing here with motor fuel taxes, (§324.3) and special fuel taxes, (§§324.34 & 324.35) and exemptions therefrom under the provisions of §386C.3. Was it the intent of the legislature to exempt urban transit companies and urban transit systems from the imposition of the excise tax on both motor fuel and special fuel (diesel fuel) as used by said transit companies or systems, when used as fuel for propelling motor vehicles? We think it was.

In the construction of the clause of a statute the context is to be regarded, as well as other statutes in pari materia, and the reason and spirit of the law. (State v. Sherman, 46 Ia. 415)

Courts will construe a statute in conformity with its dominating general purpose, and will read text in light of context. (Geer v. Birmingham, 88 F. Supp. 189, 185 F. 2d. 82, certiorari denied 71 S. Ct. 571, 340 U. S. 951, 95 L. Ed. 686)
§386C.3 provides:

"Sections 321.119 and 324.3, and chapter 326, shall not be applicable to urban transit companies or systems. [57GA, ch 43, §3; 58GA, ch 58, §1; 60GA, ch 194, §1]"

§386C.4 provides for further tax exemptions to urban transit companies or systems.

It is common knowledge that urban transit companies have been and are in considerable financial straights in their attempts to continue in operation and furnish mass transportation. Hence a policy of so-called subsidization has been adopted by the legislature by granting all of the various tax exemptions as contained in the statutes above enumerated.

These exemptions began by the enactment of Chapter 43, Acts of the 57GA, making inapplicable §324.2, Code 1954 to such transit entities. Code §324.2 Code of 1954 levied a tax of four cents per gallon on motor fuel used for *any purpose* and six cents per gallon on all fuel oil (diesel) used for *propelling motor vehicles* on the highways of the state. This same exemption was continued by the 58GA, ch 58, and the 60GA, ch 194.

The same 57GA by Chapter 164 of its Acts, repealed Chapter 324, Code 1954 and substituted the present law governing Motor Vehicle Fuel Taxes.

The title to the Act read as follows:

"An Act to amend, revise, codify, substitute for and supplement chapter three hundred twenty-four (324), Code 1954, as amended, to impose an excise tax on *motor fuel and special fuel used to propel highway motor vehicles;* to provide certain exemptions, refunds, and credits; to provide for the administration and enforcement of this Act and the disposition of the proceeds thereof." Acts 1957 (57GA) ch 164.

For better administrative operations it was divided into four divisions, i.e. Div. I (Motor Fuel Tax) Div. II (Special Fuel Tax) Div. III (Motor Fuel and Special Fuel Use Tax for Interstate Motor Vehicle Operations), and Div. IV (Provisions Common To Taxes Imposed Under Div. I, II & III.)

§324.3 of the present law, taxes motor fuel used, and §324.34, taxes special (diesel engine) fuel used in any motor vehicle.

The dominating general purpose of the original exemption, as the law stood in Code of 1954 was the exemption of urban transit entities from the motor fuel tax and the fuel oil (diesel) tax used for propelling motor vehicles.

All of these statutes being in pari materia we are convinced it was the intent of the legislature to continue the same exemption of both types of "motor vehicle fuel" under the present law.

It surely was not, if you consider the reason and spirit of the law, the intent of the legislature to penalize municipal corporations who may become the owners and operators of an urban "transit system," by denying to them the exemptions from this tax granted to other urban "transit companies," notwithstanding the provisions of §324.3 and §324.35.

Therefore, in conclusion, it is our opinion that a "transit system" as acquired by a municipal corporation is not subject to the motor vehicle fuel taxes assessed by §324.3 or §324.34, but is exempt therefrom by virtue of §386C.3 Code 1966 and the previous statutes in pari materia therewith as stated herein.

March 9, 1967

HEALTH: §154.9 — After securing a written prescription from a licensed practitioner any person may dispense and adapt contact lenses or other ophthalmic lenses provided the *prescription* is not altered or changed by anyone except a licensed practitioner.

Dr. Arthur P. Long, M.D., Dr. P.H., Commissioner of Public Health: My staff and I have carefully considered your request for reconsideration of an opinion of this office dated December 28, 1966, and signed by the then Solicitor General, Timothy McCarthy. Your letter dated February 8, 1967, is quoted in full as follows:

"On October 4, 1966 the writer requested an opinion of the Attorney General concerning three questions relating to the application of §154.9 of the Code of Iowa.

"The questions were:

"1. What construction should be given the word 'adapt' as used in this section?

"2. Should the written prescription specifically provide for the type of lens to be dispensed, i.e. contact lens or other ophthalmic lenses?

"3. May the written prescription in any way be altered or changed by anyone other than a practitioner licensed under this section or other practitioners authorized by law to write such prescriptions?

"In reply an opinion dated December 28, 1966 concluded:

"1. that the word 'adapt' as used in §154.9 is not authority for opticians or any merchant selling glasses to fit to the eye contact lenses, even after a prescription has been obtained, nor does it authorize or permit the optician to make changes or adjustments to the contact lenses which are not specifically set forth in the prescription.

"2. that a written prescription should specifically provide as to whether the lens should be a contact lens or a lens for eye glasses and shall specifically provide all necessary measurements and specifications for the manufacture or fabrication of the particular type of lens specified.

"3. that the prescription may not be altered or changed in any way by anyone except a licensed practitioner.

"The writer has received communications from physicians and legal briefs by attorneys representing the Iowa Medical Society and the Society of Dispensing Opticians.

"Enclosed are copies of the briefs submitted which cite some legal authorities not referred to in the opinion of December 28, 1966, and advance arguments for a different interpretation of legislative intent.

"The writer requests that you review the opinion of December 28, 1966 in light of this information and take such further action as you deem appropriate."

The Statute Involved

§154.9, Code of Iowa, 1966, about which you inquire, says:

"It shall be unlawful for any person to *dispense and adapt* contact lenses or any other ophthalmic lens or lenses, without first having obtained a written *prescription or order* therefor from a duly licensed practitioner referred to in this chapter, or other practitioner authorized to write said *prescriptions or orders.* Each such practitioner shall furnish his patient without charge a copy of his patient's prescription. For the purpose of this section, an ophthalmic lens shall mean one which has been ground to fill the requirements of a particular prescription." (Emphasis ours)

OPINION

We do not lightly overrule opinions of attorneys general of this state, which, when carefully considered, are entitled to weight and recognition by later attorneys general as stare decisis. See opinion of Attorney General, February 2, 1967. Nevertheless, we are convinced the opinion of December 28, 1966, contains erroneous conclusions which should now be overruled.

I

We believe the word "adapt," as used in §154.9, means "to make fit." Webster's Seventh New Collegiate Dictionary. However, in construing §154.9, the construction to be given the word "adapt" seems irrelevant. A person without a license cannot "adapt" without a written prescription or order from a licensed practitioner but *any person* with such a written prescription or order can both "dispense and adapt contact lenses or any other ophthalmic lens or lenses." Expressio unis est exclusio alterius.

II

The real question is what should be contained in a written prescription or order. Chapter 154 does not specify. In absence of legislative authority, this State and its agencies have no power, and will not presume, to interfere with the professional judgment of licensed practitioners or require more than is customary and consistent with the practice in Iowa.

III

We agree with the conclusion expressed in the opinion of December 28, 1966 that the prescription may not be altered or changed in any way by anyone except a licensed practitioner.

CONCLUSION

Accordingly, we conclude that any person having obtained a written prescription or order for contact lenses or other ophthalmic lens or lenses from a duly licensed practitioner for a particular individual may dispense and adapt such to that individual provided the prescription is not altered or changed by anyone except a licensed practitioner. Conclusions of the opinion dated December 28, 1966, inconsistent herewith, are hereby overruled.

March 13, 1967

SCHOOLS: §24.14, 1966 Code of Iowa, Iowa area recreational schools and community colleges: There is no authority entered in the constitution or code for the preparation of a budget by the state or its subdivisions which proposes expenditures in excess of revenues to be received in the fiscal period covered by the budget. Any political office failing to perform the duties imposed in Ch. 24 should be guilty of misdemeanor and subject to removal from office. See §24.24. An organization covered by the budget term may anticipate taxes levied and may issue warrants in any one year to the amount of tax collected in the ensuing year and to anticipate revenue received under the provisions of §24.14, 1966 Code of Iowa. S-67-3-2

The Honorable Eugene M. Hill, State Senator: Reference is herein made to yours of the 27th ult. in which you have submitted the following:

"On February 3, 1967 the Legislative Fiscal Director, Mr. Gerry Rankin, made a report to the Joint Appropriations Sub-committee for State Departments on the financial condition of Area Vocational Schools and Community Colleges. On the basis of information obtained from the Department of Public Instruction, the report stated that all schools are presently operating at a deficit through the use of stamped warrants. Mr. Richard N. Smith, Associate Superintendent, estimated that it would take $2.5 to $3 million dollars to pay the combined deficit of all schools. Mr. Doyle Carpenter, Associate Superintendent stated that "vocational schools hope to be bailed out by the state." Again, based on financial reports to the State Department of Public Instruction on June 30, 1966 showing "deficit" general fund budgets, the Legislative Fiscal Director projected a combined deficit for all area schools to be $4,360,943, for the 1966-1967 school year.

"On Thursday, February 23, 1967, representatives of Iowa Area Vocational Schools and Community Colleges appearing before the House Schools Committee reported that these schools are operating on deficit budgets and that it will take an emergency appropriation by the legislature of about 4.5 million dollars to get them out of the red.

"On the same day, Thursday, February 23, 1967, State Auditor Lloyd Smith made a report to the Co-Chairmen of the Joint Appropriations sub-committee for State Departments on an audit of the North Iowa Community College at Mason City. He stated that the audit indicates a deficit of $532,651, as of June 30, 1967.

"On Thursday, February 23, 1967, Mr. Robert Johnson, Superintendent of Area IX Vocational Schools and Community Colleges, stated to the Senate Chairman of the Joint Appropriations Sub-committee for State Departments that the April 23, 1967, payroll will be the last one that Area IX will be able to meet.

"The circumstances described above are such that the undersigned considers it advisable to request an official opinion from the Attorney General as to the following:

"1. Is there authorization in the Constitution of the State of Iowa, or in the Code of Iowa, for preparation of a budget by the state, or by any subdivision of state government, which proposes expenditures beyond estimated revenues for the fiscal period covered by the budget?

"2. If the preparation of such a budget is determined to be illegal, what is the extent of the liability of public officials who prepare and certify such budgets?

"Further, the Legislative Fiscal Director's report stated, on the basis of information obtained from the State Department of Public Instruction, that all area schools are presently operating at a deficit through the use of stamped warrants. There has been an expression of opinion on the part of some state officials that so long as proposed expenditures were included in the budget of a governmental subdivision warrants could be issued in anticipation of revenue beyond the fiscal period covered by the budget. This view gives rise to my third question.

"3. Can the state or any subdivision of state government, issue warrants in anticipation of revenues to be received beyond the end of the fiscal period covered by the budget, typically the current fiscal year July 1 to June 30 inclusive?

"Your attention to this matter and an early reply will be greatly appreciated."

1. We find no authority in the constitution of Iowa or in the Code, for preparation of a budget by state or any subdivision of the state government which proposes expenditures in excess of the estimate of revenues to be received during the fiscal period covered by the budget.

On the other hand, Chapter 24, Code of Iowa, 1966, dealing with county, city, school district, et cetera, budgets thereof, with respect to the limitations of taxes above estimates, §24.14 provides:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 24.6, 24.15 and subsection 4 of section 343.11. All budgets set up in accordance with the statutes shall take such funds [allocations made by sections 123.50 and 324.78] into account, and all such funds, regardless of their source, shall be considered in preparing the budget, all as is provided in this chapter."

2. In answer to your question No. 2, I call your attention to §24.24, Code of Iowa, 1966, which provides with respect to the liability of those engaged in the budget making, the following:

"Failure on the part of any public official to perform any of the duties prescribed in chapters 22, 23, and 24, and sections 8.39 and 11.1 to 11.5, inclusive, shall constitute a misdemeanor, and shall be sufficient ground for removal from office."

3. Insofar as your question No. 3 is concerned, the authority is the opinion of this department, appearing in the report of 1930 at page 54, which states a fundamental rule of taxation in these words:

"A municipal corporation may anticipate the taxes levied under the rule that taxes levied are taxes praesenti. The district may therefor issue warrants in any one year to the amount of the tax levied and to be collected for the ensuing year."

This applies to anticipated revenue received under the provisions of §24.9, Code of 1966.

4. By opinion of this department, dated September 7, 1966, concluded that all area vocational schools and community colleges organized under the provisions of Chapter 280A, Code of Iowa, 1966, are within purview of the local Budget Act, Chapter 24, Code of 1966, copy of which opinion is hereto attached.

March 14, 1967

TAXATION: Taxes for School Purposes, §§298.1, 441.1, and 444.9, Code of Iowa, 1966. Where two school districts are merged prior to the levy of taxes, the property owners of the old school district must pay taxes pursuant to rate established for the new school district for the entire year.

Mr. Walter B. MacDonald, Kossuth County Attorney: This is to acknowledge receipt of your letter of January 25, 1967, in which you posed the following situation:

"We have a situation wherein a non-twelve grade district became a part of the Algona Community twelve grade district by means of concurrent action of the two boards of education. This was effective July 1, 1966. Prior to the above action the non-twelve grade district had been on a fiscal year basis with a budget running from July 1, 1965, through June 30, 1966. When the land owners in the old non-twelve grade district went to pay their 1966 taxes, due in 1967, they discovered that they had been taxed as if they had been in the new school district for twelve months instead of from July 1, 1966, through December 31, 1966.

"I would appreciate a ruling from your office clarifying this problem and deciding whether the land owners of the old non-twelve grade district may be taxed for the entire tax year 1966."

It would appear that the relevant portions of the Code of Iowa, 1966, to be considered are Sections 298.1, 298.8, 298.9, 298.10, and Sections 444.1 and 444.9.

Section 298.1 provides:

"291.1 School taxes. The board of each school corporation shall at its regular meeting in July, or at a special meeting called between the time for the regular meeting and the twenty-fifth day of July, estimate the amount required to be raised by taxation for the general fund. The amount so estimated shall not exceed the sum of four hundred dollars for each person of school age and such additional amount as will be necessary to pay the cost of tuition for pupils attending high schools; provided, however, that compliance with chapter 24 shall be observed."

Sections 298.8, 298.9, and 298.10 authorize the board of supervisors to levy school taxes while Section 444.9 provides for the levy of taxes by the board at its September session.

Section 444.1 provides:

"444.1 Basis for amount of tax. In all taxing districts in the state, including townships, school district, cities, towns, and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year."

We must be aware of the fact that the Iowa statutes do not specifically provide for a solution to the problem presented nor does Iowa law specifically provide that when an old school district is merged with another, the land owners of the former are entitled to pay taxes at the rate established by the old school district. Therefore, the land owners of the old non-twelve grade district must either pay taxes as if they had been in the new school district for the entire year of 1966 or else pay taxes as if the school districts had not been consolidated.

Where the limits of a school district are extended by regular proceedings under a valid statute, imposition of taxes upon the land annexed is constitutional. *Wise vs. Palmer*, 165 Iowa 731, 147 N.W. 167 (1914); *Brennan vs. Black*, 34 Del. Ch. 380, 104 A. 2d 777 (1954). Furthermore, when a tax is levied upon all property in a school district for public use by the school system, *the tax need not bear a just relationship to the benefits received*, but it is constitutionally sufficient if the tax is uniform and for a public purpose in which all land owners in the school district have an interest. *Morton Salt Co. vs. City of So. Hutchinson*, 177 F. 2d 889 (1949). Thus, it is fair to say that the liability of a taxpayer to pay

a school tax commences when the tax *is levied* in accordance with law. *Toothaker vs. Moore*, 9 Iowa 468 (1859).

In a situation where a non-high school district lost a great amount of its territory but still continued to exist, the non-high school district could levy a tax upon land within the school district as it was constituted prior to such loss of territory. *People ex rel Bailey vs. Illinois Cent. R. Co.*, 407 Ill. 426, 95 N.E. 2d 352 (1950). The Illinois Court also pointed out, however, that the power of a school district to levy taxes is limited to property within the boundaries of the district *at the time of the levy. People ex rel Davis vs. Spence*, 3 Ill. 2d 244, 120 N.E. 2d 565 (1954).

A Texas Court of Civil Appeals has held that a school district which was enlarged by a transfer of territory from another school district, was entitled to school taxes levied and collected upon lands and property within such territory *from and after its annexation. Banguete Independent School Dist. vs. Agua Dulce Independent School Dist.*, 241 S.W. 2d 192 (1951).

Finally, the Iowa case of *Grout vs. Illingworth*, 131 Iowa 281, 108 N.W. 528 (1906) would appear to be significant. In this case, the taxpayer's property was annexed to the school district on April 15, 1904. The board of supervisors had levied taxes subsequent to the annexation and pursuant to a vote of the electors of the school district on March 16, 1904. (Such a vote is today authorized by Section 444.1) The directors of the school district certified the taxes after the taxpayer's property was annexed thereto. The taxes thus certified were greater than the taxes certified for the school district within which the taxpayer had resided and in which his property had been situated prior to the annexation to the other school district. The Court aptly stated at 108 N.W. 529:

"The fact that the plaintiff was not a resident at the time of the annual meeting is wholly immaterial. Had his property been within the limits of the district at that time, the action of the electors would have been binding upon him, and his property would have become subject to the payment of the tax, although he himself was a nonresident and had no opportunity to participate in the electors' meeting and would not personally, as a nonresident, have enjoyed any of the benefits of the expenditure of the school tax thus voted. As to this school house tax it is immaterial when it was certified to the board of supervisors by the directors of school district, whether prior or subsequent to the incorporation of plaintiff's property into the independent school district, for the authority of the board to levy the tax was derived from the vote of the tax at the annual meeting, and not from the certification thereof by board of directors, provided such certification was as required by law. Now, as the electors had the power to act for the school district in directing the amount of taxes for school fund purposes which should be levied, and did not exercise any authority as to determining the property on which it should be levied, *and as the levying of the tax upon the property of the independent school district was by the action of the board of supervisors after plaintiff's property became a part of the territory of the independent school district*, we think that plaintiff's property was subject to the payment of the tax." (Emphasis supplied)

The Court determined, therefore, that the taxpayer was liable to the school district for the school house tax and other school taxes as levied by the board of supervisors for the entire year in which the taxpayer's property was incorporated into the district.

It is the opinion of this office that since the non-twelve grade district became a part of the Algona community twelve grade district prior to the levy of 1966 taxes by the board of supervisors, the land owners of the old non-twelve grade district may be taxed as if they had been in the new school district for the entire year of 1966. This conclusion is consistent with the statutes set forth above and the *Grout* case.

March 15, 1967

STATE OFFICERS AND DEPARTMENTS, Vacancies — State Fair Board, §173.7, 1966 Code. Where State Fair Board fails to elect a successor to a deceased member to serve until the next state agricultural convention, but at such next convention a successor is elected such successor is entitled to serve out the unexpired portion of the deceased member's term. He is not elected to a full two year term. 67-3-8

Mr. Kenneth R. Fulk, Secretary, Iowa State Fair Board: By your letter of February 27, 1967, you have requested an Attorney General's opinion as to the expiration date of the term of a director at large of the Iowa State Fair Board elected at a regular annual meeting of the State Agricultural Convention to fill a vacancy created by the death of a director at large of such Iowa State Fair Board. Specifically you ask our opinion as to whether or not such director is elected to serve a full two year term or only until the end of the term of the deceased director he succeeds.

The circumstances which gave rise to your question are summarized herein as follows:

1. On November 1, 1966, a director at large, Lyle Higgins, of the Iowa State Fair Board died. Mr. Higgins had been elected to a term expiring at noon on the day following the day of adjournment of the convention to be held pursuant to §173.2 of the 1966 Iowa Code on the second Wednesday of December, 1967.

2. The remaining directors of the State Fair Board upon advice of the then Attorney General did not elect a successor to the deceased director to serve until noon of the day following the adjournment of the next convention held to elect members of the State Fair Board as required by §173.7 of the 1966 Iowa Code.

3. The convention held on December 14, 1966, did, among other things, elect a director to succeed the deceased director.

In our opinion the director at large elected at the December 14, 1966, convention to succeed the director who died on November 1, 1966, was elected only to serve out the unexpired term of the deceased director, to-wit, until noon of the day following adjournment of the 1967 convention.

Chapter 173 of the 1966 Iowa Code, establishes the composition, duties and manner of election of the Iowa State Fair Board.

The section of such chapter which is relevant to the inquiry you have raised is §173.7, the text of which reads as follows:

"173.7 VACANCIES. If, after the adjournment of the convention, a vacancy occurs in the office of any member of the board elected by the convention the board shall fill the same, and the member so elected shall qualify at once and serve until noon of the day following the adjournment of the next convention. If, by that time, the member elected by the board will not have completed the full term for which his predecessor was elected, said convention shall elect a member to serve out the unexpired portion of such term. The member so elected shall qualify at the same time as other members elected by the convention."

There is nothing in this section of the law which would authorize the State Agricultural Convention to elect more directors at large to full two year terms than they would otherwise have been entitled to elect if the deceased member had not died. The failure of the State Fair Board to elect an interim director to serve until the December 14, 1966, convention is irrelevant as a legal matter. The situation is no different than that which would have existed if the State Fair Board had elected an interim director to serve until the convention but the convention had then elected someone else to serve the balance of the term. Under these circumstances the suggestion could not be seriously advanced that the member so elected was elected for a full two year term.

The fact that election of the successor director to a full two year term would result in five directors being elected each year rather than four one year and six the next as is presently the case has no legal significance. Indeed a contrary intention being not present it must be presumed that the legislature intended that four members' terms expire one year and six members' the next year. An attempt by the State Agricultural Convention to change the expiration dates of the terms of State Fair Board directors would amount to an unwarranted interference in the legislative process.

March 15, 1967

TAXATION: Military Service Tax Exemption — §§427.5, 427.6, 426A.3, Code of Iowa, 1966. A veteran who ceases to be a resident of and domiciled in Iowa prior to the time when the Board of Supervisors should have considered his claim for military service tax exemption in July is not entitled to such exemption.

Mr. Richard C. Ramsay, Winnebago County Attorney: This is to acknowledge receipt of your letter of March 2, 1967, in which you posed the following problem and question:

"*Problem:* A veteran was the owner of real estate in Winnebago County, Iowa on January 1, 1966 and to this date continues to be the owner thereof. On January 1, 1966, he was a resident of and domiciled in that county, but, prior to July 1, 1966 he became a resident of Minnesota. While still a resident of and domiciled in Iowa, he claimed an exemption against his 1966 property tax on said land for military service.

"*Question:* Does the veteran lose his exemption for military service because he ceased to be a resident of and domiciled in Iowa prior to July 1, 1966?"

It would appear that there are no Iowa cases directly on point. Therefore, the relevant statutes and certain general principles of law should be considered. The relevant statutes of the Code of Iowa are as follows:

Section 426A.3 provides:

"426A.3 Computation by auditor. On or before August 1 of each year the county auditor shall certify to the county treasurer all claims for military service tax exemptions which have been allowed by the board of supervisors. Such certificate shall list the name of each owner and the legal description of the property upon which military service tax exemption has been granted, or the nature of the property upon which such military service tax exemption has been allowed on property other than real estate. The county treasurer shall forthwith certify to the state tax commission the amount of taxes which would be levied upon each property not in excess of twenty-five mills on each dollar of assessed valuation, at the regular property rate imposed on other real and personal property in the taxing district where such military service tax exemption has been granted, were such property subject to normal property taxation."

Section 427.3 provides for property tax exemptions for veterans who serve in certain wars and conflicts enumerated by the statute.

Section 427.5 provides:

"427.5 Reduction — discharge of record — oath. Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence of satisfactory service, separation, retirement, furlough to reserve, inactive status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. Said person shall file with the city or county assessor, as the case may be his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserve, inactive status, or honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. The assessor shall tabulate and deliver or file said claims with the county auditor, having his recommendations for allowance or disallowance indorsed thereon. In case the owner of the property is in active service in any of the armed forces of the United States or of this state, including the nurses corps of the state or of the United States, said claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney. No person may claim a reduction or exemption in more than one county of the state, and if no designation is made the exemption shall apply to the homestead, if any."

Section 427.6 provides:

"427.6 Allowance — continuing effectiveness. Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed. Provided, notwithstanding the filing of the claim on or before July 1 of any year, the claimant shall be the legal or equitable owner of the property upon which exemption is claimed, on the first day of July of the year in which said exemption is claimed.

"Any person whose claim is denied under the provisions of this chapter may appeal from the action of the board of supervisors in the district court of the county in which said claimed military service tax exemption is situated by giving written notice of such appeal to the county auditor of said county within twenty days from the date of mailing of notice of such action by the board of supervisors."

"The purpose of this law (Section 427.3) is to grant a gift of tax exemption in recognition of patriotic service rendered by *Iowa citizens.*" (Emphasis supplied) *Lamb vs. Kroeger*, 233 Iowa 730, 8 N.W. 2d 405 (1943). The military service tax exemption is granted to the *person* and not to the property. 1964 O.A.G. 430. Therefore, such statutes should be construed to allow the exemption to a veteran who is a *resident* of the State. *Flaska vs. State*, 51 N. M. 13, 177 P. 2d 174 (1946).

Since the statutes in question concern tax exemptions, such statutes must be strictly construed to the end that no property not clearly and fairly within the express terms of the law shall be held to be exempt. Any doubt concerning the exemption must be resolved against the exemption in favor of taxation. *Cress vs. State Tax Commission*, 244 Iowa 974, 58 N.W. 2d 831 (1953); *Odle vs. Iowa State Tax Commission*, 246 Iowa 1241, 71 N.W. 2d 584 (1955); 1942 O.A.G. 79. Therefore, under the military service tax exemption statutes which are accorded to residents domiciled within the State of Iowa the exemption, although once properly established, does not continue after the parties entitled thereto terminate their Iowa residence and domicile. *Odle vs. Iowa State Tax Commission*, supra.

If a veteran files a claim for exemption prior to July 1, and the claim is allowed where upon the veteran sells the property and moves out of Iowa prior to the levy of the tax, the exemptions should be allowed. 1958 O.A.G. 255. However, where a veteran duly files a claim for the exemption, sells the property, and moves out of the State of Iowa prior to July 1, the exemption should be disallowed. 1958 O.A.G. 255. Furthermore, it would seem that the controlling date for allowance or disallowance of the exemption is the date on which the Board of Supervisors considered or should have considered the claim for exemption which would not be later than August 1:

". . . It is during the month of July that the board of supervisors must allow or disallow claims for military service exemptions, since the auditor is required to certify to the county treasurer on or before August 1st of each year all claims for military service tax exemption which have been allowed. Necessarily, the date for allowance could not be later than August 1st. Therefore, if the board of supervisors has allowed the claim prior to the taxpayer selling his property and removing himself from the state, his rights have become fixed, and to carry out the mandate of the statute (427.6) the exemption should be allowed . . ." (1958 O.A.G. 255, 257)

Prior to 1955, Section 427.6 provided:

"Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors shall be effective to secure an exemption for the year in which such exemption is filed, *and when a claim has once been made and allowed, it shall be effective thereafter during the period of ownership of the property designated or of the homestead, as the case may be, or until the death of all persons named in section 427.3 who remain equitable and legal owners of said property.*" (Emphasis supplied)

Section 427.6 was amended in 1955 by Acts of the 56th G.A., Ch. 219, Section 2, and the underlined portions of the statute were stricken out. Section 427.6 was again amended in 1961 by the Acts of the 59th G.A., Ch. 233, Section 1, to provide for ownership of the property by the claimant on July 1 of the year in which the exemption is claimed. Thus, the legislature intended to provide for a definite date on which the veteran should have a legal or equitable interest in the property for the year in which the exemption is claimed.

Since domicile and residence in the State of Iowa as well as ownership is a condition precedent to the allowance of the military service tax exemption, it would be consistent to say that the veteran should be a resident and domiciliary of the State of Iowa on July 1 of the year in which the exemption is claimed. This consistency is also justified by the fact that tax exemption statutes are to be strictly construed in favor of taxation and against exemption and the fact that Section 427.6 when read in conjunction with Section 427.5 raises some doubt as to whether the veteran may retain his exemption when he ceases to reside in Iowa prior to July 1. Also, this conclusion is consistent and in accordance with the Iowa Supreme Court's decision in *Odle vs. Iowa State Tax Commission*, supra, and the prior opinion of the Attorney General in 1958 O.A.G. 255 which have been alluded to above.

Finally, it should be noted that under a Massachusetts' statute which required domicile as a condition precedent to the allowance of a military service tax exemption, a veteran who was not domiciled in Massachusetts for the entire year in which the exemption was claimed could not obtain the exemption. *Earl vs. Board of Assessors of City of Malden, Mass.*, A.T.B. 31 (1948).

It is the opinion of this office that a veteran who ceases to be a resident of and domiciled in Iowa prior to the time when the board of supervisors should have considered his claim for exemption in July is not entitled to the military service tax exemption.

March 16, 1967

CITIES AND TOWNS: Proprietary enterprises — Statutory Constitution Ch. 28E, Code of Iowa, 1966. Chapter 28E authorizes cities and towns to do jointly what they are empowered to do individually whether it be construed to be a proprietary enterprise or a governmental function and SF 414 or other bill if enacted would not effect or render void any agreements.

Honorable Max Milo Mills, State Senator: I have your letter of March 15, 1967, wherein you inquire as follows:

"The 61st General Assembly enacted what is now codified as Chapter 28E, Code of Iowa, 1966. You will note that this chapter authorizes cities and towns to jointly accomplish those things which either could do individually.

"In 1966 several communities in northwest Iowa alleging the authority in Chapter 28E, formed a power agency to construct, maintain and operate electric generation, transmission and distribution facilities.

"This current legislature will surely consider SF 414 and HF 388. The purpose of this proposed legislation is to prohibit counties and towns from jointly operating electrical power facilities.

"This letter is to solicit your opinion on the following two questions:

"1. Does Chapter 28E, Code of Iowa, authorize cities and towns to jointly engage in proprietary enterprises such as electric power facilities, or is the authority granted under this chapter limited to governmental functions?

"2. If SF 414 and HF 388 are duly enacted into law and clearly restricts the electric facilities operation, will such new statute void any such mutual agreements entered into under the alleged authority of Chapter 28E?"

Sections 28E.3, 28E.4 and 28E.10, Code of Iowa, 1966, provide as follows:

"28E.3. *Joint exercise of powers.* Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency. (61GA, ch 83, §3)."

"28E.4. *Agreement with other agencies.* Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force. (61GA, ch 83, §4)."

"28E.10. *Approval of statutory officer.* If an agreement made pursuant to this chapter shall deal in whole or in part with the provision of services or facilities with regard to which an officer or agency of the state has constitutional or statutory powers of control, the agreement shall, as a condition precedent to its entry into force, be submitted to the state officer or agency having such power of control and shall be approved or disapproved by him or it as to all matters within his or its jurisdiction. (61GA, ch 83, §10)."

Section 397.1, Code of Iowa, 1966, provides as follows:

"397.1. *Cities and towns may purchase.* Cities and towns shall have the power to purchase, establish, erect, maintain, and operate within or without their corporate limits, heating plants, waterworks, gasworks, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants and lease or sell the same. (C73, §§471-473; C97, §720; S13§720; C24, 27, 31, 35, 39, §6127; C46, 50, 54, 58, 62, §397.1)."

In my opinion, chapter 28E, and particularly the sections quoted, would authorize cities and towns to do jointly what they are empowered to do individually. Since, under §397.1, cities and towns have power to "purchase, establish, erect, maintain, and operate within *or without* their corporate limits" electric light or power plants, Chapter 28E authorizes them to engage in such an activity jointly, whether or not it be construed to be a proprietary enterprise or a governmental function.

Senate File 414 (a companion bill of House File 388) which you and others are proposing be enacted by the 62nd General Assembly, would add to §28E.10, a proviso that "no agreement under this chapter (28E) shall provide for generation, transmission or distribution of electricity" and, to that extent, will if enacted, limit the applicability of Chapter 28E and prohibit the joint exercise of power to provide for generation, transmission or distribution of electricity and agreements with respect thereto. However, this bill, if enacted, will not, in my opinion, effect or render void any agreements entered prior to its effective date or destroy any vested interests created under Chapter 28E. See Article I, §21, Constitution of the State of Iowa.

March 16, 1967

SHERIFF INADEQUATE QUARTERS: Allowance in lieu thereof §§340.7(11), 332.3(2) 1966 Code of Iowa. Board of Supervisors may determine whether quarters offered Sheriff are adequate and if not, may pay quarters allowance in lieu thereof. (Hendrickson to Hayden, Warren County Attorney, 3/17/67.)

Mr. Maynard Hayden, Warren County Attorney: This will acknowledge receipt of yours of the 8th of March, 1967, in which you requested an opinion as to whether Warren County may pay the Sheriff a housing allowance if the Sheriff's quarters in the Warren County Courthouse are inadequate for his family.

In reply to your request, please be advised that Chapter 340.7(11), Code of Iowa 1966, provides:

"In counties where the Sheriff is not furnished a residence by the county, an additional sum of seven hundred and fifty dollars per annum (shall be paid) in addition to the foregoing schedule."

In our opinion the foregoing statute makes it mandatory upon the Board of Supervisors to provide either 1) a residence for the Sheriff or 2) a sum of seven hundred and fifty dollars in lieu thereof.

Chapter 332.3(2) Code of Iowa 1966, provides that the County Board of Supervisors are authorized:

"To make such rules not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order."

The County Board of Supervisors has wide discretion in the exercise of the powers conferred upon it. See *Sorenson v. Andrews 221 Iowa 44. 264 N. W. 562 (1936), Op. Atty. Gen. 1940, p. 34.*

Although the county is under no obligation to furnish a "palatial" residence for the Sheriff, it is at least implied that the residence so provided by the county must be adequate. See *Jones v. County of Woodbury 199 Iowa 773, 202 N. W. 884 (1925).*

Since the County Board of Supervisors is the governing body of the county it is our opinion that a decision of the County Board of Supervisors as to the adequacy of the quarters of the Sheriff would be binding unless the County Board of Supervisors have clearly abused their discretion.

March 27, 1967

TAXATION: Property Tax Exemption — §§427.1, 427.2, and 427.13(1), Code of Iowa, 1966. A toll bridge built by a corporation across the Des Moines river which is the boundary between Missouri and Iowa is not exempt from property taxation as to that portion of the bridge which is within the State of Iowa.

Mr. Michael M. Phelan, Lee County Deputy Attorney: This is to acknowledge receipt of your letter of March 17, 1967, in which you posed the following situation:

"A group of businessmen from Wayland, Missouri got together and formed The Wayland Special Road District for the purpose of building a bridge across the Des Moines River at a spot a few miles south of Donnellson, Iowa. We are not certain as to whether or not the Wayland Special Road District is a political subdivision or some sort of a non-profit corporation, but be that as it may, it was formed for the express purpose of building this bridge. This bridge spans the Des Moines River which is the boundary between Missouri and Iowa. Bonds were sold by this corporation to finance this bridge and the corporation now has a ten cent toll for cars and a toll for trucks which pass across this bridge in order to raise sufficient funds to pay off these bonds.

"The County Assessor of Lee County assessed half of the bridge in Iowa at $16,000.00 and sent a tax bill to the corporation in the amount of $1,300.00. A delegation from the corporation came into talk to the County Assessor and contend that they are political subdivision and should not be taxed."

This office, upon investigation, has determined that the toll bridge in question is not owned by the State of Iowa nor by Lee County and it does not appear that the Wayland Special Road District is a political subdivision of the State of Iowa. It appears that the bridge is owned and controlled by a Missouri corporation which was formed for the purpose of building the bridge. Therefore, in order to determine the taxable status of that portion of the bridge within Lee County and the State of Iowa, we must examine the relevant Iowa statutes and case law.

Section 427.1(1), Code of Iowa, 1966, provides property tax exemptions for:

"427.1(1) Federal and state property. The property of the United States and this state, including state university, university of science and technology, and school lands. The exemption herein provided shall not include any real property subject to taxation under any federal statute applicable thereto, but such exemption shall extend to and include all machinery and equipment owned exclusively by the United States or any corporate agency or instrumentality thereof with regard to the manner of the affixation of such machinery and equipment to the land or building upon or in which such property is located, until such time as the Congress of the United States shall expressly authorize the taxation of such machinery and equipment."

Section 427.1(2), Code of Iowa, 1966, exempts the following kinds of property from taxation:

"427.1(2) Municipal and Military property. The property of a county, township, city, town, school district or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit."

Section 427.1(5), Code of Iowa, 1966, authorizes property tax exemptions for:

"427.1(5) Public securities. Bonds or certificates issued by any municipality, school district, drainage or levee district, river-front improvement commission or county within the state of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above."

Nowhere in Section 427.1 which lists the various classes of real and personal property exempt from property taxation, including the subsections quoted above, is there any mention of an exemption for a special road district formed by a group of businessmen for the express purpose of building a bridge regardless of whether this road district is declared to be a so-called separate and distinct political subdivision or a non-profit corporation.

Section 427.2, Code of Iowa, 1966, exempts the following types of property from taxation:

"427.2 Roads and drainage rights of way. Real estate occupied as a public road, and rights of way for established public levees and rights of way for established, open, public drainage improvements shall not be taxed."

Section 427.2, however, should be read in conjunction with Section 427.13 which provides in relevant part:

"427.13 What taxable. All other property, real or personal, is subject to taxation in the manner prescribed, and this section is also intended to embrace:

"1. Ferry franchises and *toll bridges*, which, for the purpose of this chapter are considered real property. . . ." (Emphasis supplied)

Finally, the case law concerning the construction of tax exemption statutes and the taxation of bridges should be considered. Tax exemption statutes must be strictly construed against the exemption and in favor of taxation. Tax exemption is based upon the theory that such exemption will benefit the public generally, and not upon any idea of lessening the burden of individual owners of property. *Boss vs. Polk County*, 236 Iowa 384, 19 N.W. 2d 225 (1945). Those who claim a tax exemption under a statute must clearly show that the property is exempt within the terms of the statute and any doubt will be resolved in favor of taxation. *Readlyn Hospital vs. Hoth*, 223 Iowa 341, 272 N.W. 90 (1937).

The case of *In Re Appeal of Dubuque Bridge Comm.*, 232 Iowa 112, 5 N.W. 2d 334 (1942) Cert. Denied 317 U. S. 686, 87 L. Ed. 549, 63 S. Ct. 259 (1942) would appear to be significant. In this case, the Local Board of Review denied a property tax exemption for the old Mississippi river bridge which spanned the river between Dubuque, Iowa, and East Dubuque, Illinois. Under a federal statute, the city of Dubuque Bridge Commission took over the bridge and charged tolls for the purpose of paying for the construction of a new bridge. The Court rejected the argument that Section 6945, Code of Iowa, 1939, and Section 6953 of the 1939 Code, which have become Sections 427.2 and 427.13(1) respectively, provided an exemption on the ground that the bridge was "real estate occupied as a public road:"

". . . We hold that the mere fact that the bridge, as any toll bridge, is to be used as a highway, does not entitle it to an exemption for that reason.

"Our conclusion must be that since the commission operates only under the authority granted by the act creating it, we must look to that act or to our Iowa statutes for any right to exemption from state or local taxation. Taxation is the rule, exemption the exception. We hold that the state law does not grant immunity . . ." 232 Iowa at 133.

It is the opinion of this office that a toll bridge which was built by a corporation to span the Des Moines river which is the boundary between Missouri and Iowa is not exempt from property taxation as to that portion of the bridge which is within the boundary of the State of Iowa.

March 27, 1967

GENERAL ASSEMBLY—Labor Commissioner. Chapter 91, 91.12, 91.13, 91.16, Chapter 88A. A member of the General Assembly is entitled to information acquired by the Labor Commissioner when same is to be used in the official business of the legislature.

Honorable Warren J. Kruck, State Senator: This will acknowledge your written request for an opinion from this office concerning the refusal of the Labor Commissioner to furnish you certain information identified by you as "Notice of Violations" and "Safety Inspection Reports." It is the opinion of the Labor Commissioner that he is prohibited from granting your request by the terms of §§91.13 and 91.16(3), Code of Iowa, 1966.

You have stated that your request for said information is to assist you in performing your official duties as a member of the General Assembly and it is not your intention to use this information in an unlawful manner.

Chapter 91, Code of Iowa, 1966, defines the duties of the Labor Commissioner as head of the Bureau of Labor.

"Sec. 91.12 Reports to bureau. It shall be the duty of every owner, operator, or manager of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment where labor is employed, as herein provided, to make to the bureau, upon blanks furnished by the commissioner, such *reports* and returns as he may require for *the purpose of compiling such labor statistics as are contemplated in this chapter;* and the owner, operator, or business manager shall make such reports or returns within sixty days from the receipt of blanks furnished by the commissioner, and shall certify under oath to the correctness of the same. (Emphasis Ours)

"Sec. 91.13 Persons furnishing information. Any use of the names of individuals, firms, or corporations furnishing the commissioner *information* required by this chapter *for his biennial report,* in such manner as to disclose any of their private or personal affairs, is hereby prohibited. (Emphasis Ours)

* * *

"Sec. 91.16 Violations — penalties. Persons violating any of the *provisions of this chapter* shall be punished as in this section provided, respectively: (Emphasis Ours)

* * *

"3. Any officer or employee of the bureau of labor, or any person making *unlawful use* of names or information obtained by virtue of his office, shall be fined not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year." (Emphasis Ours)

Reference to §91.4(1), (2), (3) and (4) outlines the information to be gathered by the Labor Commissioner for the purpose of making a "biennial report" to the governor. We must assume that this statistical information does not include the "Safety Inspection Reports" requested by you.

§91.11 refers to "written notice" to the county attorney of alleged violations of certain provisions of the law and we assume this is not the information referred to in your request for "Notice of Violations."

Under the provisions of §91.12, certain employers are charged with the duty of filing reports with the Commissioner which must contain information to be used by him "for the purpose of compiling such labor statistics" as are defined in §91.4. In a written opinion from this office, Op. Atty. Gen. 1938, p. 431, it was held that reports under §91.12 are privileged and the Commissioner need not divulge the information therein to the "public." Assuming the information requested by you was acquired by virtue of this section of the law, this privilege would not justify refusing you said information since you are not a member of the public when acting in your official capacity as a member of the current General Assembly.

§91.13 prohibits use of the names of any individual, firm or corporation in such manner as to disclose their private or personal affairs after they have furnished the Commissioner information required by Chapter 91 for his use in compiling his "biennial report." This section does not prohibit the Commissioner from furnishing you with the requested information since said information is not part of the statistical information contained in the "biennial report." Furthermore, you are already in possession of the names of the firms inquired about and your inquiry gives no evidence of your being concerned with the "private and personal affairs" of the named firms.

The penalty provided for violation of the provisions of Chapter 91, can be invoked against the Commissioner only if his use of the names or information obtained by him in his official capacity are used "unlawfully." It is to be noted that §91.2 requires that the Senate approve the appointment of a Labor Commissioner, which necessarily implies that you, as a member of that body, must acquire such information as you deem necessary to assist you in making an official determination under said statute. As earlier stated, furnishing you with the information requested by you, cannot be considered "unlawful use" of same by the Commissioner.

You are also referred to the provisions of Chapter 88A., Code of Iowa, 1966, which was enacted by the 61 G.A., chpt. 107, titled Employment Safety Act. In accord with the provisions of §91.5(4), the Labor Commissioner was given additional duties under §§88A.14 and 88A.15 and reference to those sections indicates that certain "reports" are received by the Commissioner and he is also charged with the duty of filing "written notice" of violations of said law. A review of Chapter 88A., fails to, disclose any prohibition against furnishing information gathered by him while performing his duties thereunder.

It is the opinion of this office that you are entitled to the information requested by you for use by you while acting in your official capacity as a member of the current General Assembly.

March 30, 1967

TAXATION: Tax Exemption, Urban Renewal Property. Property obtained by city pursuant to Chapter 403, Code of Iowa, is property devoted to public use and under Chapter 427.1, Code of Iowa, is exempt from taxation.

Mr. Robert B. Dickey, Lee County Attorney: This will acknowledge receipt of a letter dated March 27, 1967, in which Mr. George L. Norman, City Attorney, Keokuk, Iowa, states that you have asked him to request of this office an opinion to the following:

"The City of Keokuk is currently completing an Urban Renewal Project. All of the property has been purchased and sold to the developer. Under our contract with the developer we were to prorate taxes for any year to the date of delivery of the deed. The deed was delivered to the developer on May 12, 1966, therefore, under our agreement, the City of Keokuk would be liable for the 1966 taxes due and payable in 1967 for the period from January 1 to May 12th and the developer would be responsible for the period thereafter."

Your question is whether the three taxing bodies, to-wit: the City of Keokuk, Keokuk Community School District and the Lee County Board of Supervisors can exempt the city's portion of the taxes from the period of January 1, 1966 to May 12, 1966.

Please be advised that Chapter 427.1, 1966 Code of Iowa, states in part:

"§427.1 Exemptions. The following classes of property shall not be taxed:

1. . . . .

2. Municipal and military property. The property of a county, township, city, town, school district or military company of the State of Iowa, when devoted to public use and not held for pecuniary profit."

Thus, if the property is owned by the municipality and is devoted to a public use, the property will be exempt from taxation. Therefore, it is necessary to determine whether this property obtained by the city for urban renewal purposes pursuant to Chapter 403, Code of Iowa, 1966, is property devoted to a public use.

The legislature has decreed that powers conferred by Chapter 403, Urban Renewal Law, are for a public purpose for it is stated in §403.2(3) as follows:

"3. It is further found and declared that the powers conferred by this chapter are for public uses and purposes for which public money may be expended and for which the power of eminent domain and police power exercised; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination."

In addition, §403.11(2) of the Code of Iowa, 1966, provides as follows:

"2. The property of a municipality, acquired or held for the purposes of this chapter, is declared to be public property used for essential public and governmental purposes, and such property shall be exempt from all taxes of the municipality, the county, the state, or any political subdivision thereof: Provided, that such tax exemption shall terminate when the municipality sells, leases or otherwise disposes of such property in an urban renewal area to a purchaser or lessee which is not a public body entitled to tax exemption with respect to such property."

Therefore, it is our opinion that while the title to property in an urban renewal project, which has been authorized by virtue of Chapter 403, Code of Iowa, 1966, is in the name of the municipality, such property is exempt from taxation.

In view of the mandatory language of §403.11(2) requiring that once the property is disposed of by the municipality the tax exemption shall no longer exist, it is our opinion that the taxing bodies have no choice other than to tax the property for such portion of a year as the property is held by one not entitled to tax exemption and, therefore, tax will be assessed for the year 1966 beginning on May 12th of that year, the date the property was disposed by the municipality.

April 3, 1967

ALCOHOLIC BEVERAGES: Sale of Cooking Wines: §123.27 of the 1966 Code of Iowa. Cooking wines are food products, the legitimate sales of which are exempt from the application of the provisions of Chapter 123.

Hon. Howard C. Reppert, Jr., State Senator: By your letter of March 13, 1967, you have requested our opinion with respect to the legality of sales of cooking wines by retail grocery stores.

The pertinent statutory provision is contained in §123.27 of the 1966 Code of Iowa which reads in relevant part as follows:

"3. Nothing in this chapter shall prohibit the legitimate sale of patent and proprietary medicines, tinctures, food products, extracts, toilet articles and perfumes, and other like commodities, none of which are generally classified or used as a beverage but which require as one of their ingredients alcoholic or vinous liquors, through the ordinary retail or wholesale channels."

In our opinion cooking wines of the types commonly found and sold at retail in grocery stores, such as, for example, cooking sherry are "food products," the legitimate sales of which are exempt from the application of the provisions of Chapter 123. Such cooking wines are not "generally classified or used as a beverage." Moreover they are generally used for culinary rather than beverage purposes. Cooking wines, in common use in the haute cuisine, might more aptly be characterized as a savoring agent than as a wine. Indeed, such cooking wines are, by means of the addition of salts and other seasoning, usually rendered unpotable as a beverage except to one possessed of a most undiscriminatory palate. The fact that a few determined barbarians may occasionally purchase cooking wine, remove the seasoning by one means or another, and then drink the same, does not, in our view, alter the fundamental character of such cooking wines as food products, sales of which are not governed by Chapter 123.

Chapter 123 having no application the fact that cooking wines might be sold on Sunday and to minors is irrelevant as a legal matter.

Of course, on the specific facts of an actual given case, an issue might be raised as to whether sales of cooking wines were in fact "legitimate" as that expression is used in the portion of §123.27 hereinbefore set forth. Thus, sales of cooking wines to minors when it was known that such wines would probably be converted to and used for beverage purposes might raise a serious issue as to whether or not the sales were legitimate.

April 4, 1967

SCHOOLS: County board of education is not authorized by §294.16 to purchase individual annuity contracts for its employees.

Mr. Robert H. Story, Jones County Attorney: This is to acknowledge receipt of your request for an opinion which you state as follows:

"The County Board of Education pays salaries to eight (8) Special Education Teachers in the Jones County area who teach retarded and gifted children in the area. Iowa Code, Section 294.16 authorized a school district to purchase an individual Annuity Contract for an employee at the request of an employee from an insurance organization and to make payroll deductions in accordance with such arrangements for the purpose of paying the entire premium due and to become due under the contract, so that the said deductions will qualify for the benefit afforded under Section 403B of the Federal Internal Revenue Code and Amendments thereto.

"It is our assumption that the County Board of Education would be authorized to do this in the same way that a school district as set forth in Section 294.16, is authorized. Chapter 294 refers to teachers and it would seem that if the Special Education Teachers could not enjoy the benefits of 294.16, there would be some discrimination against these teachers and in favor of other teachers paid by school districts. Therefore, the County Superintendent has asked for a formal opinion from the Attorney General to be sure that the County Board of Education or Jones County would be authorized to make the payroll deductions as set forth in Section 294.16 in the same manner that a school district is authorized to do so."

§281.4 authorizes the county board of education or the board of directors of a school district in counties providing for children requiring special education to employ qualified teachers, certified by the authority provided by law as teachers for children requiring such special education.

While §273.12 subparagraph 4 provides that the county board may carry out the duties and responsibilities not in conflict with the local boards, we find no provision to authorize the county boards to act as a "school district" for the purposes of §294.16, which permits school districts to purchase individual annuity contracts for its employees. The doctrine of expressio unis exclusio alterius applies, consequently our interpretation of §294.16 is that the county board of education may not purchase individual annuity contracts for an employee as a school district is permitted to do.

April 4, 1967

MOTOR VEHICLE REGISTRATION FEES: Refund of Monies Collected as Such Fees in Excess of What the Statute Requires. Iowa Constitution, 18th Amendment, and Section 25.2, 1966 Code of Iowa. Where State Appeal Board approves claims for refund of monies illegally exacted as motor vehicle registration fees, Section 25.2 of the Code provides for payment of such claims from the Road Use Tax Fund, the "fund of original certification of the claim." Nothing in the 18th Amendment to the Iowa Constitution prohibits paying such claims from that fund.

Mr. Marvin R. Selden, Jr., Chairman, State Appeal Board, State Comptroller: You will recall that on December 28, 1966, the State Appeal Board approved as valid eleven (11) claims filed by various trucking firms for refunds of monies exacted as motor vehicle registration fees. Since then there has been considerable discussion as to whether the claims can be paid and, if so, from what source. Mr. Don R. Bennett, Special Assistant Attorney General, Claims, has conferred with me relative to this matter and he has stated the Appeal Board is reluctant to pay the claims approved unless there is clear legal authority to do so. Mr. Bennett has requested the main office to issue a staff opinion setting forth the Attorney General's position on the legal issues involved.

In *Consolidated Freightways* v. *Nichols*, ... Iowa ....., 137 N.W. 2d 900, the Supreme Court ruled that for the years in issue the Reciprocity Board had collected more monies for registration of interstate carrier fleets than the relevant statute permitted. In approving the claims in issue, the Appeal Board found that the carriers involved were factually in the same position as the plaintiff in *Consolidated Freightways* who recovered a judgment for overpayment of $27,028.68. Predicated on this finding, and in keeping with the *Consolidated Freightways* case, it must be conceded that the State has in its possession monies to which it was not legally entitled.

For the State to be in such a posture is not a novel situation and both the Supreme Court and the General Assembly have, from time to time, recognized that the State should refund monies exacted without authority of law — see e.g., *In Re Estate of Van Vechten*, 218 Iowa 229, 251 N.W. 729; *Scottish U & N Ins. Co.* v. *Herriott*, 109 Iowa 606, 80 N.W. 665; *Morrison-Knudsen* v. *Tax Comm.*, 242 Iowa 33, 44 N.W. 2d 449; See also Sections 324.71 and 422.66 of the 1966 Code of Iowa. The Supreme Court in *Estate of Van Vechten* stated the policy thusly (218 Iowa at p. 236):

"The State of Iowa does not want to keep, in its Treasury, funds unlawfully obtained from a taxpayer. We cannot conceive that the State would try to work a hardship upon the taxpayer by making it unduly difficult for him to recover from the State Treasurer his money unlawfully held in the State Treasury."

Morrison-Knudsen, supra, also involved a case where a State agency misconstrued a revenue statute and exacted more money than the statute allowed. Though the law provided an administrative procedure to obtain a refund in such cases, the Iowa Court held that a mandamus action would lie to compel a refund. The force and effect of this decision and numerous others like it is the recognition by the Iowa Court and by the Legislature that where revenues have been unlawfully exacted the taxpayer is entitled to relief by one form of proceeding or another. This same principle is embodied in Chapter 25 of the Iowa Code. In accordance with Section 25.2 of that Chapter the General Assembly has authorized the Appeal Board to approve a refund of monies paid for "registration permits" or as "fees collected by the State." And it is axiomatic that the Appeal Board can and should approve, as valid, claims involving monies that have been exacted in excess of what the law allows. Moreover, once a claim has been approved Section 25.2 clearly contemplates that it *shall* be paid.

But it is said that the claims in issue cannot be paid because there is no fund for that purpose. Some have suggested that the problem of payment can only be resolved by resort to the Legislature for a special appropriation. We cannot agree with these observations because Section 25.2 of the Code specifies the source to pay such claims. The statute, as here material, directs that claims approved by the Appeal Board "shall be paid from the . . . fund of original certification of the claim. . . ." In this respect, monies collected from interstate carriers as motor vehicle registration fees are, by virtue of Section 321.145 of the Code, credited by the Treasurer to the following funds:

1. Road Use Tax Fund 96%
2. General Fund 3%
3. Reimbursement Fund 1%

Though at the outset there appears to be three funds of original certification within the meaning of Section 25.2, in practical application the Road Use Tax Fund presents the only fund of original certification where these claims are concerned. This is so because under Section 321.146 any unexpended monies in the 3% and 1% categories are transferred to the Road Use Tax Fund at the end of each fiscal year. It was felt, however, that the claims could not be paid out of the Road Use Tax Fund because of the Eighteenth Amendment which reads as follows:

"All motor vehicle registration fees . . . and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for [highway purposes]."

We think, however, there are at least two sound reasons why the language of this Amendment does not preclude paying claims of this nature from the Road Use Tax Fund.

In the first place, the constitutional injunction, as here material, relates only to the expenditure of a specifically earmarked source of revenue — to wit, "motor vehicle registration fees." That which constitutes such a fee is defined by statute; there are no other such fees. In this respect, Section 321.105 of the Code requires that "an annual registration fee shall be paid for each motor vehicle." Moreover, Section 321.122

establishes the amount of such fee with respect to a "truck tractor or road tractor drawing or designed to draw a semitrailer, or trailer." The fee having been delineated by statute, monies exacted over and above the amount set does not represent *a fee* within the meaning of the Eighteenth Amendment. The Amendment operates only with respect to fees as defined by statute and it is, at best, a misnomer to label monies exacted without statutory authority "fees." The Eighteenth Amendment clearly does not prohibit the refunding of spurious monies that have found their way into the Road Use Tax Fund and which comprise no legitimate portion of that fund. To assume a contrary position flies in the face of the policy announced by our Supreme Court that the State does not want to keep funds unlawfully obtained from a taxpayer or to make it unduly difficult for him to recover his money unlawfully held, *In Re Estate of Van Vechten*, supra.

A somewhat analogous situation was presented in *McKeown* v. *Brown, Treas.*, 167 Iowa 489, 149 N.W. 593. In that case, the State Treasurer had received $7,853.99 as an Escheat and this sum was distributed and delivered in varying sums to the County Auditors of Adair, Ringgold, Howard, and Story Counties. A short time later one entitled to the money filed a petition for the return of the funds and joined the Treasurer as a party to the suit. The Treasurer answered that he was now without possession or control of the money "and [had] no moneys or available funds in his hands to meet or discharge the plaintiff's demands." The trial court held that the State officers must recover for the plaintiff the money held by the several counties and the Supreme Court affirmed the trial court's judgment.

Secondly, satisfying these claims from the Road Use Tax Fund is well within the exception noted in the Eighteenth Amendment, i.e., "cost of administration," compare *Plank* v. *Grimes*, 238 Iowa 594, 28 N.W. 2d 34, with Sections 324.71 and 324.76 of the Code. In the *Grimes* case, the Iowa Court ruled that as a cost of administering the road fund the Treasurer could pay from it rewards to persons who called attention to any evasion of the tax. If monies can be expended from the fund to assure that the fund gets all that is owing it, the converse is also true that as a cost of administering the road revenue monies can be expended to refund that not owing to the fund in the first place.

Nor is there anything novel about the proposition that as a "cost of administration" the Eighteenth Amendment allows a refund of monies illegally collected. Indeed, the General Assembly has specifically so directed where revenue has been illegally exacted as "excise taxes on motor vehicle fuel," a source of money which the Amendment also specifically earmarks for highway purposes. In this respect, Chapter 324 of the Code provides for the collection of excise taxes on motor vehicle fuel and Section 324.71 of that Chapter reads, in part, as follows:

"In the event that any fuel taxes . . . have been erroneously or illegally collected from a licensee, the Treasurer may permit the licensee to take credit . . . or, shall certify the amount thereof to the comptroller of this State, who shall thereupon draw his warrant for the certified amount on the Treasurer of State payable to the licensee. The refund shall be paid to the licensee forthwith."

Section 324.76 specifies the source from which such refunds are to be paid:

"There is hereby appropriated out of the money received under the provisions of this Chapter sufficient funds to pay the help of Treasurer's office in *administrating* and enforcing this Chapter, . . . *such refunds* as are provided for in this Chapter, and the cost of postage, equipment, supplies and printing used by the Treasurer in *administrating* this Chapter." (Emphasis added).

Since "all . . . excise taxes on motor vehicle fuel" are to be used exclusively for highway purposes except "cost of administration," these provisions relative to the refund of monies exacted as fuel taxes present a clear expression on behalf of the Legislature that the refund of fuel taxes illegally collected is permissible under the Eighteenth Amendment as a "cost of administration." A Priori, the same is true as to monies unlawfully exacted as motor vehicle registration fees.

In conclusion, we call your attention to the fact that in the argument to the Court in *Consolidated Freightways* the appellant also took the position that a refund could not be had. The Court responded thusly (137 N.W. 2d at 909):

"Appellants do not dispute the correctness of these amounts and, although the right to order refunds from the board is questioned, *we find no merit therein* (emphasis added)."

Based on all of these observations we are of the opinion that the Appeal Board has the authority and should pay the claims out of the Road Use Tax Fund and resort to the Legislature is not necessary.

April 5, 1967

TAXATION: Property Tax Exemption — §427.1(2), Code of Iowa, 1966. An aircraft hangar which is owned by a municipality and leased to a private concern and which is devoted to public use and not held by the municipality for pecuniary profit is exempt from property taxation.

Mr. Joe L. Boddicker, Crawford County Attorney: This is to acknowledge receipt of your letter of March 10, 1967, in which you posed the following situation:

"Several years ago the City of Denison, Iowa acquired, by condemnation, land outside of the city limits for the use as a municipal airport. This land and the existing city hangars had not been assessed for county taxation purposes since the acquisition thereof by the City. On March 29, 1965, the City entered into a 'lease' with Iowa Beef Packers, Inc., a profit making corporation. (A copy of the lease is enclosed herewith.) The construction of the hangar referred to in said lease was completed as of January 1, 1966, and the County Assessor assessed said building to Iowa Beef in 1966. Thereafter, the assessor received a letter from Iowa Beef requesting that the assessment be made against the city instead of against the packing company. (See copy of letter attached.)

"My specific question therefore is, whether this particular hangar should be assessed to Iowa Beef Packers, Inc., or to the City of Denison?

"Recently, the packing company moved its headquarters out of Denison and apparently no longer needs the hangar for its purposes. If the city and the packing company would enter into an agreement modifying the existing lease whereby the hangar would be either removed from the premises or the city would sublet the hangar from the packing company, (see copy of newspaper article enclosed), would this effect the assessment of the hangar and if so, to what extent?"

Sections 427.1(2) and 427.1(21), Code of Iowa, 1966, provide as follows:

"427.1 Exemptions. The following classes of property shall not be taxed:

* * *

"2. Municipal and Military Property. The property of a county, township, city, town, school district, or military company of the state of Iowa, when devoted to public use and not held for pecuniary profit.

* * *

"21. Public Airports. Any lands, the use of which (without charge by or compensation to the holder of the legal title thereto) has been granted to and accepted by the state or any political subdivision thereof for airport or aircraft landing area purposes."

Section 427.1(21) is inapplicable in regard to your first question since the land upon which the airport is located is owned by the City of Denison rather than by the private person. The hangar is also owned by the City of Denison pursuant to paragraph six of the lease which provides:

"It is understood and agreed between the parties hereto that title to the buildings leased and improvements shall remain exclusively in the City of Denison, Iowa, and upon the expiration of this lease and any options exercised, all improvements shall remain on said premises."

Therefore, we must determine whether the aircraft hangar has a tax exemption status under Section 427.1(2).

Tax exemption statutes must be strictly construed and all doubts must be resolved against the exemption and in favor of taxation. *Clarion Ready Mixed Concrete Co. vs. Iowa State Tax Commission*, 252 Iowa 500, 107 N.W. 2d 553 (1961). However, this does not mean that the clear, plain, and unambiguous language of a statute can be subjected to a strained construction. *Holzhauser vs. Iowa State Tax Commission*, 245 Iowa 525, 62 N.W. 2d 229 (1954).

In the instant situation, it would appear that the property tax should not be assessed against the lessee, Iowa Beef Packers, Inc. In general, property which is leased for a term of years is taxable to the owner, and not to the lessee. 84 C.J.S. Taxation, §95 (1954). In the instant situation, the lease agreement is for a period of twenty years with options to extend said lease for an additional period of forty-five years. In *Crews vs. Collins*, 252 Iowa 863, 109 N.W. 2d 235 (1961), which involved the lease of a hospital by the City of Knoxville to private lessees for a period of forty-five years, the Iowa Supreme Court held that the leasehold interests of the lessees could not be separately subjected to property taxation. Thus, the question now becomes whether the City of Denison is liable for taxes upon the property.

Where the exemption under a statute is given to publicly owned property devoted to a public use and not held for pecuniary profit, the question must resolve itself upon the use to which the property is put. *Brown vs. City of Sioux City*, 242 Iowa 1196, 49 N.W. 2d 853 (1951) In the instant situation, the lease agreement provides for an annual rental of one dollar. This rental is of such a small amount as to indicate that the City of Denison did not intend to lease the premises for a pecuniary profit. Further more, this hangar should be considered as devoted to a public purpose as shown by the following excerpts from the statement of purposes and objects of the lease agreement:

"WHEREAS, the City of Denison, Iowa, in particularly interested in increasing the traffic at the Airport of the City of Denison, Iowa, and in this connection is desirous of a full use by the Lessee, Iowa Beef Packers, Inc., and is particularly desirous of their being able to maintain, service and hangar all of the planes owned or leased by Iowa Beef Packers, Inc., which situation does not exist at the present time due to the fact that there is not sufficient hangar space for said planes, and

"WHEREAS, the Lessee, Iowa Beef Packers, Inc. also is desirous of bein gable to maintain, care for and hangar all of the planes owned or leased by the said corporation at the Airport at Denison, Iowa, the City of Denison, Iowa, being the city where the Lessee has its home office, and

"WHEREAS, the City of Denison, Iowa, does not have sufficient funds with which to construct the necessary hangar facilities needed by Iowa Beef Packers, Inc., and does not wish to incur indebtedness to the City of Denison, Iowa, for construction of said hangar facilities, and "

Therefore, it is reasonable to conclude that the lease agreement is incidental to and consistent with a public use since it allowed the city to increase aircraft traffic without the need of incurring an indebtedness which could be detrimental to its citizens.

More over, the instant situation is distinguishable from that found in 1934 O.A.G. 749 where it was concluded that a long term lease of school district lands to a private commercial establishment was held not to be devoted to a public use nor incidental to school purposes. A careful reading of the lease agreement between the City of Denison and the leasee shows that upon termination of the lease, the city, being the owner of the hangar and improvement on the airport premises made by the lessee, can utilize these facilities for the benefit of the general public, rather than for only certain private individuals.

Thus, in answer to your first question, the hangar should be considered exempt from property taxation under Section 427.1(2) for the year 1966, **and the County Auditor should correct the error in assessment pursuant to Section 443.6, Code of Iowa, 1966.**

The answer to your second question is that since the hangar was not taxable for the year 1966, no modification of the lease agreement in 1967 could affect the hangar's tax exempt status for 1966. It may be noted, by way of conjecture, that if the City of Denison and the lessee, Iowa Beef Packers, Inc. were to modify the lease agreement in 1967 whereby the lessee would receive title to the hangar from the city, the hangar would not be exempt from property taxes for the year 1967, collectible in 1968. However, as long as title to the Hangar remains in the City of

Denison and the hangar is used for a public purpose and not held for pecuniary profit, the hangar will be tax exempt.

It is the opinion of this office that an aircraft hangar which is owned by a municipality and leased to a private concern and which is devoted to a public use and not held by the municipality for pecuniary profit is exempt from property taxation.

April 6, 1967

MOTOR VEHICLES — speed limit — truck tractor operation in excess of 50 miles per hour constitutes violation of §321.286. Turner to Robert Burdette, Decatur County Attorney.

Mr. Robert W. Burdette, Decatur County Attornay: Your letter of March 28, 1967, has been received asking a question as follows:

"A semi-trailer truck, of course, would be considered a truck under the speed regulations as set out in Section 321.285 of the 1966 Code of Iowa. However, this question is then raised: Supposing a truck tractor is being driven on the public highway with no semi-trailer behind it, is this unit then considered a truck under the above quoted Section or is it considered a passenger vehicle as far as the speed regulations are concerned?"

§321.286, 1966 Code of Iowa, provides as follows:

"It shall be unlawful for the driver of a freight-carrying vehicle, with a gross weight of over five thousand pounds, to drive the same at a speed exceeding the following:

"1. Fifty miles per hour for any freight-carrying vehicle which is equipped with pneumatic tires. . . ."

A truck tractor is defined in §321.1(6) as follows:

" 'Truck tractor' means every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn."

Most of these truck tractors with single axles have a gross weight of between 8,000 and 12,000 pounds, and with a double axle have a gross weight of over 10,000 pounds. They are to be classed as trucks, although used primarily for drawing other vehicles, which in turn are loaded with freight. They come within the definition of a freight carrying vehicle, as described in the above-mentioned §321.286, although the freight is carried in and on the attached trailer.

The removal of the trailer does not require reclassification of its primary design which is for carrying freight.

Accordingly, I am of the opinion that if the truck tractor is primarily designed to draw a trailer with freight, and has a weight of over 5,000 pounds, it must be limited to a speed of fifty miles per hour, whether carrying freight or not.

April 10, 1967

WAREHOUSEMEN; BONDS — §§ 543.1(8), 543.12, 543.16, 543.17 and 543.18. The bond which a warehouseman is required to file with the Commerce Commission in order to obtain a license secures only the performance of his duties as a warehouseman i.e., duties related to the storage of agricultural products for compensation. Grain deposited with a warehouseman under a contract for a purpose other than storage for compensation would not be covered by such bond.

Mr. Karl Nolin, State Representative: You have requested our opinion with respect to the following question:

"Does Section 543.12 provide bond coverage on grain held under a contract between the depositor and the warehouseman but not covered by warehouse receipt?"

§543.12 of the Code of Iowa, 1966, provides in relevant part:

"543.12 Bond required. Any person applying for a license or licenses to conduct a warehouse or warehouses in accordance with this chapter shall, as a condition to the granting thereof, execute and file with the commission a good and sufficient bond, other than personal security, to secure the faithful performance of his obligations *as a warehouseman* under the terms of this chapter and the rules and regulations prescribed hereunder, and of such additional obligations *as a warehouseman* which may be assumed by him under contracts with depositors of agricultural products in such warehouse. * * *" (Emphasis supplied)

§543.1(8) defines the word "warehouseman" in the following terms:

" 'Warehouseman' shall mean a person who uses or undertakes to use a warehouse for the *storage* of agricultural products *for compensation.*" (Emphasis supplied)

It seems evident from the foregoing that the furnishing of a good and sufficient bond is a prerequisite to the issuance of a warehouse license by the Commerce Commission. It is equally clear from the italicized portions of the quoted statutory provisions that except to the extent that he may have assumed additional obligations by separate contract with a person depositing goods with him, that a bond furnished by a warehouseman secures only the performance of the obligations of such warehouseman *qua* warehouseman, that is to say, the storage of agricultural products for compensation. Thus one who deposited grain with a licensed warehouseman for gratuitous storage or for some purpose other than storage would have no right to recover under the bond. In this connection, it should be noted that even if the warehouseman assumed additional obligations by contract the bond would secure the performance only of those obligations which related to his duties *"as a warehouseman."*

The question you have presented postulates a situation in which grain which is deposited with a warehouseman is not covered by a warehouse receipt. §543.16 provides, with exceptions not material to this discussion that, "It shall be unlawful for any person other than a licensed warehouseman to place in storage or to accept for storage any bulk grain, and it shall be unlawful for any person to place bulk grain in storage in a warehouse other than a licensed warehouse." And §543.18 requires that warehouse receipts be issued for all agricultural products which become storage in a licensed warehouse.

Thus if your question contemplates the storage of *bulk* grain it posits a legally impossible fact situation since such grain would have to be stored with a licensed warehouseman and the latter would be obliged to issue a warehouse receipt.

If, however, the state of facts which you have under consideration involves deposits of bulk grain for purposes other than storage a situation could exist wherein a warehouse receipt would not be issued. §543.17 permits any warehouseman, whether or not licensed, to accept and retain for a period of ten days without issuing a warehouse receipt therefor grain for purposes other than storage such as sale to the warehouseman, processing and cleaning or shipping for the account of the depositor. Since a bond given pursuant to §543.12 is security only for the faithful performance of a warehouseman's obligations as a warehouseman, i.e., storage of agricultural products for compensation, it would not cover grain held under contract in a licensed warehouse for a purpose other than storage for compensation. In the case of bulk grain being deposited with an unlicensed warehouseman there would be no bond coverage for plainly there would be no bond since §543.12 requires a bond only of licensed warehousemen and as a prerequisite to the issuance of a license.

April 12, 1967

TAXATION: Property Tax Exemption — §427.1(18) Real estate owned by the State of Iowa and sold by the Board of Control at a public auction in December of 1965 subject to title being granted to the purchasers in 1966 are not liable for 1966 property taxes collectible in 1967.

Mr. James L. McDonald, Cherokee County Attorney: This is to acknowledge receipt of your letter of March 7, 1967, in which you posed the following situation:

"On December 8, 1965, the Board of Control held a public auction and sold the bulk of its lands in Cherokee County that had been operated as a part of the Mental Health Institute. The deed was delivered in August of 1966. The settlement was delayed until a survey was made to obtain the description of the property to be transferred. The purchasers knew what they were buying on the date of the auction from a physical standpoint, but were not certain of the exact acreage and description until the survey was made. Possession was given immediately and the purchasers farmed the land for the year 1966, receiving all of the crops raised on the lands in question."

You indicated that the issue is whether these lands were subject to property taxation for 1966. The relevant statute would appear to be Section 427.1(18) which provides:

"427.1 Exemptions. The following classes of property shall not be taxed:

* * *

"18. Government lands. Government lands entered and located, or lands purchased from this state, for the year in which the entry, location, or purchase is made."

A grant of a tax exemption is based upon the theory that the exemption will benefit the general public and not upon the idea of lessening the burdens of the individual property owner. *Boss vs. Polk County*, 236 Iowa 384, 19 N.W. 2d 225 (1945). A tax exemption statute must be strictly construed, but clear, plain, and unambiguous language of a statute cannot be made to say what it unquestionably does not say. *Holzhauser vs. Iowa State Tax Commission*, 245 Iowa 525, 62 N.W. 2d 229 (1954).

Prior to adoption of Section 427.1(18), it was held that property which was acquired from the State after the time for assessment had expired was not liable to taxation until the following year. *Des Moines Nav. & R. Co. vs. Polk County*, 10 Iowa 1 (1859); *Tallman vs. Butler County*, 12 Iowa 531 (1861). Furthermore, it has been held that the date when the instrument issued by the State *passes title* to the individual land owner constitutes the end of the period of exemption. *Fisher vs. Wisner*, 34 Iowa 447 (1872). However, it has also been held that an equitable owner of land which was once owned by the government is liable for taxes thereon. *Davis vs. Magoun*, 109 Iowa 308, 80 N.W. 423 (1899).

Section 427.1(18) was construed by a prior Attorney General's Opinion which concluded that land purchased from the State of Iowa in January of 1938 would be exempt from property taxation for that year irrespective of the exact day on which the property was purchased. 1940 O.A.G. 506. An unpublished Attorney General's Opinion dated March 26, 1959, states that the taxable status of real property is determined on the date of the levy. However, this opinion does not consider the impact of Section 427.1(18) and is, therefore, not controlling in regard to lands purchased from the State of Iowa by nonexempt persons or organizations.

The Board of Control had set forth certain provisions pertaining to the sale of the lands in question:

"8. *FINAL APPROVAL OF BIDS*

"The Board of Control of State Institutions will present the highest bid or bids received for the porperty to the State Executive Council for final approval.

"(a) If the State Executive Council approval is granted, to bids as received, the remaining balance shall be due and payable in cash upon acceptance of an abstract or title showing marketable title in the State of Iowa, prior to the delivery of a land patent executed by the Secretary of the State of Iowa conveying the same. Possession of said real estate to be given on or before March 1, 1966. The State of Iowa is not responsible for buildings and improvements lost by acts beyond their control between the time of signing said purchase contract and the date of possession.

"(b) If the State Executive Council approval is not granted, to bids as received, certified checks will be promptly returned to all persons submitting same."

It was the intention of the Board of Control that the title to said lands would not pass to the purchasers until 1966 and that the sale could be rescinded in 1966 if the Executive Council did not approve of the bids received. Also, it would appear that possession of the lands were to be considered completed in the year of 1966. This office has been informed by an official from the Board of Control that the lands sold at the auction were not to be taxable for the year 1966, but that the taxable status of

the lands was to be determined in 1967 for property taxes collectible in 1968.

It is the opinion of this office that the land sold by the Board of Control at a public auction on December 8, 1965, to nonexempt purchasers are not subject to 1966 property taxes collectible in 1967.

April 19, 1967

WELFARE: Payments to Nursing or Custodial Homes for Services to Recipients under Chapters 241, 241A, 249, and 249A, 1966 Code of Iowa — Provisions in proposed legislation, Senate File 510, 62nd General Assembly of the State of Iowa, would not conflict with provisions in foregoing chapters or Social Security Act of 1935 as amended.

Hon. James T. Klein, State Representative: I have before me your letter dated March 22, 1967 in which you ask the following question to-wit:

"Enclosed is a copy of Senate File 510, and I should like an opinion from your office as to the legality to such a proposal. Is there a conflict with any other section or provisions of the Code of Iowa, or in Federal law?"

Senate File 510 is a bill for an act relating to payments to nursing homes and custodial homes, and the following paragraph would be added to Chapter 241, Aid for the Blind; Chapter 241A, Aid to Disabled Persons; Chapter 249, Old Age Assistance; and Chapter 249A, Medical Assistance for the Aged:

"If the state board is making direct assistance payments to persons providing a recipient with custodial and nursing home service in amounts less than the usual and reasonable charge for such service, the state board shall permit the recipient or someone on his behalf to pay the person rendering the service the difference between the amount of assistance and the reasonable value of such service, without deducting such additional payment from the direct assistance payment to be made by the state board."

From a review of the Federal Act and the State statutes referred to, it is the opinion of the undersigned that there is nothing therein that would conflict if Senate File 510 were passed.

There would be a change in administrative practice and procedure however, if Senate File 510 were passed. Income of the recipient and contributions made by a responsible relative are currently deducted from the payment made by the Department to the vendor, i.e., the nursing home operator. Senate File 510 provides that all income, including that of the recipient and contributions made by responsible relatives, would, in the event the Department funds did not permit payments based on usual and reasonable charges, be applied first against the deficit (the difference between the usual and reasonable charge and the payment made by the Department) and only any balance deducted from the Department's payment.

The words "usual and reasonable charge" for such services would also make a change as to the amounts which the Department has set up as standards for such services, i.e., in all cases where the standards are below the "usual and reasonable charges."

It should also be noted that the Federal law does not provide funds for direct payments to custodial homes (as distinguished from nursing homes) although the State Department includes allowance for custodial home services in the recipient's grant paid to him directly.

April 19, 1967

LEGISLATURE: Annual sessions — Constitution of Iowa, Article III, §2, Amendment No. 1 of 1904, Senate Joint Resolution 4, Acts of the 62nd G. A. Senate Joint Resolution 4, if approved and ratified by the people, will expressly repeal §2, Article III of the Constitution of Iowa and substitute in lieu thereof a new provision providing for annual rather than biennial sessions of the legislature. Such joint resolution will also by implication repeal so much of Amendment No. 1 of 1904 as provided for biennial sessions.

Hon. Maurice Van Norstrand, State Representative: In your letter of April 4, 1967, you state:

"Amendment No. 1 of 1904 to the Constitution of the State of Iowa says, 'The general assembly shall meet in regular session on the second Monday in January, in the year one thousand nine hundred and six, and also on the second Monday in January, in the year one thousand nine hundred and seven, and biennially thereafter.'

"My question is will this language still limit the general assembly to biennial sessions in spite of the passage and ratification of the annual sessions constitutional amendment which amends a different section of the constitution?"

Article III, §2, Constitution of the State of Iowa provides:

"Sec. 2. The sessions of the General Assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the Governor of the State shall, in the meantime, convene the General Assembly by proclamation."

Senate Joint Resolution 4, Acts of the 62nd G. A. was passed for the first time in 1965. See Chapter 472, Acts of 61st G. A. It provides:

"A Joint Resolution proposing an amendment to the Constitution of the State of Iowa relating to the sessions of the General Assembly.

"Be it Resolved by the General Assembly of the State of Iowa:

"Section 1. The following amendment to the Constitution of the State of Iowa is hereby proposed:

"Section two (2) of Article three (III) of the Constitution of the State of Iowa is hereby repealed and the following adopted in lieu thereof:

" 'Section 2. The General Assembly shall meet in session on the second Monday of January of each year. The Governor of the State may convene the General Assembly by proclamation in the interim.' "

The pertinent part of Amendment No. 1 of the 1904 amendments to the Constitution of Iowa, quoted from your letter above, did not specifically amend Article III, §2, which of course, already provided for biennial sessions. Following its enactment, the legislature met on even numbered years. The only purpose of the quoted part of the 1904 amendments was to provide for another regular session in the year 1907 and to shift the biennial sessions from even numbered years to odd numbered years. Once the session in 1907 and the shift to odd numbered years had been accomplished, there was no further necessity or purpose to this part of the 1904 amendments. Thereafter, the legislature still met biennially under Article III, §2, but on odd numbered years.

The passage of Senate Joint Resolution 4 for the second time in the 62nd G. A., if the people approve and ratify the same as provided in Article X, §1 of the Constitution, will impliedly repeal the pertinent parts (and particularly the words "and biennially thereafter") as they appear in Amendment No. 1 of the 1904 amendments. Repeals by implication are not favored by the Courts and will not be upheld unless intent to repeal clearly and unmistakably appears as it must, here, where the two provisions would otherwise be mutually and absolutely repugnant and irreconcilable. Where, as here, the last or dominant amendment is not reconcilable with the former amendment, the last must prevail.

"The provisions of a Constitution may be impliedly repealed or abrogated by the adoption of changes in other portions which render such provisions obnoxious or ineffective, or by the adoption of a new Constitution which is all-inclusive, but repeals by implication are not favored." 16 C.J.S. 35, Constitutional Law, §7.

"While amendments are part of the Constitution, according to some cases, they are not regarded as though they had been parts of the original instruments, but are considered rather in the nature of codiciles or second instruments, altering or rescinding the originals to the extent to which they are in conflict, and in any event, they are to be treated as having a force superior to, and as superseding, the originals or other earlier provisions, to the extent of such conflict. Even though an amendment does not in terms expressly repeal a constitutional provision, yet, if it covers the same subject provided for in such provision, the amendment will be regarded as a substitute for, and as superseding, it. It is a generally accepted rule, however, that repeals by implication are not favored, and an earlier provision remains in force in so far as it is not repugnant to an amendment, in the absence of express repeal; in order to effect a repeal, the repugnance must be so clear and positive that they cannot consistently stand together, and, to effect an amendment of an existing provision, the intent to amend, which is to be gathered from the language employed, must be clear and unmistakable. To summarize, if on a consideration of the language of the amendment and the history and purpose of its adoption, it appears that it was not the intent to alter or repeal a provision of the original constitution, such provision remains in force, unaffected by the amendment." 16 C.J.S. 133, Constitutional Law §42.

Of course, it is preferable and the better practice to specifically repeal all sections in conflict so as to avoid confusion and to keep the Constitution cleaned up. But such is not necessarily essential to the validity of the amendment.

April 19, 1967

OLD AGE ASSISTANCE: County Relief — Supplementation — Supplementation of old age assistance from county relief funds is limited to expenditures for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance.

Mr. Edgar E. Cook, Mills County Attorney: Your letter dated March 31, 1967, addressed to Mr. Richard Turner, Attorney General of Iowa, has been referred to me for an informal opinion.

In your letter you call attention to Section 249.29, 1966 Code of Iowa, and ask what agency is referred to in Section 249.48, 1966 Code of Iowa, in view of said Section 249.29.

Section 249.29, 1966 Code of Iowa, reads in part as follows:

"No person receiving assistance under this chapter shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance, and hospitalization. . . ."

Section 249.48, 1966 Code of Iowa, reads:

"Supplemental assistance. The old age assistance granted to a person under this chapter may be supplemented by another person, association, society corporation, or agency of county government, other than specified in subsection 249.6, 1966 Code of Iowa."

The parties referred to in the exception in the foregoing Section 249.48, 1966 Code of Iowa, are designated in subsection 249.6, 1966 Code of Iowa, and would include a spouse, child, other person, municipality, association, society or corporation legally or contractually responsible for the support of a recipient under the law of this state found by the State Department able to support said recipient. The said Section 249.6 of the 1966 Code of Iowa, reads as follows:

"249.6 To Whom Granted. Old Age Assistance may be granted and paid only to a person who: . . . (7) Has no spouse, child, other person, municipality, association, society or corporation legally or contractually responsible under the law of this state and found by the state department able to support him."

Again, referring to Section 249.48, 1966 Code of Iowa, it is the opinion of the undersigned that the "agency of county government" refers to the county board of supervisors. However, in view of Section 249.29 the county board of supervisors can make no payments except for "fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance, and hospitalization," and cannot make such payments for those in the event the said county board of supervisors is under any legal or contractual responsibility for the support of the recipient, in view of Section 249.6(7), 1966 Code of Iowa.

Therefore, the county not being included in Section 249.6, 1966 Code of Iowa, the county could pay such supplemental assistance from its general relief funds. I refer you to Chapter 252, 1966 Code of Iowa (Support of the Poor). I also refer you to Report of Attorney General, Volume I, 1960, in which there are two Attorney General Opinions concerning this matter. One is found on page 272 being Section 23.1 dated February 2, 1959, and the other is found on page 291 being Section 23.10 dated August 1, 1960. I enclose photostatic copies of the Opinions.

April 21, 1967

SCHOOLS: **Cooperative study for Post High School Education in Iowa.** The State Board of Public Instruction, Higher Education Facilities Commission, and the Board of Regents have authority to participate with the Iowa Association of Private Colleges and Universities in a voluntary organization for a cooperative study of Post High School education in Iowa for making studies and gathering information for institutional and state wide planning and coordination of information from boards and institutions concerning problems, plans and legislative requests and the formulation of recommendations in the interest of state wide coordination; and it is legal and proper for funds appropriated to such boards and commission to be budgeted for such studies.

Hon. Charles E. Grassley, House of Representatives: This will acknowledge receipt of your letter dated April 6, 1967 requesting an Attorney General's opinion on the following:

"Enclosed is a clipping from the Des Moines Register explaining the creation of the organization of the Iowa Coordinating Council for Post High School Education.

"I ask whether or not there is statutory authority for the creation of such a council and whether or not the Board of Regents and State Board of Public Instruction have the power to obligate funds to the support and work of this Iowa Co-ordinating Council for Post High School Education."

In §257.8 the State Board of Public Instruction is authorized to adopt the long-range program for the state system of public education based upon special studies, surveys, research, and recommendations submitted by or proposed under the direction of the State Superintendent of Public Instruction; and in subsection 9 it is authorized to constitute a continuing research commission as to public school matters in the state and cause to be prepared and submitted each regular session of the General Assembly, a report containing such recommendations.

In §262.12 of the Iowa Code, The Board of Regents is authorized to exercise all powers necessary and convenient for the effective administration of its office and of the institutions under its control, and to this end may create such committees, offices and agencies from its own members or others, and employ persons to staff the same, fix their compensation and tenure and delegate thereto, or to the administrative officers and the faculty of the institutions under its control, such part of the authority and duties vested by statute in the board, and shall formulate and establish such rules and regulations, outline such policies and prescribe such procedures therefor, all as may be desired or determined by the board as recorded in their minutes.

The Higher Education Facilities Commission is authorized by §261.2 (1) (4) of the Iowa Code, to prepare and administer a state plan for higher education facilities which shall be the state plan submitted to the Commissioner of Education in connection with participation of this state in programs authorized by the Federal Act of 1963, Public Law 88-204, and to prepare and administer a state plan for a state supported and administered scholarship program.

It is our opinion that the above cited statutes provide adequate authority for the Board of Public Instruction, the Higher Education Facilities Commission, and the Board of Regents, to participate with the executive committee of the Iowa Association of Private Colleges and Universities in a voluntary organization for a cooperative study of Post High School Education in Iowa, having as its stated purpose, the making of studies and gathering of other information needed for a sound institutional and state wide planning, the coordination of information from boards and institutions concerning problems, plans and legislative requests and the formulation of recommendations to such boards and institutions in the interest of state wide coordination. It further appears to be legal and proper for the three state offices to budget funds from their appropriations for such studies.

April 24, 1967

TAXATION: Tuition and Offsetting Tax — §282.2, Code of Iowa, 1966. Section 282.2 should be construed to mean that the parent or guardian whose child or ward attends school is a district in which the parent or guardian is a non-resident and in which the parent or guardian pays school taxes can deduct the amount of such school taxes paid from the amount of the tuition required to be paid.

Mr. R. K. Richardson, Greene County Attorney: This is to acknowledge receipt of your letter of April 4, 1967, in which you posed the following factual situations:

"As a background to the questions to be asked, I offer the following explanation: In 1965, a guardianship was established for several reasons, among these reasons being the problem of tuition of the ward who lives in one district and attends school in another district.

"The guardian is the ward's natural grandfather, who lives in the district where the child goes to school, and owns considerable farm property in that district. The ward rides the school bus daily and is delivered at the grandparents' home. Due to his involvement in extracurricular activities, he is often taken to school. He spends an average of three hours per day at the grandparents' home."

In your letter, you stated that you, primarily, wanted an opinion interpreting Section 282.2, Code of Iowa, 1966, as to what "he" and "him" refer to. Section 282.2 provides:

"Offsetting tax. The parent or guardian whose child or ward attends school in any district of which *he* is not a resident shall be allowed to deduct the amount of school tax paid by *him* in said district from the amount of the tuition required to be paid." (emphasis supplied)

The ultimate object in the construction of a statute is to determine its real purpose and meaning. *Builders Land Co. vs. Martens*, 255 Iowa 231, 122 N.W. 2d 189 (1963). In construing Section 282.2, the case of *Hume vs. Independent School District*, 180 Iowa 1233, 164 N.W. 188 (1917), would appear to be helpful. This was an action to enjoin the Des Moines School District from expelling plaintiff's nephew from a Des Moines high school. The plaintiff was a Des Moines resident, which the nephew allegedly was not. The following language of the Court at 180 Iowa 1249, although dictum, would appear to be significant:

"Appellant contends that the pronoun 'he' in this statute stands for the nouns 'child' or 'ward,' not for the nouns 'parent' or 'guardian,' and that, when so construed, the words 'parent or guardian' include the parent, and that, if the child or ward, Thomas Hatton, in attending the West Des Moines High School, be held to attend a school within a 'district of which he (child or ward) is not a resident,' the appellant should be allowed to deduct the amount of school tax paid by him in said district. Appellee contends that the pronoun 'he,' as used in the statute refers to the words 'parent or guardian,' and that plaintiff is neither, and that plaintiff is a resident of the same district in which Thomas D. Hatton is required to pay tuition, the contention at this point being that the person who is entitled to deduct the taxes paid is the parent or guardian whose child or ward is attending school in a district of which said parent or guardian is not a resident. Without determining the question, *I am inclined to appellee's view on this point . . .*" (emphasis supplied)

At the time the *Hume* case was decided, the statute was essentially identical to Section 282.2, Code of Iowa, 1966, except that it contained the word "Independent" before the word "district." The word "Independent" was deleted by the Acts of the 58th G. A., Ch. 96, §18, (1959).

Furthermore, an Attorney General's Opinion has construed what is now Section 282.2 in 1926 O.A.G. 491 to mean:

. . . However, we are of the opinion that the statute should be strictly construed and that no person except the *parent* or *guardian* who *actually pays the tax* and whose child or ward actually attends school in the district where he does not reside but where he does own property would be entitled to offset the tax so paid against the tuition charged."

Also, in 1928 O.A.G. 410, the conclusion was reached that a parent may offset the tax paid by him in a district other than that of his residence and in which his children or wards attend school against the tuition charged to him. Thus, the "he" and "him" in Section 282.2 refer to the parent or guardian who is a non-resident of the school district where his child or ward attends school and who pays school taxes in that school district.

In your letter, you stated, secondarily, that you also wanted an opinion regarding the right of the school board to determine the guardianship's validity. The theory of guardianship is to protect the ward during his period of incapacity to protect himself. *Oyama vs. State of California*, 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948). The district court sitting in probate has full jurisdiction of the estate of a person under guardianship. *Reeves vs. Hunter*, 185 Iowa 958, 171 N.W. 567, (1919). Furthermore, the guardian is generally held to be an officer of the Court which appoints him. *Redditt vs. Hale*, 184 F. 2d 433 (1950); *Martineau vs. City of St. Paul*, 172 F. 2d 777 (1949); *Hornaday vs. Hornaday*, 95

Cal. 2d 384, 213 P. 2d 91 (1950). After the appointment of the guardian, the Court retains jurisdiction over the guardianship. *Anderson vs. Schwitzer*, 236 Iowa 765, 20 N.W. 2d 67 (1945); *Haradon vs. Boardman*, 229 Iowa 540, 294 N.W. 770 (1940); Sections 633.669 and 633.670, Code of Iowa, 1966.

Although mere irregularities may justify a direct attack upon the validity of the guardianship, they do not justify a collateral attack on the Court's order of appointment. *Jensen vs. Martinsen*, 228 Iowa 307, 291 N.W. 422 (1940). Moreover, the question of the appointment or removal of a guardian rests within the sound discretion of the Court. *McIntire vs. Bailey*, 133 Iowa 418, 110 N.W. 588 (1907); *Gould vs. Smith*, 405 P. 2d 82 (Okl. 1965). Assuming that the Court had jurisdiction to appoint a guardian, the guardianship would not be void ab initio. Thus, the school board has no right to independently determine the validity or invalidity of guardianship. Such determination would invade the province of the Courts which have continuing jurisdiction of guardianships.

It is the opinion of this office that Section 282.2, Code of Iowa, 1966, should be construed to mean that the parent or guardian whose child or ward attends school in a district in which the parent or guardian is a non-resident and in which the parent or guardian pays school taxes can deduct the amount of such school taxes paid from the amount of tuition required to be paid. This office is of the further opinion that a school district has no right to make an independent determination as to the validity of a guardianship since such determination would invade the province of the Courts.

April 24, 1967

CIGARETTE DIVISION: Promotional support plan Section 551A.3, Code of Iowa, 1966. Cigarette manufacturer's promotional support plan whereby the manufacturer mails coupons and refund certificates to consumers who may use such coupons and refund certificates against the purchase of cigarettes from a wholesaler or retailer, does not violate the Iowa Unfair Cigarette Sales Act.

Mr. E. A. Burrows, Jr., Chairman, Iowa State Tax Commission: Our opinion has been requested with respect to the legality of a promotional support plan by a cigarette manufacturer which reads in pertinent part as follows:

"Promotional Support: A consumer mailing to 15,000,000 homes of a 7¢ store coupon good against the purchase of 1 pack *plus* a refund certificate good for $1.00 on the purchase of a carton."

Section 551A.3, Code of Iowa, 1966, provides:

"551A.3 Sales at less than cost — penalty.

"1. It shall be unlawful for any wholesaler or retailer to offer to sell, or sell, at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer, as the case may be, as defined in this chapter. Any wholesaler or retailer who violates the provisions of this section shall be guilty of a misdemeanor and be punishable by fine of not less than one hundred dollars, nor more than five hundred dollars.

"2. Evidence of advertisement, offering to sell, or sale of cigarettes by any wholesaler or retailer at less than cost to him as defined by this chapter shall be evidence of a violation of this chapter."

As you can see, the latter statute penalizes wholesalers and retailers, but not the cigarette manufacturer. *Expressio unis est exciusio alterius.*

The cigarette manufacturer is not sending these coupons or refund certificates to wholesalers or retailers, but is sending them directly to the consumer. Although the consumer who has a coupon or refund certificate will actually pay less than the wholesaler's or retailer's costs for a package or carton of the manufacturer's cigarettes, the manufacturer, and not the wholesaler or retailer, would appear to be absorbing the loss. Under the promotional plan in question, the manufacturer will redeem the coupons and refund certificates and, therefore, the wholesaler or retailer has not actually absorbed any loss, but is still making his statutory profit.

There is here no violation of the Iowa Unfair Cigarette Sales Act, which is designed to prevent injury to free competition by prohibiting the sale of cigarettes at less than the cost by such wholesaler or retailer. The Iowa Unfair Cigarette Sales Act protects the public by protecting competing wholesalers and retailers, and this assuring free competition. Cigarette manufacturing companies are not protected under this law. This conclusion is also consistent with 1958 O.A.G. 23 and *May's Drug Stores vs. State Tax Commission*, 242 Iowa 319, 45 N.W. 2d 245 (1951).

April 27, 1967

SCHOOLS: **Shared time-minimum standards-private schools.** Ch. 257 and §257.26. Students from private schools may be enrolled in public school courses required under the minimum standards provision of Ch. 257, Code of Iowa, 1966, under the conditions specified in §257.26 and it is erroneous to conclude that maintenance of standards in the private school is requisite to such enrollment or that this section provides authority for the approval of agreements between a private school and a public school district; the state board may not approve shared time for courses other than those required by law as "necessary" to comply with the state minimum curriculum standard; §257.26 does not permit private schools to count the courses which their students take in the public schools for the purpose of satisfying minimum standards for school approval.

Hon. Earl M. Yoder, State Representative, Johnson County: In your letter of April 26, 1967, you requested an opinion as to the following:

"1) Are private schools required to maintain state minimum school standards before their students may be permitted to enroll in public schools for courses not available in such private schools? See Shared time section (257.26) of the Code.

"2) Are students from private schools entitled to enroll in public school courses not required by the minimum standards?

"3) Senate File 381 (pending in 62nd G. A.) would amend Section 257.26, Code of Iowa, to permit private schools to utilize shared time authorization to meet minimum school standards. Is this legislation required or does Section 257.26 as it presently stands contain such authorization?"

§257.26, Code of Iowa, 1966, provides:

"*Sharing instructors and services.* The state board, when necessary to realize the purposes of this chapter, shall approve:

"1. The sharing of the services of a single instructor by two or more schools in two or more school districts;

"2. The enrollment in public schools for specified courses of students who also are enrolled in private schools, when the courses in which they seek enrollment are not available to them in their private schools, provided such students have satisfactorily completed prerequisite courses, if any, in schools maintaining standards equivalent to the approval standards for public schools, or have otherwise shown equivalent competence through testing.

"The provisions of this section shall not deprive the respective boards of public school districts of any of their legal powers, statutory or otherwise, and in accepting such specially enrolled students, each of said boards shall prescribe the terms of such special enrollment, including but not limited to scheduling of such courses and the length of class periods. In addition, the board of the affected public school district shall be given notice by the state board of its decision to permit such special enrollment not later than six months prior to the opening of the affected public school district's school year, except that the board of the public school district may, in its discretion, waive such notice requirement."

In an opinion of former Attorney General Lawrence F. Scalise, dated November 4, 1965, answering 17 questions with reference to the school standards, we find the following:

"However, before a Senate File 553 (Ch. 226, Acts 61st G. A. and now §§257.25 to 257.28, Code of Iowa 1966) shared time arrangement, which meets the purposes of Chapter 257 (Code of Iowa 1966) as interpreted by the state board, can be approved, the state board must determine that the private school is satisfying the State's minimum curriculum and the approval standards implementing said minimum curriculum."

Mr. Scalise says that the words "in schools maintaining standards equivalent to the approval standards" in §257.26, "indicate that private schools *entering into shared time agreements* must maintain approval standards based on the State's minimum curriculum" and that private schools cannot "depend on the public schools to supply the minimum curriculum." (Emphasis added)

DIVISION I

In construing a statute, all parts thereof must be given meaning and effect. *Hartz v. Truckenmiller*, 228 Iowa 819, 293 N.W. 568; *Misbach v. Civil Service Commission of Cedar Rapids*, 230 Iowa 323, 297 N.W. 284.

§257.26(2) requires the state board of public instruction to approve so-called "shared time" or enrollment of students from private schools in public schools "when the courses are not available to them in their private schools, provided such students have satisfactorily completed *prerequisite courses*, if any, *in schools maintaining standards equivalent to the approval standards for public schools*, or have otherwise shown equivalent competence through testing."

This section makes no reference to any "shared time agreement" entered into by the private school, as mentioned in the previous Attorney General's opinion of November 4, 1965. No agreement between the private school and the public school is either required or necessary, and public schools have no express statutory authority to enter into agreements with private schools respecting enrollment. Enrollment of private school students in public schools for specified courses is permitted under the conditions of the statute on application of the student, not the school.

The conditions permitting enrollment in such courses, in addition to those mentioned in Division II hereof, are (1) that the courses are not available to the student in his private school and (2) that the student (a) has satisfactorily completed prerequisite courses, if any, in a school maintaining standards equivalent to the approval standards for public schools, or (b) has otherwise shown equivalent competence through testing. The conditions for enrollment are imposed on the *student* rather than on the private school from which the student comes. If no prerequisite course is required for the course in which the student seeks enrollment, the fact he comes from a private school not maintaining the standards does not bar his enrollment. On the other hand, if a prerequisite course is required for the course in which enrollment is sought the student may nevertheless be permitted to enroll if he has previously completed the prerequisite in a school maintaining sufficient standards or if, through testing, he shows equivalent competence to other public school students qualified to enroll in the course, even though the private school from which he seeks enrollment does not maintain sufficient standards.

We do not lightly overrule opinions of Attorneys General of this State, which, when carefully considered, are entitled to weight and recognition by later Attorneys General as stare decisis. (See Op. A. G., February 2, 1967). Nevertheless, we are convinced the opinion of November 4, 1965, contains an erroneous conclusion which should now be overruled.

The previous opinion apparently ignores the relationship and limitations of the words "have satisfactorily completed prerequisite courses, if any" to and on the clause "in schools maintaining standards equivalent to the approval standards for public schools." It erroneously concludes that maintenance of standards in the private school is requisite to the student's enrollment in the public school course or to some shared time agreement not mentioned or authorized. Accordingly, and to the extent mentioned, that opinion is now overruled.

DIVISION II

As suggested in Division I, there is a further condition which §257.26 imposes on state board approval of so-called "shared time." The beginning clause of the section says the state board *"when necessary to realize the purposes of this chapter"* shall approve such enrollment. This limitation of the shared time practice excludes approval of time when *not* necessary to realize the purposes of the chapter.

It is not entirely clear whether the word "chapter" refers to the entire Chapter 257, Code of Iowa, 1966, or the Act (Chapter 226, Acts 61st G. A.) in which educational standards were added to Chapter 257. The former opinion concludes that "chapter" refers to Chapter 257 as amended, and we agree. However it is our opinion that the *"purposes of this chapter,"* as referred to in §257.26, can only have reference to the purposes of that part of the chapter in the preceding section (257.25) which prescribes educational standards. The purpose, in that sense, was to establish a minimum curriculum and standards guideline for use by the state board and state superintendent of public instruction in determining what schools should be approved. The only other purposes of Chapter 257 are related to such things as establishing the department of public

instruction and board and superintendent thereof and prescribing their duties, etc. which purposes are obviously not the purposes to which §257.26 has reference. Ch. 114, Acts 55th G. A. and Ch. 226, Acts 61st G. A.

Accordingly, we conclude the state board may not approve shared time for courses other than those required by law as "necessary" in order to meet the minimum requirements for an approved school. Such courses are not necessarily limited to those set out in Chapter 257. §257.25(10), third paragraph, requires schools to meet "all other requirements of the laws of Iowa," as an approval standard guideline, and other chapters than 257 may require that courses be offered.

In other words, §257.26 does not allow the state board to approve shared time with reference to any course not required by law as requisite to the minimum standards for an approved school. To the extent the earlier opinion is in conflict herewith, the same is overruled.

This being the case, a construction, such as that in the Attorney General's Opinion of November 4, 1965, that a private school must maintain the state's minimum curriculum as requisite to the shared time practice would render §257.26(2) meaningless. Students of a private school would have no occasion or incentive to enroll in public school courses being offered by their private school and their private school could not tolerate such a shared time arrangement where duplication is involved.

DIVISION III

Of course, private schools are required to comply with the minimum standards if they are to be approved. §275.25. And, although we have concluded that maintaining standards is not a necessary requisite of the shared time practice, there is no provision in §257.26 or elsewhere to allow a private school credit for shared time in satisfying the minimum standards imposed by Chapter 257. §257.28, which allows agreements for attendance of pupils residing in one district in schools of another for the purpose of taking courses not offered in the resident district, does provide for such credit. But it is applicable only as to agreements between public school districts and does not encompass such agreements between public schools and private. *Expressio unis est exclusio alterius.*

See, also, Mr. Scalise's opinion of November 4, 1965, herewith enclosed, and with which we agree on this point.

Senate File 381 or similar legislation would be necessary to allow private schools credit for shared time in satisfying the state minimum standards. We, of course, express no opinion on the wisdom of allowing such credit.

April 27, 1967

A county is not a person within the terms of §155.3, subsection 4, 1966 Code of Iowa, and is not entitled to a pharmacy permit nor is there statutory authority for the county to operate a pharmacy.

Mr. Edward F. Samore, Woodbury County Attorney: Reference is herein made to yours of the 3rd inst. in which you submitted the following:

"Your opinion is respectfully requested, as soon as possible, in regard to the following:

"For over thirty years up to January 1, 1967, the Woodbury County Medical Association contracted with Woodbury County to furnish medical care to indigents and others for whom the County had a legal responsibility. In connection with this contract, the Medical Association operated and staffed a pharmacy; this pharmacy dispensed nearly all drugs which the County was legally responsible to buy. The contract terminated January 1, 1967.

"Since the first of the year the County has operated the pharmacy and has hired a registered pharmacist to do the pharmacy work and to manage the pharmacy.

"It has come to our attention that it is necessary that we have a pharmacy license to continue the operation of this pharmacy. The Pharmacy Examiners have denied a license to Woodbury County on the basis that it is not a 'person' as defined by Chapter 155.3(4) Code of Iowa, 1966.

"The operation of the pharmacy saves Woodbury County thousands of dollars every year. The Board of Supervisors, therefore, would like to continue operating the pharmacy if it is at all possible.

"Is Woodbury County such a 'person' under Chapter 155.3(4), Code of Iowa, 1966, so that it may be issued a pharmacy license and be permitted to continue to operate its pharmacy."

In reply thereto I advise the following:

I agree with the Pharmacy Examiners in the conclusion that §155.3, subsection 4, 1966 Code of Iowa, a county is not a person within its terms. In order to be so designated legislation is required. Lincoln Dist. v. Redfield Dist. 226 Iowa, 298, 283 N.W., 887, to this point states:

"It will be noted that this section states 'no *person* shall be deprived * * *'

"In the case of Waddell v. Board of Directors, reported in 190 Iowa 400, at page 406, 175 N.W. 65, at page 67, this court said:

" 'The defendant is a school corporation. It is a legislative creation. It is not organized for profit. It is an arm of the State, a part of its political organization. It is not a 'person,' within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. The legislative power is plenary. It may prescribe its form of organization and its functions today, and it may change them tomorrow. * * * It may dissolve the corporation at any time, and may direct the disposition of its property.

" 'If any rights arose out of any conveyance at the time thereof to any *person* other than the district township, such rights could not be impaired by subsequent legislation. As to the rights of the school corporation, these *could* be impaired and diminished by subsequent legislation.'

"In the case of Herrick v. Cherokee County, 199 Iowa 510, at page 513, 202 N.W. 252, at page 253, we read:

" 'A county is, in reality, an arm of the state, to aid in its governmental functions only; and being such, it and its property are wholly under the control of the legislature.'

"And in the very recent case of Charles Hewitt & Sons Company v. Keller, 223 Iowa 1372, 1377, 275 N.W. 94, 97, this court, speaking through Justice Sager, said:

" 'Counties and other municipal corporations are, of course, the creatures of the legislature; they exist by reason of statutes enacted within the power of the legislature, and we see no sound basis upon which a

ministerial (or, for that matter, any other) office may question the laws of its being. The creature is not greater than its creator, and may not question that power which brought it into existence and set the bounds of its capacities.' "

See also Julander & Julander v. Reynolds, 206 Iowa, 1115, 221 N.W., 807, while involving garnishment of a school district which was denied said as pertinent hereto the following:

"It is our conclusion, therefore, that section 11815 is not only not broad enough in its terms to include a school district, but that such political subdivisions of the state should not be included unless the legislature specifically so provides, and thereby changes the public policy of the state; but until it does so, our holding is that school districts are not subject to this equitable proceeding marked out by Section 11815 of the Code."

In addition to the foregoing, Hilgers v. Woodbury County, 200 Iowa 1318, 206 N.W. 660, states:

"Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute, or necessarily implied from the power so conferred."

There does not appear to be any express or implied power vested in the county to operate a pharmacy.

May 1, 1967

TAXATION — COUNTY CONFERENCE BOARD. Members of County Conference Board are certain officers who must qualify as electors of the city, county, or district in which they are elected. Such members must be residents of the county even where a joint county board of education exists in the county, in which case each high school district maintaining 12 grades pursuant to Ch. 275, Code of Iowa, is represented on the Board. Actions by the Board are valid when voted by two units as provided in §441.2.

Mr. E. A. Burrows, Jr., Chairman, State Tax Commission: This replies to the State Tax Commission's request for an Attorney General's Opinion as to the membership of a county conference board. The request, originating from the Property Tax Division, poses the following questions.

"1. Is it required by law that a member of a county conference board provided for in Section 441.2, Code of Iowa, 1966, be a resident of or domiciled in the county, or be an elector of the county, whose conference board he serves on?

"2. Is it required by law that a county conference board provided for in Section 441.2, Code 1966, have as members thereof only persons who are residents of and domiciled in, or who are electors of, the county that the conference board represents, even though there is a joint county board of education formed under Section 273.22-(13), Code 1966, that exists in the same county?

"3. What constitutes a 'high school district' *of* a county, as such term appears in Subsection 13, Section 273.22, Code 1966?

"4. In the event that the county board of education members on a county conference board are replaced under Section 273.22-(13), Code 1966, by one representative from the board of directors of a single high school district of the county, thus causing one unit of the county conference board to have only one member, would such situation create an illegal conference board as provided for in Section 441.2, Code 1966? (1960 Report of Attorney General pg. 226).

(a) What if there were two high school districts of the county represented by one representative each, making one unit of the county conference board have only two members, would such bring about an illegal conference board?

(b) If it be held that there must be more than two high school districts represented and there are in fact less than three (3) high school districts of the county, how can the situation be straightened out so that there will be a legal county conference board as provided for in Section 441.2, Code 1966?"

Our answer to the first question is affirmative. The county conference board under §441.2, 1966 Code of Iowa, consists of the members of the city council, school board, county board of supervisors or the mayors of all incorporated cities or towns whose property is assessed by the county assessor, the members of the county or city board of education, and the county board of supervisors. Each of these officers must qualify for election by being a qualified elector of the county (municipality) in which he holds office. (§§273.4, 331.1, and 363.23) Residence in the city or county is necessary to the qualification of such an elector.

The answer to question number two is also affirmative. The existence of a joint county board of education formed under §273.22 does not effect the membership of the county conference board except as provided in §273.22(13):

"When two or more county boards of education are merged into a joint county board of education under this section, the county conference board as provided for in section 441.2 shall include one representative from the board of directors of each high school district of the county, who shall replace the county board of education members on the conference board as provided for in section 441.2."

In answer to question three, a high school district of a county as such term appears in subsection 13 of §273.22, 1966 Code of Iowa, means a school district maintaining 12 grades in accordance with chapter 275, 1966 Code of Iowa.

In the event, due to the existence of a joint county board of education formed pursuant to §273.22, there exists but one high school district within the county thus causing one unit of the county conference board to have only one member, actions by the county conference board would be valid when voted by the other two units in which the majority vote of the members present determined the vote of the voting unit. As previously held in 1960 O.A.G. 226, a single high school district would not constitute a voting unit inasmuch as a *majority* vote of such unit could not be obtained. However, we have ascertained from information provided by the Department of Public Instruction that no county in this state has only a single high school district within its boundaries. Where school districts cross county lines, the representative from the board of directors of such school district must be the person elected from the election area which includes the territory of the county to be represented on the county conference board.

If there were two high school districts in the county constituting one unit of the county conference board, the vote of both representatives would be required to have a majority vote and determine the vote of the unit.

In view of the conclusion reached in the previous paragraph it appears that an answer to your question 4(b) is not required.

May 3, 1967

MOTOR VEHICLES: Cities and Towns; City Ordinance. §§ 321.283, 321.235, 321.236. A city ordinance purporting to include negligence as a basis for criminal prosecution is invalid, under §§ 321.235 and 321.236, as being inconsistent with State law.
Lawn type utility tractors, not complying with safety standards in §§ 321.381, 321.382 and 321.383, cannot be driven on public streets or highways.

Mr. James E. Van Werden, Dallas County Attorney: Your letter of May 2nd has been received stating two questions to be answered:

The first question is, can a municipality enact an ordinance reading as follows:

"CARELESS DRIVING. Any person who drives or operates any vehicle upon any street or alley in the city of....., Iowa, carelessly or imprudently, or at a rate of speed or in a manner so as to endanger or to be likely to endanger the property or person of another, or who upon approaching any pedestrian in a cross walk, fails to operate said vehicle in a reasonable or prudent way or who skids, shall be guilty of careless driving."

In answer to this question the Supreme Court has held in a recent opinion that general negligence cannot be a basis for criminal prosecutions in either a State or Municipal Court. See City of Vinton v. Engledow, 140 NW (2d) 857.

In this case a similar ordinance enacted by the City of Vinton was declared invalid.

In 1937 provisions similar to the ordinance referred to in your letter were a part of the Code of Iowa, but in that year this Section was repealed in a general revision of what is now Chapter 321. Also in this revision the legislature made the following pronouncement in Sections 321.235 and 321.236, Code, 1962, where the statute reads in part as follows:

"Provisions uniform. The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. * * *

" '. . . and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from: * * *' "

The Supreme Court in the case of City of Vinton vs. Engledow (supra) interpreted the above statute as follows:

"Thereafter certain fields for regulation by local authorities are listed. None covers the ordinance here considered. This review would indicate non-uniformity such as this ordinance creates is prohibited."

The Supreme Court in the above case in further construction of this statute stated as follows:

"Consistent enforcement of the traffic laws is of major importance in this era of increasing injury, death and destruction on the highways. The laws enforced must likewise be consistent. The rules of the road must have reasonable uniformity in the City of Vinton with the rules in force elsewhere in the state. This we take to be the legislative policy. The ordinance is therefore invalid."

On reading this opinion, it appears that either form of the ordinance to which you refer in your letter, does not comply with the provisions of Chapter 321 (Code of Iowa) whatever may be the title of the ordinance. The legislature has deleted from the reckless driving statute (Section 321.283, Code of Iowa 1966) the words which describe ordinary negligence. By construing this Section as redrafted, together with Sections 321.235 and 321.236, which define the power of local authorities in the exercise of the police power, and which provide for uniformity in applying the enforcing traffic rules and regulations, it is my opinion that the ordinance to which you refer in your letter would be invalid.

Your second question is ". . . whether or not a person without a valid Iowa drivers license may drive a lawn type utility tractor upon the public streets and highways in Iowa and whether or not a tractor of such type can be driven on the streets and highways of Iowa even with a valid Iowa drivers license."

In answer to the first part of this second question, I am of opinion that a person without a valid drivers license may not drive a lawn type utility tractor upon public streets or highways.

In answer to the second part of this question neither can such a miniature tractor be driven on the street. It would appear that such a lawn type tractor as usually operated would not comply with the safety standards set out in Sections 321.381, 321.382 and 321.383.

Enclosed is a copy of an opinion by the Attorney General dated March 9, 1966, which bears on your question.

May 9, 1967

STATE OFFICERS AND DEPARTMENTS: Workmen's Compensation; State's liability for injuries to employee is controlled and measured by Chapter 85, §§ 85.62, 85.23 and 85.25.

Mr. W. C. Wellman, Deputy Secretary, Executive Council of Iowa: Your letter of May 5th has been received, reading in part as follows:

"I have been directed by the Executive Council to secure from you an opinion relative to the State's liability for injuries received in line of duty specifically as it applies to an Executive order given by the Governor when he directs that personnel of State departments assist the Highway Patrol force in the control of traffic on major holiday week-ends."

A state employee, such as this, is covered by § 85.62, of Workmen's Compensation Law, which provides as follows:

"Any policeman (except those pensioned under the policemen's pension fund created by law), any sheriff, marshal, constable, state highway patrolman, conservation officer, and any and all of their deputies and any and all other legally appointed or elected law-enforcing officers, who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, become temporarily or permanently physically disabled or if said injury results in death shall be entitled to compensation for all such injuries or disability together with statutory medical, nursing, hospital, surgery and funeral expenses, and where the officer is paid from public funds said compensation shall be paid out of the general fund of the state. * * *

"The compensation to be paid to such officers shall be computed the same as in other compensation cases, except where injury results in death, permanent total or permanent partial disability, then the weekly compensation shall be the maximum allowed by the workmen's compensation law.

"The industrial commissioner shall have jurisdiction as in other cases. . . ."

Please turn the claim over to the Industrial Commissioner, who has definite guide lines to determine the amount of the award. This is not the sort of claim to be made pursuant to § 79.1, Code of Iowa.

Notice is provided for in §§ 85.23 and 85.25.

May 10, 1967

CONSTITUTIONAL LAW: Powers of the legislature — Art. III, §§ 1, 16 and 17, Constitution of Iowa; § 17A.10, Code of Iowa, 1966. § 17A.10, Code of Iowa 1966, cannot be amended to permit legislative review and modification or repeal of administrative rules by joint or concurrent resolution, rather than by law subject to the Governor's approval or veto, without violating Art. III, §§ 1, 16 and 17, Constitution of Iowa, respecting legislation and Art. III, § 1, respecting distribution of powers.

The Hon. Ray Bailey, State Representative: § 17A.10, Code of Iowa, 1966, provides as follows:

"All rules hereafter filed as provided in Section 17A.8 shall be referred by the chairman of the departmental rules review committee to the speaker of the house and the president of the senate of the next regular session of the general assembly, who shall refer rules to the appropriate committees of the general assembly.

"If the committee to which a departmental rule has been referred, finds objection to such rule, it may report such finding to the general assembly together with its suggestion for the general assembly *to proceed by law* to overcome the objection. Any committee of the general assembly may at any time consider any departmental rule previously filed and, if it finds such rule objectionable, proceed as above. (Emphasis added.)

You request our opinion as to the constitutionality of that section, if amended by a law inserting in lieu of the words "to proceed by law," italicized in the above paragraph, the words, "by concurrent or joint resolution."

The primary purpose of Chapter 17A., Code of Iowa, 1966, was to provide a method of legislative review of departmental rules. There is little precedent for a system of legislative, rather than judicial, review and the procedure prescribed by this chapter comes perilously close to encroachment by the legislative branch of our government upon both the

executive and judicial branches. It is well settled, and no authority need be cited, that under our system of government it is for the legislative branch to make the laws, the executive branch to administer them and the judicial branch to review the laws so made and the method of their administration.

While the legislature may not delegate its power to make the law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Locke's Appeal* 72 Pa. 491, quoted with approval in *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 505, 36 L. Ed. 294.

Within this limited power of delegation, the legislature may make a law prescribing fixed standards or guidelines within which it may authorize an administrative agency to promulgate rules and regulations for administering the law and covering details which cannot practicably be covered by the law. In exercising this rule making authority, the administrative agency is limited by the law, can make no new or additional law, cannot establish policy and cannot abridge or venture beyond the limitations of the guidelines fixed by the law. Often, the question of whether the administrative agency has exceeded its limitations in these respects, and encroached upon the legislative function, is a difficult issue for *judicial* determination. See *Goodlove v. Logan*, 1933, 217 Ia. 98, 251 N.W. 39 and *Lewis Consolidated School District v. Johnston*, 1964, 256 Ia. 236, 127 N.W. 2d 118 and cases cited in both.

Within its rule making power, as so limited, an administrative agency may amend the rules it has already promulgated. *Peoples Gas and Electric Co. v. State Tax Commission*, 1947, 238 Ia. 1369, 28 N.W. 2d 799.

Aside from the power of the judicial branch, through its courts, to review and limit an administrative agency's rule making power, and aside from the administrative agency's own power to amend its rules, there is no question but that the legislature can effectively amend, modify, circumscribe, enlarge or repeal such rules. It can do this by any one of several different means, among which are specifically changing the rules or enacting its own; changing the standards or guidelines within which the rules were promulgated; repealing the rule making authority or abolishing the agency. Moreover, its power in these respects is not limited by the fact that the rule may be otherwise valid, legal and within the powers properly delegated to the administrative agency. The only exception is where the agency is a creature of the constitution, rather than of the law, with constitutional powers, rather than those delegated by law. 73 C.J.S. 336, Public Administrative Bodies and Procedure, §34.

But, in my opinion, such amendment or repeal of administrative rules can only be accomplished *by enactment of a law subject to the governor's approval or veto.* A joint or concurrent resolution is not sufficient. There are at least two reasons for this: First, the original rule making power comes from a law duly enacted. Assuming the rule is within the delegation and not an improper exercise of the legislative function, it merges with and becomes an integral part of the statute under which it was promulgated. The rule thereby attains the force and effect of law. 73 C.J.S. 430, Public Administrative Bodies and Procedure, §108. If a legislature can change an administrative rule by resolution, which is not a

law, it would have the power to effectively repeal any statute which delegates rule making powers, without a law of equal standing so that statute and without the governor's approval or veto. This would be contrary to the provisions of Article III, §§1, 16 and 17 of the Constitution of the State of Iowa respecting the legislature.

Secondly, administration of law, including exercise of the rule making power, is the proper function of the *executive*, rather than the legislative, branch of our government. Review of administrative rules is, except as heretofore stated, a function of the judicial branch of our government. No one branch of our government may encroach upon the functions of either of the other two except as authorized by our constitution. If the legislature changes administrative rules by joint or concurrent resolution, without the governor's approval or veto, it will, in my opinion, violate Article III, §1, Constitution of the State of Iowa, respecting distribution of powers.

Accordingly, the proposed amendment of §17A.10 which would allow the legislature to change administrative rules by joint or concurrent resolution, rather than by law, is, in my opinion, unconstitutional. See also Opinions of the Attorney General of Wisconsin, 1954, page 350, which generally reaches the same conclusion on this issue.

May 10, 1967

STATE OFFICERS AND DEPARTMENTS: Department of Agriculture —Affiliated Associations; Constitutional Law: Appropriations, §3.14, Chapters 178, 181, 183 and 185, Code of Iowa, 1966; Constitution, Art. III, §§ 17, 24 and 31. Legislature may by simple majority vote make appropriations to the State Dairy Association, Beef Cattle Producers Association, Swine Producers Association and State Sheep Association. §3.14 is no bar to such appropriations, notwithstanding the fact that such associations are not wholly controlled by the state. §3.14 was and is a nullity and of no binding practical force and effect upon the same or subsequent sessions of the legislature. Appropriations to the associations in question may be found by the General Assembly to be in the public interest and for a public purpose. Such appropriations would require only the majority vote required by Art. III, §§ 17 and 24, Constitution of Iowa, rather than the two-thirds vote required by Art. III, §31 for appropriations for private or local purposes.

Mr. Gerry D. Rankin, Legislative Fiscal Director: By your letter of April 20, 1967, you have requested our opinion as to whether or not the Appropriations Committee can appropriate funds from the State Treasurer for 'the use of such organizations as the Beef Cattle Producers Association, State Dairy Association, State Sheep Association and Swine Breeders Association." I assume when you inquire as to the authority of the Appropriations Committee to appropriate money you mean the authority of the legislature since the Appropriation Committee clearly could not itself make any appropriation.

In your letter you refer to a February 16, 1966, opinion of the then Attorney General, Laurence F. Scalise, to the then Secretary of Agriculture to the effect that employees of the societies affiliated with the Department of Agriculture of the type which you describe are not state employees and are therefore not entitled to office space or supplies with-

out charge nor are they entitled to the assignment and use of state cars. This opinion holds, in addition, that these agencies are not offices, departments, bureaus, or commissions of the State.

Chapters 178, 181, 183 and 185 provide respectively for the recognition by the state of the State Dairy Association, the Beef Cattle Producers Association, the Swine Producers Association and the State Sheep Association. These provisions of the Code are substantially similar. Chapter 178 relative to the State Dairy Association is typical and reads as follows:

"178.1 Recognition of organization. The organization known as the Iowa state dairy association shall be entitled to the benefits of this chapter by filing each year with the department of agriculture verified proofs of its organization, the names of its president, vice-president, secretary, and treasurer, and that five hundred persons are bona fide members of said association, together with such other information as the department of agriculture may require.

"178.2 Duties and objects of association. The Iowa state dairy association shall:

1. Cause inspection to be made of dairy products, farms, cattle, barns, and other buildings, appliances and methods used or employed in connection with the dairy industry of the state.
2. Promote dairy test associations, shows, and sales.
3. Publish a breeders directory.
4. Furnish such general instruction and assistance, either by institutes or otherwise, as it may deem proper, to advance the general interests of the dairy industry.
5. Make an annual report of the proceedings and expenditures to the secretary of agriculture.

"178.3 Executive committee. The association shall conduct its business through an executive committee which shall consist of:

1. The president and the secretary of the association.
2. The dean of the college of agriculture of the Iowa State University of science and technology.
3. A member of the faculty of said university engaged in the teaching of dairying to be designated by said dean.
4. The secretary of agriculture.

"178.4 Employees of committee. The executive committee may employ two or more competent persons who shall devote their entire time, under the direction of the executive committee, in carrying out the provisions of this chapter. The salary of such persons so employed shall be set by the executive committee subject to the approval of the secretary of agriculture, and such persons shall hold office at the pleasure of the executive committee.

"178.5 Expenses of officers. The officers of the association shall serve without compensation, but shall receive their necessary expenses while engaged in the business of the association."

§3.14, Code of Iowa, 1966, provides:

"Certain appropriations prohibited. No appropriations shall be made to any institution not wholly under the control of the state."

Although §§178.3, 181.3, 183.3 and 185.5 provide that the Secretary of Agriculture shall be a member of the five member Executive Committees

of each of the affiliated associations, it seems clear that having one vote out of five is insufficient to place any of such associations "wholly under the control of the state." Hence at first blush it would appear that §3.14 would act as a bar to any appropriations to the organizations in question.

However, §3.14 represents the codification of a mere statutory enactment not rising to the dignity of a constitutional provision which could be utilized to prohibit appropriations to these affiliated associations. Patently the legislature which enacted §3.14 could not by such enactment limit itself or future sessions of the legislature from making appropriations otherwise permitted by the constitution. Thus each appropriation subsequent to the enactment of §3.14 which was at variance therewith effectively vitiated and impliedly repealed such §3.14. To the extent that it seeks to limit the authority of the legislature to make appropriations §3.14 was and is a nullity and of no practical force and effect.

The issue thus resolves itself into a question not of whether or not the legislature may make appropriations to the organizations described in Chapters 178, 181, 183 and 185 at all, but rather whether constitutionally such appropriations may be made by a simple majority of both houses or require a two-thirds vote.

The relevant constitutional provisions are found in Article III:

"Passage of bills. Sec. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

"Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

"Extra compensation-payment of claims-appropriations for local or private purposes. Sec. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

Sections 17 and 24 of Article III would require the assent of only a majority of the members of each branch of the General Assembly to make the appropriation in question unless it can be said that such appropriation is for local or private purposes in which case §31 would require a two-thirds vote.

The leading and controlling Iowa case on the dichotomy between public and private purposes is *Dickinson v. Porter*, 240 Iowa 393, 35 N.W. 2d 66 (1949); appeal dismissed 70 S. Ct. 88, 338 U. S. 843 (1949). As noted by the court in that case at page 79, "An act cannot be said to be for a private purpose where 'some principle of public policy' underlies its passage." The court further observed, "The term 'public purpose' is not to be construed narrowly."

The opinion in *Dickinson v. Porter, supra* recognizes that questions of what are public purposes involve broad questions of public policy the determination of which fall properly within the ambit of the legislative branch rather than the province of the courts. The court in the *Dickinson* case observed:

"The authorities agree not only that the legislature has the broadest discretion as to what is a public purpose but also that such question is a changing one.

* * *

"Whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.

* * *

"Again, from 1 Cooley, 4th Ed., section 175, page 384: 'In case of doubt, courts are largely influenced by the public policy of the state, in determining whether taxation is for a public purpose.' "

The court recognized that, "there can be no question it is part of the public policy of this state to encourage agriculture," and quoted from *State ex rel State Reclamation Board v. Clauson*, 110 Wash. 525, 188 P. 538, 544 to the effect that, "* * * it cannot be said that the Legislature has wrongly decided that to so encourage agricultural development in our state will promote its public welfare. It hardly needs argument to demonstrate that no other industry is so closely related to the welfare of the people as a whole."

The affiliated associations recognized by Chapters 178, 181, 183 and 185 are all devoted to promoting and improving certain agrarian pursuits vital to the important agricultural industry of this state.

Accordingly in our opinion, appropriations to such agencies could be found by the General Assembly to be in the public interest and for a public purpose. If so determined (and such determination may be implied from the appropriation) the legislature may appropriate funds for such organizations by simple majority vote.

May 10, 1967

CONSERVATION: Buying and selling of fur bearing animals, §§109.87 and 109.55. It is lawful under the provisions of Chapter 109 for one possessing a game breeder's license to buy and sell live, fur bearing animals, as defined by law, during their legal open season or their continuous open season. (Hendrickson to Don Carlos, Adair County Attorney, 5/10/67.)

Mr. William W. Don Carlos, Adair County Attorney: This is to acknowledge your letter of March 30, 1967 in which you posed the following situation:

"There appears to be some conflict or question regarding the buying and selling of fur bearing animals under the conservation laws of the State of Iowa. The following questions have been presented to me and I am forwarding them to your office for your opinion.

"1. Whether or not it is legal for one possessing a game breeder's license and a fur dealer's license to buy and sell live raccoon and skunk and/or to take himself and sell such fur bearing animals during their legal open seasons?

"2. Whether or not it is legal for one possessing a game breeder's license and a fur dealer's license to buy and sell live red fox, gray fox and coyote and/or to take himself and sell such fur bearing animals during their continuous open season?

"The circumstances are that there is a person in Adair county who meets the above licensing requirements and since 1935 has actively been engaged in purchasing live raccoon, skunk, red and gray fox and coyotes and reselling them both within and outside of the State of Iowa. These fur bearing animals are brought to him mostly as kittens and puppies by farmers in the surrounding area who have taken them from their fields. He has sold some for pets, others to different states for restocking and yet others to different states in connection with rabies control programs."

I have examined the following statutes which in my opinion are applicable either directly or indirectly in answering the above questions. They are §§109.2, 109.23, 109.38, 109.40, 109.41, 109.55, 109.60, 109.61, 109.87 and 110.16 of the 1966 Code of Iowa. All of these statutes relate to the taking, pursuing, trapping and killing of game and fur bearing animals and whether or not it is lawful to buy, sell, possess and transport such animals.

In so answering the questions in which you have requested my opinion I have applied the various rules of statutory construction in an effort to arrive at an interpretation of the statutes which is consistent with the apparent purpose and intent of the regulation of fur bearing animals by the State Conservation Commission.

It is a well settled proposition of law that statutes relating to the same person or thing, or of the same class of persons or things are in pari materia and are to be taken together and examined as one law for the purpose of arriving at legislative intent. Howard v. Emmet County, 140 Iowa 527, 118 N.W. 882, and Conly v. Dilley, 153 Iowa 677, 133 N.W. 230. Legislative language must be liberally construed to promote beneficient purposes of the act. §4.2 1966 Code of Iowa, Swisher v. Swisher, 157 Iowa 55, 137 N.W. 1076, Rath v. Rath Packing Company, 136 N.W. 2d 410. It is equally well settled that repeals by implication are not favored.

The legislature has defined which animals are "fur bearing animals" and which animals are "game animals." §109.40 states that raccoon, skunk, coyote, red fox and gray fox are declared fur bearing animals for the purpose of regulation and protection under Chapter 109. §109.41 specifically declares which wild animals shall be designated for the purpose of regulation and protection as "game."

In interpreting the various regulatory statutes one must therefore be aware of the fact that the legislature has made distinction between "game animals" and "fur bearing animals." There is a definite distinction in the buying and selling of game animals as opposed to the buying and selling of fur bearing animals. Likewise there is a distinction between the capturing, trapping or taking of live game animals and the capturing, trapping and taking of fur bearing animals.

§109.87 provides as follows:

"§109.87 Open seasons. Except as otherwise provided, no person shall take, capture, kill or have in possession any fur-bearing animal or any part thereof of any of the following varieties at any time except during the open season as set by the commission under authority of section 109.39 and embraced within the dates between September 1 and March 1 both dates inclusive, specified for each variety and each locality, respectively, except where such killing, trapping, or ensnaring may be for the protection of public or private property. Provided, it shall be lawful for any person to have in his possession, sell, transport, or otherwise dispose of during such open season as herein provided, and for ten days thereafter, the carcass of, hide or skin of any animal named in this section.

1. Badger, September 1 to March 1
2. Mink, September 1 to March 1
3. Raccoon, September 1 to March 1
4. Skunk, September 1 to March 1
5. Opossum, September 1 to March 1
6. Civet cat, September 1 to March 1
7. Muskrat, September 1 to March 1
8. Beaver, September 1 to March 1

Such open season on beaver, badger, mink, raccoon, skunk, opossum, civit cat, and muskrat to begin at noon on the first day thereof.

9. Red fox or gray fox, continuous open season
10. Weasel, continuous open season
11. Ground hog, continuous open season
12. Wolf, coyote, continuous open season
13. Otter, continuous closed season

Taking or attempting to take beaver on private lands or waters without permission of the owner or tenant shall constitute a misdemeanor punishable as provided in section 109.32."

Pursuant to the provisions of this statute there is a continuous open season for the capturing and possession of red fox and gray fox. Raccoon and skunk may be captured and in possession from September 1 to March 1 of each year. There are no possession limits for raccoon, skunk, red fox or gray fox. That part of §109.87 which provides that it shall be lawful to have in his possession, sell, transport, or otherwise dispose of during such open season as hereto provided or for ten days thereafter the carcass of, hide or skin of any animal named in this section, fails to mention whether or not it is lawful for the person to possess, sell or transport a live animal. Since the same is not expressly prohibited it must be construed to be consistent with §109.55. This provision reads as follows:

"§109.55 Selling game. Except as otherwise provided, it shall be unlawful for any person to buy or sell, dead or alive, any bird or animal or any part thereof which is protected by this chapter *but nothing in this section shall apply to fur-bearing animals* or rabbits." (Emphasis added)

§109.55 expressly states that it is lawful to buy or sell dead or alive fur bearing animals or rabbits. Since the buying and selling of live fur bearing animals is expressly made lawful by §109.55 all other statutes which do not expressly prohibit or allow the buying or selling of fur bearing animals must by implication allow the same pursuant to §109.55.

§109.23 would appear to prohibit the transportation of such animals, however, the statute does not contain the phrase fur bearing animals and this office has previously construed this section as applying to game animals only. See Report of Attorney General, 1938, page 602, 603.

It is the opinion of this office that any consistent interpretation of the statutes should not prohibit the transportation of raccoon, skunk, red fox, gray fox, or coyote during the season in which it is legal to take such fur bearing animals.

The prohibited acts in §109.38 are subject to the provision of §109.55 which expressly makes it lawful to buy or sell live fur bearing animals. §109.61 states when a licensed game breeder may hold in possession any fur bearing animal and expressly states that such possession is limited to (1) fur bearing animals raised by him, (2) fur bearing animals obtained from without the state or (3) from a licensed game breeder within the state.

It is the opinion of this office that §109.61 and §109.55 must be construed and interpreted to be consistent and that when they are taken together and examined as one law for the purpose of arriving at the legislative intent a licensed game breeder may also hold in possession for sale any live animal such as raccoon, skunk, red fox, gray fox and coyote providing it is during the legally established season.

In 1938 this office issued an opinion construing §109.55 and §109.23. See Report of Attorney General, 1938, page 603, 602. In this opinion the Attorney General specifically ruled that it was lawful to buy and sell rabbits whether such animals have been acquired by purchase or otherwise, provided not more than the number legally allowed under the legal possession limit is acquired. This opinion would apply with equal affect as to all fur bearing animals.

It is therefore the opinion of this office that it is legal for one possessing a game breeder's license and a fur dealer's license to buy and sell any live raccoon and skunk which have been legally acquired during their legal open season. Similarly, it would be legal for one possessing a game breeder's license and fur dealer's license to buy and sell live red fox and gray fox and coyote, which are legally acquired and to sell such fur bearing animals during their continuous open season.

May 11, 1967

SCHOOLS: Board of Directors — Vacancy. Fact that vacancy existed because of resignation of one of the members did not invalidate the actions of the board at a meeting where a quorum was present and acted upon matters before the board by majority vote of those present and voting.

Mr. Robert W. Sackett, Clay County Attorney: In your letter of March 2, 1967, you request an opinion from this office on the following:

"Essentially the problem is that the A School Board accepted one of its members' resignations, but continued to do business that day and the next day without representation on the Board from the district represented by the resigned member. Although a quorum was present and a majority thereof voted favorably on the decisions, the taxpayers in the unrepresented district question the legality of the meeting. The primary

problem being that the superintendent and principal were offered three- and one-year contracts accordingly, receiving a majority vote, but some of the areas represented feels their interests were not being taken care of.

"The County School Board, the local school board, the superintendent and principal all desire your prompt opinion as to whether or not the meetings and votes taken, specifically the superintendent's and principal's contracts, were legal."

It is my opinion that the meeting of the board was a legal meeting and that the fact that a vacancy did exist by virtue of the resignation of one of the members did not invalidate the action of the board at the special meeting held on January 17th, 1967. The authority for the board to hold special meetings is clearly specified in §279.2, Code of Iowa. There is no statutory requirement that a vacancy must be filled before such a board can act on other matters. Acts by a majority of the directors, acting as a board, are upheld where the public officers manifest good faith and show substantial compliance with the law. Andrew v. Stuart Savings Bank, 204 Iowa 570, 215 N.W. 807 1927, Gallagher v. School Township of Willow, Woodbury County, 173 Iowa 610, 154 N.W. 437 1915. In an opinion of the Attorney General dated June 8, 1935, it is stated that where the law fixed the number constituting a quorum, this number has the same authority to act as the full board, and the actions of this number constitutes the actions of the board, so that if a quorum is present at the meeting, all that would be required to carry a proposition would be a majority vote of those present and actually voting. 1936 O.A.G. 173.

May 11, 1967

INSURANCE: Licensing of Agents — Minority. A license may be issued under Chapter 522, Code, 1966, to an individual under twenty-one years of age.

Mr. Lorne R. Worthington, Commissioner, Insurance Department of Iowa: This is in reply to a letter dated May 4, 1967 from First Deputy Commissioner, Lloyd G. Jackson, which requests an opinion on the following:

"This office has repeatedly been requested to issue insurance agents licenses under Chapter 522, 1966 Code of Iowa, to individuals under 21 years of age, generally in the 19 and 20 year age bracket. Due to the nature of these contracts, the question arises as to the competency of a minor to write such contracts.

"To answer this question, this Department respectfully requests an answer to the following:

" 'Is there anything in the Iowa law to prevent licensing under Chapter 522, 1966 Code of Iowa, of individuals under 21 years of age, specifically individuals 19 years or under?' "

In answer to the above I wish to advise that by law there is no age requirement for an applicant for a license as an insurance agent. Nor do I find in the published rules and regulations authorized by §522.3, any qualification that a person must have reached majority to be licensed as an insurance agent, or in fact, that such person must execute a bond absolutely enforcible against himself as such reasonable prove of character and competency as will protect the public interest. Inasmuch as the law recognizes that a minor may engage in business as an adult (§599.3),

and since there appears to be no law or regulation precluding such minor from being licensed to sell insurance, it is my conclusion that a license may be issued under Chapter 522, 1966 Code of Iowa, to an individual under twenty-one years of age.

May 11, 1967

COUNTIES AND COUNTY OFFICERS: County Attorney. §336.2(7). The County Attorney is required to advise township officials with respect to the preparation and conduct of special elections and bond proceedings. §§359.18 and 359.19 provide an additional duty relating to representation of the trustees in the event they become or are made parties to litigation.

Mr. Gene G. Eaton, Fremont County Attorney: This is in answer to your letter dated April 15, 1967 in which you requested an opinion on the following:

1. "Is the county attorney required, in addition to his prescribed duties, to advise and assist township officials in respect to preparation and conduct of special election and bond proceedings?

2. "If he is not thus required, do the township trustees have the authority to employ independent counsel, and can a county attorney serve as such counsel for compensation?"

In answer to the first question it is our opinion that the county attorney is required to advise the township officials with respect to the preparation and conduct of special election and bond proceedings; that this is required by §336.2(7), 1966 Code of Iowa, which provides:

"Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested."

In reply to your second question, it is our opinion that the §§359.18 and 359.19 provide an additional duty rather than a limitation of duty, and in any event are not applicable unless the trustees become or are made parties to litigation.

May 11, 1967

STATE OFFICERS AND DEPARTMENTS: Legislature — State Printing Board; Constitutional Law; Appropriations, Constitution, Art. III, §§ 1, 9 and 31; §§ 2.10 and 15.6, Code, 1966. Legislature is not a state "department" within the meaning of § 15.6. Accordingly State Printing Board has no authority to let contracts for printing Senate and House Journals and contracts for such printing purportedly entered into by Printing Board are void *ab initio*. There is no legal or equitable basis on which such printing companies may recover on such void contracts. Each house of the legislature has a constitutional duty to keep and publish a journal of its proceedings, Const. Art. III, § 9. Sec. 2.10 provides a standing appropriation from which the costs of such publication may be paid. Const., Art. III, § 31 requiring a two-thirds vote for certain appropriations has no application.

The Hon. Harold O. Fischer, State Representative, Grundy County: By letter dated May 4, 1967, you have requested my opinion as to the following:

"1. Does the State Printing Board have authority to contract for printing of the House and Senate journals and processes incident thereto?

"2. If not, were the contracts for legislative printing and composition which the State Printing Board negotiated and executed with Oline Printing Company on December 12, 1966 and with Midwest Photo-Engraving Corporation on December 22, 1966, valid?

"3. If these contracts were not valid, can either company be paid on the contracts or on any other basis?

Article III, Section 9, Constitution of Iowa provides in Part:

"Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; * * *."

§2.10, Code of Iowa, 1966, provides a standing appropriation for the cost of printing for each legislative session and that the state comptroller is authorized to issue warrants for payment of bills upon vouchers approved by the state printing board.

§15.6, Code of Iowa, 1966, provides in Part:

"The printing board shall:

1. Let contracts, except as provided in section 15.28, for all printing for all state offices, departments, boards and commissions when the cost of such printing is payable out of any taxes, fees, licenses, or funds collected for state purposes.

* * *."

I am unable to find other statutory authority under which the printing board is authorized to let state contracts. In my opinion, the legislature is not a state office, board or commission within the terms of §15.6 as quoted.

This leaves for resolution, the difficult question as to whether or not the legislature is a "department" within the meaning of §15.6.

Article III, Section 1 of the Constitution of Iowa, relating to distribution of powers, provides in part:

"The powers of the government of Iowa shall be divided into three separate *departments* — the legislative, the Executive, and the Judicial: * * *." (Emphasis supplied).

While I assume the legislature which enacted §15.6 was familiar with the Constitution of Iowa, I think they used the word "departments" therein in the sense of executive or administrative departments. They included with it the words "state offices, boards and commissions," inserting it *after* the words "state offices." The three grand departments (Legislative, Executive and Judicial) would, had they been intended to be included, have been mentioned *first* and by their respective names, all of them outranking, in importance, the state offices. It is a rule of statu-

tory construction that meaning of words may be ascertained by reference to meanings of words associated with them. *Noscitur a Sociis. Greer v. Birmingham,* (Iowa) 88 F. Supp. 189; *State v. Bauer,* 1945, 236 Iowa 1020, 20 N.W. 2d 431.

In my opinion, to attribute to the word "departments," the meaning that it encompasses all three branches of the government, would render superfluous the remaining words "state offices, boards and commissions," appearing in §15.6. Any such state office, board or commission would necessarily be included within one or the other of the three main departments of government.

The Supreme Judicial Court of Massachusetts when called upon to interpret the word "department" as the same appeared in Article 30 of the Constitution of the Commonwealth and as such expression was used in Article 48 of the Amendments to such Constitution observed:

"For several reasons it is not permissible to interpret the word "departments" used in the relevant clause of Article 48 as comprehending the three grand departments of government described in Article . . . 30 of the Declaration of Rights. . . . The word "department" is used in Article 30. It there embraces as applied respectively to 'the legislative department,' 'the executive,' and 'the judicial,' all the functions of the government of the commonwealth. Although the same word in the plural is found in the clause already quoted from article 48 of the Amendments, it manifestly is there used in a much more restricted sense. . . . To attribute the same meaning to the word in both articles would also render superfluous and of no signification the remaining descriptive words in the relevant clause of article 48 of the Amendments, namely: "Boards, commissions or institutions." Every part, clause, phrase and word of the Constitution and its Amendments must be given meaning commensurate with the importance of the instrument of government in which it occurs." *Yont et al. v. Secretary of Commonwealth* 176 N.E. 1, 2, 275 Mass. 365 (1931).

In my opinion, the legislature is not a department within the terms of §15.6.

Accordingly, legislative printing is not included among the types of printing for which the printing board may let contracts.

It is questionable whether the legislature may constitutionally delegate to the printing board the constitutional duty of each house to keep and publish the journal of its proceedings. But it is unnecessary to decide that question because the legislature has not delegated these duties. The clear implication from the express duty of each house to keep and publish its own journal is that each may arrange for its own printing. *Koehler & Lange v. Hill,* 1883, 60 Iowa 541, 14 NW 738.

The printing board is a creature of statute with no powers except those expressly delegated to it by statute or necessarily and fairly implied as being incidental to the exercise of an expressly delegated power. In my opinion it has no express or implied power to execute contracts for legislative printing. Its only duty in connection with legislative printing is to approve vouchers for payment of bills therefor as provided in §2.10.

Accordingly, I must conclude that the contracts which the printing board negotiated and executed with Oline Printing Company on Decem-

ber 12, 1966, for composition of the House and Senate journals, and with Midwest Photo-Engraving Corporation on December 22, 1966, for the legislative printing, were void *ab initio*.

Unless it is determined that each house ratified or renegotiated these contracts, or is somehow estopped from denying them, there is no legal basis under which either company can recover the balance of any agreed consideration due thereunder. Nor is either company entitled to recover on the quantum meruit for the value of the services they have rendered. Nor can they recover on the theory of unjust enrichment. *Madrid Lumber Co. v. Boone County*, 1963, 255 Iowa 380, 121 NW 2d 523 and cases cited therein; 43 Am Jur 771; 43 Am Jur 761; 49 Am Jur 277; 49 Am Jur 285-286; 10 Drake L R 53; see also O.A.G. 2/20/67 and 38 A.G. 891 re void contracts for attorney fees.

The foregoing authorities also support the proposition that where statutory bid requirements are violated, public contracts are ultra vires and void (not merely voidable). There is some evidence here that the composition of the House and Senate journals, a process incident to the printing, and which was the subject of the Oline Printing Company contract, was not properly advertised for bid as required by the law effecting printing board contracts. No further consideration is given to this issue because I have concluded that contract is void for other reasons.

From the facts I have ascertained, there is no evidence or law to sustain these contracts on the theory of ratification, renegotiation, estoppel, or waiver. 10 Drake LR 67 and Iowa cases cited therein.

On the other hand, it does not appear that the state is entitled to recover back from either company the money it has paid under these void contracts during the progress of the work. See 10 Drake LR 72 and Iowa cases cited thereunder, and 43 Am Jur 771-772.

Furthermore, the printing companies may be able to retain and even recover back their work product created for the benefit of the state and for which no payment has yet been made. *Snouffer & Ford v. City of Tipton*, 1913, 161 Iowa 223, 142 NW 97. The Snouffer case held that a contractor not entitled to recover on his contract for paving the streets of Tipton, or on the quantum meruit therefor, was nevertheless legally entitled to remove the paving if it could be done without leaving the streets in worse condition than they were prior to the paving. On the basis of that case, it is my opinion the state will not be permitted to retain the work product of these companies for which no payment has been made.

In my judgment, the state has a moral obligation to compensate these companies on some equitable basis for the services they have performed to date and the benefit of which the State accepts, but such compensation can only be authorized by the legislature. O.A.G., 2/20/67.

Article III, Section 31, Constitution of Iowa, provides:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject

matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

Since I have concluded the contracts are void *ab initio*, the first clause of the aforementioned section is not applicable. The second clause is not applicable because Article III, §9 of the Constitution requires each house to keep and publish a journal of its proceedings. And §2.10, Code, 1966, provides a standing appropriation for the cost of printing, which is the subject matter. Both the constitutional duty and the law with reference to this subject matter pre-existed the claim. The third clause is not applicable because no appropriation is required. §2.10 already provides the necessary appropriation.

None of Article III, Section 31, being applicable to restrict payment of these companies' claims, if authorized by the legislature on some equitable basis, it is within the province and power of the legislature to enact a law, by a constitutional majority in each house, allowing the same and fixing the amount thereof to be paid from the appropriation provided by §2.10 and in accordance with the terms thereof.

As far as future printing for the 62nd General Assembly is concerned, each house has a constitutional duty to keep and publish a journal of its proceedings, and each must do so. The manner and method, and the person or corporation with whom each contracts for such printing, if it contracts with anyone, is the sole prerogative of each house. No bids are required. There is nothing to prevent either house from contracting with the same printing companies, or either of them, as the printing board purported to do, or on the same or different terms.

May 12, 1967

MOTOR VEHICLES: Temporary restricted license. No modified order to issue a temporary restricted license is authorized under §321B.8 where individual license is revoked because of a refusal to submit to a test for intoxication.

Mr. Thomas Rowe, Jefferson County Attorney: Your letter of May 5th has been received asking our opinion on the following question:

"When an individual has been arrested for the offense of operating a motor vehicle while intoxicated and elects not to submit to the withdrawal of a specimen of blood, breath, saliva or urine for the purpose of determining the alcoholic content of his blood, the question is asked that after his driving privileges in the State of Iowa are revoked for refusal to submit to the withdrawal of said specimen, and said revocation is thereafter sustained in a hearing before an authorized agent of the Commissioner of Public Safety, may the Commissioner, on application, issue a temporary restricted license to the individual when the individual cannot perform his regular occupation without the use of a motor vehicle?"

In answer to your question we are of the opinion that a temporary restricted license cannot be issued to this individual. The Section, §321.B.8, dealing with these cases, provides for a hearing and an order as follows:

"The Commissioner or his authorized agent shall order that the revocation or denial be either rescinded or sustained."

No modified form of order is authorized in this case. Only in §321.210, dealing with other stated violations, is authority granted for the issuance of a restricted license "to any person *convicted* whose regular employment is the operation of a motor vehicle or who cannot perform his regular occupation without the use of a motor vehicle." But in your above case, the license is revoked, not because of a conviction, but because of a refusal to submit to a test for intoxication. See opinion in 1960 O.A.G. 161 as to what is meant by *conviction* annexed.

May 17, 1967

LIQUOR, BEER AND CIGARETTES — Class "B" Beer Permits. §124.39 Holders of Class "B" Club Beer Permits are not subject to the provisions of §124.39, 1966 Code of Iowa where the sale of beer is merely incidental to the primary purposes of a private club and is not a business of the private club.

Mr. Richard J. Murphy, Clarke County Attorney: Your letter of May 2, 1967 has been received wherein you request this office to render an opinion as to the application of Chapter 124.39, 1966 Code of Iowa to clubs possessing a class "B" club beer permit under the provisions of Chapter 124.15, 1966 Code of Iowa.

Chapter 124.39, 1966 Code of Iowa provides in part that:

"1. No Dancing shall be permitted in connection with the operation of a *beer business* under any class "B" license, except that cities and towns may, by ordinance, and county boards of supervisors may by resolution authorize and license dancing in connection with the operation of a beer business under a class "B" license provided. . . ." (Emphasis added)

Thus, Chapter 124.39, 1966 Code of Iowa prohibits dancing in establishments operating a beer business under a class "B" license unless authorized by cities or towns or Board of Supervisors as the case may be.

Initially, Chapter 124.3, 1966 Code of Iowa establishes three classess of beer permits, i.e. Class "A," Class "B" and Class "C." A class "B" permit allows the holder thereof to sell at retail beer for consumption *on* or *off* the premises. However, Chapter 124, 1966 Code of Iowa has created two classes of class "B" permits for Chapter 124.15, 1966 Code of Iowa provides that:

"Cities and towns shall upon application, issue to a club within their respective limits a class "B" permit for the sale of beer for consumption *on* the premises, subject to the provisions of this Chapter." (Emphasis added)

Chapter 124.16, 1966 Code of Iowa lists certain restrictions and prerequisites before a club may obtain a class "B" permit and among those restrictions is found the following language:

"No club shall be granted a class "B" permit under this Chapter:

* * *

2. If it is a proprietory club, or operated for pecuniary profit."

Chapter 124.39, 1966 Code of Iowa restricts dancing in connection with the operation of a *beer business.* It is incumbant to determine what is meant by the term "business." In Vol. 5, Words and Phrases, the usual

and more accepted meaning of the term "business" is that which occupies time, attention and labor of men for the purpose of a livelihood or profit. (Citing numerous cases) Admittedly, the lack of a profit does not indicate that one is not conducting a business within the accepted meaning. However, it is necessary that the motivation for devoting the time and attention to certain activities is the expectation of a livelihood or profit.

By statutory restriction, however, a holder of a class "B" club permit is prohibited from conducting an operation for pecuniary profit. Therefore, it would necessarily follow that if a club has met the prerequisites for obtaining and possessing a valid class "B" club permit, then by definition the club cannot be conducting a beer business within the accepted meaning of the term "business."

This view is strengthened by the fact that class "B" club permit holders are restricted to the sale of beer for consumption on the premises only and, thus, sales would be merely incidental to the purposes of the club. Sales of beer for consumption off the premises could not be said to be sales incidental to the purpose of the club, but would, in all likelihood, be for pecuniary reasons.

In *State v. University Club*, 130 P. 468 (Nev. 1913), the Nevada Court held that a bona fide social club, which dispensed liquor at its clubhouse to members and guests at a fixed charge as an incident to the general purposes of the club, the profit on the sale going to pay the general expense of the organi ation was not required to take out a license by Revenue Laws §§3777-3785, which provides for a license upon the *business* of dispensing intoxicating liquors; the court indicated the term "business" in such a statute meant business in the trade or commercial sense.

The legislative history of Chapter 124.39, 1966 Code of Iowa shows that the statute was amended by the Acts of the 61st General Assembly. Prior to the present wording of the statute in question, Chapter 124.39, in addition to prohibiting dancing unless so authorized by cities and towns, also provided for the attendance of a policeman at all times during the hours of dancing at the expense of the permittee. These provisions regulating dancing were specifically not applicable to a club holding a class "B" permit as the exception was provided for in Chapter 124.39.

The 61st General Assembly amended Chapter 124.39 by striking all of what was formerly sub-section (2) of Chapter 124.39 which contained the provisions concerning the necessity of having a policeman present when dancing is permitted on the premises as well as the exclusion relating to clubs.

The intent of the legislature amending Chapter 124.39 is manifested in the explanation of House File 64 which amended Chapter 124.39. The explanation states:

"The intent of this bill is to eliminate the provision that beer permittees having dancing must hire policeman. The statute as presently written creates a conflict of interest in enforcement and it places an unnecessary financial burden on the licensee or permittee, and is not a realistic control measure.

"Further this provision is not uniformly enforced around the state and there are a number of police officers where the measure is enforced who believe the dance police supervisor should be eliminated."

There is no indication that the legislature intended to change the statute to make clubs operating under a class "B" club permit subject to the restrictions on dancing. In fact, the explanation attached to House File 64 indicates that the intent of the 1965 amendment to Chapter 124.39 was to remove the provisions pertaining to police officers only.

The distinctions between class "B" beer permits and class "B" club beer permits are still found in other sections of Chapter 124, and in view of the fact that a club does not operate a business within the accepted definition of business, it is the opinion of this office that Chapter 124.39, 1966 Code of Iowa prohibiting dancing in connection with the operation of a beer business is not applicable to the holder of a class "B" club permit issued under the authority of Chapters 124.15 and 124.16, 1966 Code of Iowa, where the sale of beer on the premises only is merely incidental to the primary purpose of such a club.

May 18, 1967

DOMESTIC RELATIONS — Marriages — Validity — Who may solemnize — Chapter 595, Code of Iowa, 1966. A marriage solemnized by a member of the Spiritual Assembly of the Baha'i who is neither licensed nor ordained is valid. The Baha'i religion provides for a mode of entering the marriage relation which is peculiar within the meaning of §595.17 so that the provisions of Chapter 595 so far as they relate to procuring licenses and solemnizing marriages are not applicable to members of the Baha'i denomination participating in marriage ceremonies conducted in accordance with the usages of their faith.

Hon. Lucas J. DeKoster, State Senate Chambers, Hon. William Hill, House of Representatives: You have requested our opinion with respect to the following question:

Are marriages performed by a member of the Spiritual Assembly of the Baha'i (hereinafter referred to as an "Assemblyman") who is neither licensed nor authorized except by the Assembly, legal in Iowa under §595.17 of the Code, or any other section thereof.

The plain answer to your question is, yes. §§595.10 and 595.11, Code of Iowa, 1966, provide:

"Who may solemnize. Marriages must be solemnized by:

1. A justice of the peace, or the mayor of the city or town wherein the marriage takes place.

2. Some judges of the supreme, district, superior, or municipal court of the state.

3. Some minister of the gospel, ordained or licensed according to the usages of his denomination."

"Nonstatutory solemnization — forfeiture. Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days thereafter he makes the required return to the clerk of the district court."

Under the first clause of §595.11 a marriage performed with the consent of the parties by an Assemblyman or any other person is valid regardless of whether or not the Assemblyman or other person falls within the classes of persons authorized by §595.10 to solemnize marriages or whether or not the marriage was celebrated in the manner prescribed in Chapter 595. *State* v. *McKay*, 122 Iowa 658, 98 N.W. 510 (1904).

There remains the question of whether the persons who are married in a ceremony, celebrated in the Baha'i manner, the Assemblyman officiating at the ceremony as well as all persons aiding or abetting them should each be obliged to forfeit the sum of fifty dollars to school fund as required by §595.11. It is to be observed also that the entitlement of the Assemblyman solemnizing such a union to the two dollar fee provided for in §595.12 hinges on whether or not such Assemblyman is authorized to solemnize.

In your letter you describe the Baha'i as a religious organization loosely organized on a local basis around a group of members called a "Spiritual Assembly" which you liken to a board of trustees. You indicate that there are no clergymen in the Baha'i, licensed or otherwise, and that there is no chairman of the Spiritual Assembly, an astonishingly democratic organizational arrangement. You indicate that Baha'i marriages are performed by an Assemblyman in manner similar to that of a conventional clergyman but as distinguished from the Quaker faith where the parties marry each other without benefit of clergy (a phrase having unfortunate connotations certainly not intended in the present context).

To find the answer to the question presented it is necessary only to turn to the language of the statutory provision you cite, §595.17, which provides:

"Exceptions. The provisions of this chapter, so far as they relate to procuring licenses and to the solemnizing of marriages are not applicable to members of any particular denomination having, as such, any peculiar mode of entering the marriage relation; but each and every denomination and religious society thus exempted from the duties on the part of their members as to procuring a marriage license, before they allow such marriage relation to be entered into in their church, meeting or society, shall require and ascertain that a certificate as provided by chapter 596 has been filed in the office of the clerk of the court; in the county where such marriage ceremony is to take place; and the clerk of the district court shall not make any record or certificate regarding such marriage or marriage ceremony until such certificate has been filed in his office, as provided in section 596.2."

The question thus becomes, is the Baha'i rite a "peculiar mode of entering the marriage relationship?" We think it is. Webster's Seventh New Collegiate Dictionary defines "peculiar" to mean, "1: belonging exclusively to one person or group 2: felt to be characteristic of one only: *Distinctive* 3: different from the usual or normal: a: *special, particular* b: *curious* c: *eccentric, queer. syn* see *characteristic, strange.*"

In our opinion the Baha'i rite is sufficiently "different from the usual or ordinary" to bring it within the exception contained in §595.17. A search of Iowa cases and the authorities in other jurisdictions disclose no holdings which would lead to a contrary conclusion.

May 18, 1967

ELECTIONS: Notice of special elections, time for filing certificates of nomination by independent and nonparty candidates §§39.2, 43.11, 43.84, 43.86, 43.88, 43.121, 44.14 and 69.14, 1966 Code of Iowa. Where under §69.14 Governor calls special election on 10 days notice to fill vacancy created by death of member of state house of representatives provisions of §44.14 requiring that independent and nonparty organization candidates file certificates of nomination not less than 12 days before the time of holding such special election may be disregarded and the certificates of nomination of such candidates may be filed at any time not later than the time required for the filing of a certificate for a party candidate as provided in §43.88 i.e. in time for the candidate's name to be printed on the ballot. Although §44.14 requires that nominating papers of nonparty organization and independent candidates in such special elections be filed with the county auditor the practice of long standing in all cases of elections to the General Assembly has been to file nomination papers with the Secretary of State. Accordingly, nominating papers may be filed with either the county auditor or the secretary of state. Statutes relating to the steps necessary to hold an election are not mandatory but only directory and are to be liberally construed. To hold otherwise would discriminate against independent and nonparty organizations and deprive them of one of the most basic and fundamental rights of citizenship, namely, to run for and hold public office.

Hon. Melvin Synhorst, Secretary of State: This is in answer to your oral request for an opinion as to how party candidates, indepedent candidates and nonparty organization candidates can get their names printed on the ballot for the election to be held May 26, 1967, to fill the vacancy occasioned by the death of Representative Utzig of Dubuque, who died at his seat in the House on May 9, 1967.

On May 15, 1967, the Governor ordered a special election to be held on May 26, 1967 to fill this vacancy, acting pursuant to his duties under §69.14, Code of Iowa, 1966. That section provides:

"69.14. Special election to fill vacancies. A special election to fill a vacancy shall be held for a representative in Congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practical time, *giving ten days notice* thereof." (Emphasis added).

PARTY CANDIDATES

Chapter 43, Code of Iowa, 1966, governing nominations by political parties, makes provisions for nominations of party candidates for elections to fill vacancies:

"43.84. Vacancies in office of state senator or representative of one county. A nomination to be voted on at a special election and occasioned by a vacancy in the office of senator or representative in the general assembly for a district composed of one county, shall be made by the county central committee."

"43.86. Committee may call convention. A party central committee empowered to make a nomination to fill a vacancy, either in a nomination authorized to be made at the primary or to fill a vacancy in office, may, in lieu of exercising such right, call a convention to make such nomination."

"43.88. Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be *forthwith certified* to the *proper officer* by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received *in time*, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election." (Emphasis added).

No specific provision is made as to time, except as stated in §43.88 and, in my opinion if the certificate of nomination of a party candidate is filed within such reasonable time as will allow it to be printed on the ballot, it must be printed thereon. In case of a state senator or representative, the "proper officer" with whom the petition is to be filed is the secretary of state. §43.11(2), Code of Iowa, 1966.

INDEPENDENTS AND NONPARTY ORGANIZATION CANDIDATES

§43.121, Code of Iowa, 1966, provides:

"Nominations by petition or nonparty organizations. This chapter shall not be construed to prohibit nomination of candidates for office by petition, or by nonparty organizations, as hereafter provided in this title, but no person so nominated shall be permitted to use the name, or any part thereof, of any political party authorized or entitled under this chapter to nominate a ticket by primary vote, or that has nominated a ticket by primary vote under this chapter."

A. *Independents*

Chapter 45, Code of Iowa, 1966, relating to nominations by petitions, provides for nomination of so-called "independents," although that name is not specifically mentioned by the statute. Under this chapter, an independent may be nominated by petition as provided therein, which petition, when verified in accordance with the statute, is known as a nomination paper. The time and place of filing such nomination papers, the presumption of validity thereof, etc. are not specifically set out in Chapter 45 but such "shall be governed by the law relating to nominations by political organizations which are not political parties." It thus appears that Chapter 44, relating to nominations by nonparty organizations, governs the time and place of filing for an independent candidate.

B. *Nonparty Organization Candidates*

Chapter 44, Code of Iowa, 1966, governs nomination of nonparty organization candidates. Thereunder, §44.14 provides:

"Filing of certificates. Said certificates of nominations shall be *filed* as follows:

1. For state, congressional, and legislative offices, with the *secretary of state*, not more than eighty-five nor less than sixty-five days before the general election. . . .

2. For municipal office. . . .

3. In case of *special elections to fill vacancies* for offices to be filled by the electors of a *larger district* than a county, with the secretary of state, *not less than fifteen days* before the time of holding such special election.

4. In case of *special elections to fill vacancies* for offices to be filled by the voters of *a county,* with the *county auditor, not less than twelve days* before the time of holding such special election." (All emphasis added).

The vacancy created by the death of Representative Utzig is to an office "to be filled by the voters of a county," but two conflicts appear from §44.14. First, under §§43.11, 44.14(1) and 44.14(3) papers regarding nomination of state senators and representatives are to be filed with the secretary of state rather than the county auditor as provided in §44.14(4). And, under §43.88 such papers are to be filed with the "proper officer" whom we have said earlier herein is the secretary of state. But under §44.14(4) the papers are to be filed with the county auditor. Thus, if these sections are strictly construed as mandatory in these circumstances, we have the anomolous situation of candidates for state senate or representative filing:

1. With the secretary of state
a. If a party candidate in a general election.
b. If an independent in a general election.
c. If a nonparty organization candidate in a general election.
d. If a party candidate in a special election to fill a vacancy.
e. If an independent running for such office in a district larger than one county in a special election to fill a vacancy.
f. If a nonparty candidate, as in e
2. With the county auditor
a. If an independent running for office to be filled by the voters of a county in a special election to fill a vacancy.
b. If a nonparty candidate, as in a.

The practice has always been to file nomination papers and certificates for candidates for election to the General Assembly with the secretary of state, not the county auditor, under all of the foregoing situations. Such practice, being of long standing, is entitled to weight in our considerations.

The second conflict is that a person desiring to run as an independent or nonparty candidate, who receives only ten days notice of the special election to fill the vacancy, as provided in §69.14, cannot possibly get his papers filed with either the county auditor or the secretary of state within twelve days (as required by §44.14(4)) or within fifteen days (as required by §44.14(3)). Yet, a party candidate could, conceivably, comply with §43.88 if his certificate was filed on the day before the election "in time" to be printed on the ballot.

Of course, an independent or nonparty candidate could nevertheless be elected by a write-in vote but his chances would be slim, indeed, particularly if he had only ten days in which to campaign. I do not believe the legislature so intended to handicap or discriminate against such candidates.

It might be possible to conclude that §44.14(4) was intended to apply only to vacancies in county offices, although the words certainly do not appear that restrictive. Such a construction would not solve the problem, which would still exist as to such candidates for county office. Furthermore, had Representative Utzig represented more than one county, §44.14(3) would certainly apply and such an independent or nonparty candidate would face a fifteen day requirement. No one could contend that voters from a district larger than a county may elect county officers.

It might also be concluded that the Governor should enter a new order, fixing a new date, and giving more than ten days notice thereof. See §39.2. But, it will be noted that §69.14 says he shall give ten days notice and not "at least ten days." Moreover, the notice has already been given and to now attempt to undo and do over would doubtless create more problems and confusion, and prejudice more rights, than such procedure would relieve. The people of Dubuque County are entitled to representation in the General Assembly, which is currently in session, "at the earliest practical time" under §69.14, and which is also their constitutional right. While ten days may be a minimum, rather than an absolute, we think the Governor acted in accordance with the law and he is not required to enter a new order or prescribe additional notice. *State ex rel Carstens vs. Miskimins*, 1955, 247 Iowa 39, 72 N.W. 2d 571.

While §44.14(3) and (4) appear to be mandatory in their requirements that petitions and certificates of nominations for independent and nonparty candidates *shall* be filed as therein stated, we do not believe the legislature intended to so discriminate against them or prevent them from being nominated and running with their names printed on the ballots, in a special election to fill a vacancy called on the required ten day notice. To conclude otherwise is to emasculate §43.121 and other provisions specifically authorizing such nominations. While the calling of elections, and permitting candidates to be nominated, is mandatory under the statutes and constitutional provisions relating thereto, it is our opinion that §44.14(3) and (4) are distinguishable and not mandatory in this situation. Unlike statutes safeguarding against the loss of substantial rights of the public, statutes which are mere directions as to the steps preparatory to an election, at which there is an opportunity to accept or reject what the formalities present, are only directory, to be liberally construed. *Rafferty vs. Town Council of Incorporated Town of Clermont*, 1917, 180 Iowa 1391, 164 N.W. 199.

"The right to become a candidate for election to public office is a valuable and fundamental right. The legislature may, however, prescribe the qualifications of a person who desires to become a candidate for office, but provisions in that regard must be reasonable and not in conflict with any constitutional provisions." *29 CJS 377, Elections §130.*

" 'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are political rights which the humblest citizen possesses." *Winnett vs. Adams*, 71 Neb. 817, 99 N.W. 681.

We conclude the twelve and fifteen day limitations of §44.14(4) and (3) may be disregarded in this situation in order to effectuate what we

believe is the obvious legislative intent in all of the election laws. It is our opinion that the petition or certificate of nomination for an independent or nonparty candidate in a special election to fill a vacancy may be filed at any time not later than the time required for the filing of a certificate for a party candidate as provided in §43.88. And, in this particular case, the filing of such with either the county auditor or the secretary of state will be sufficient if filed "in time" to be printed on the ballot.

May 18, 1967

JAILS — **Judgment:** Cities and towns, §§368.15 and 789.18, Code of Iowa, 1966. Both cities and counties may be liable for expenses where a person convicted of violating a city ordinance has been sent to another county jail and without a showing that the court was arbitrary, capricious and abused its discretion, the Board of Supervisors may not interfere with his exercise thereof, under §789.18.

Mr. Michael S. McCauley, Dubuque County Attorney: By your letter of May 8, 1967, you have requested my opinion as to the following:

1. Is Dubuque County, or a city or town therein, responsible to another county for the cost of the other county's keeping of prisoners in its jail facility where convicted and sentenced in Dubuque County for a violation of a city oridnance to serve the term in the other county because Dubuque County's jail facilities are deemed inadequate by the court?

2. Does the court have authority to force the Dubuque Board of Supervisors to approve the other county's claim for the keeping of such prisoners if the Dubuque Supervisors conclude Dubuque County's jail facilities are adequate and that the court has added an unnecessary cost to the taxpayers of Dubuque County?

§368.15, Code of Iowa, 1966, provides in part:

"* * *. Any city or town shall have the right to use the jail of the county for confinement of such prisoners as may be subject to imprisonment under the ordinances of such city or town, but it shall pay the county the cost of keeping such prisoners."

§789.18, Code of Iowa, 1966, provides:

"*Commitment to jail of another county.* When a person is to be committed to jail, if there is no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be liable for all the expenses thereof."

It is my opinion, by authority of the quoted sections, that both the city and county may be liable to the keeping county under the factual situation posed in your first question. Under §368.15, the city is liable to Dubuque County and under §789.18, the Dubuque County is liable to the keeping county.

§789.18 vests the court or magistrate, and not the supervisors, with the power to commit a person to the jail of some other county, "which shall be the one which is most convenient and safe" if there "is no jail or no sufficient one in the county where the party would be permitted under the ordinary provisions of law." The court has a broad discretion

in this matter and, in absence of a showing that the court acted arbitrarily and capriciously, and abused its discretion, there is no way in which the Board of Supervisors may interfere in his exercise thereof. And, whether the court could, on its own, initiate an action against the supervisors, or order or compel them to pay the claim of the keeping county, it could certainly adjudicate an action properly brought before it by the keeping county.

May 18, 1967

COUNTIES AND COUNTY OFFICERS: Members of County Boards of Supervisors, mileage expense allowance. §§79.9 and 331.22, 1966 Code of Iowa. Under §331.22 in counties with populations under 40,000 the maximum mileage collectible by a member of the County Board of Supervisors is seven cents per mile traveled in going to and from regular, special and adjourned meetings of the Board of Supervisors and in going to and from the place of performing committee service. In counties where the population is over 40,000 a member of the Board of Supervisors may collect the statutory rate of ten cents per mile provided in §79.9.

The Hon. James T. Klein, State Representative: Your letter of May 16, 1967, presents a matter which has not previously been the subject of an opinion from this office:

"Chapter 331.22, Code of 1966, relating to compensation of the members of the County Board of Supervisors specifically enumerates 'seven cents per mile' when discussing mileage allowances.

"However, Chapter 79.9, 1966 Code, indicates an allowance of 'ten cents per mile.'

"In light of this apparent conflict I should like a ruling regarding the maximum mileage, in per mile charges, collectible by a member of the County Board of Supervisors."

In reply to your request, we wish to advise that §331.22, Code of Iowa, makes provision for mileage collectible by a member of a Board of Supervisors at two rates, one of which applies to counties with a population of less than 40,000, the other to counties with more than 40,000 population.

It is our interpretation of the law at present that in counties with populations under 40,000 the maximum mileage collectible by a member of the County Board of Supervisors is seven cents per mile traveled in going to and from the regular, special and adjourned sessions of the Board of Supervisors and in going to and from the place of performing committee service as provided in the first paragraph of §331.22. In counties where the population is over 40,000 a member of the Board of Supervisors may collect the statutory rate provided in §79.9 which is not "in excess of ten cents per mile of actual and necessary travel" while actually engaged in the performance of official duties according to the last paragraph of Section 331.22.

We have been informed by several legislators that when Ch. 101, Acts of 61st G.A. was enacted to amend several separate sections of the Code regarding mileage, it was intended that all mileage allowances for state

and county officials be fixed at the uniform rate of ten cents per mile. A Bill has been introduced to correct this situation and another has been introduced to legalize overpayments which have been made on the ten cent basis.

May 18, 1967

AGRICULTURE — Pesticides, Ch. 206. Ch. 206, Code of Iowa 1966, governs the sale, use and application of pesticides and contains no notice requirements or requirements of consent for any person or group of persons to intend to utilize aerial spraying of pesticides in the control of mosquitoes and insects providing said pesticide is applied in accordance with, or at a rate less than, the label requirements.

Mr. Dale E. Gray, Calhoun County Attorney: Receipt of your request for an opinion dated April 20, 1967, is hereby acknowledged. You have requested an opinion of this office regarding the following situation:

"In Calhoun County there is an organization known as the Twin Lakes Restoration Society which society is composed of members interested in restoring Twin Lakes and is comprised largely of residents of Webster and Calhoun County who own and occupy homes surrounding North Twin Lakes.

"In the interest of Twin Lakes the Restoration Society on numerous occasions has used toxic sprays for mosquitoes and other insects, which spraying is frequently done by airplane and the area is sprayed without giving any advance notice of intention to spray.

"A number of people have complained concerning the use of these toxic sprays as being harmful to the general welfare of the residents of North Twin Lakes and also have complained that the same is injurious to the plant life, bird life and human life.

"This office would request from you an opinion as to whether or not the laws of the State of Iowa require such a society or their agents to give notice to the residents of the area affected of the intention to spray and whether or not they must give notice of the spray to be used. Must such an organization or society obtain permission of the residents of the area to spray and what is the effect of the consent of a portion of the residents agreeing to such a spraying and denial by the remainder of the residents.

"This I know is an unusual request but it affects a considerable number of people residing in the vicinity of Twin Lakes because we have over 300 temporary and permanent homes scattered around North Twin Lakes."

Regulation of the sale, use and application of insecticides and pesticides is regulated under Chapter 206, 1966 Code of Iowa. The following statutes are applicable to the above situation:

§206.2(1) defines pesticides as:

"The term 'pesticide' shall mean (a) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating directly or indirectly any insects, rodents, nematodes, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living man, which the secretary shall declare to be a pest, and (b) any substances intended for use as a plant growth regulator, defoliant or desiccant."

§206.2(12) provides:

"The term 'commercial applicator' shall mean any person or corporation who enters into a contract or an agreement for the sake of monetary payment and agrees to perform a service by applying any pesticide or servicing any device but shall not include a farmer trading work with another."

§206.3(2)(d) states that it shall be unlawful:

"To apply or cause to be applied any pesticide in such a way as to damage seriously the health, welfare, or property of any person or pollute or cause pollution of public waters as defined in section 135.18, but no person shall be liable under this chapter if said pesticide is applied in accordance with, or at a rate less than, the label requirements."

§206.6(5) provides:

"After public hearing, the secretary is empowered to ban the use of a pesticide or formulation of a pesticide in specific areas or during certain periods upon evidence that the pesticide caused widespread serious damage to crops or livestock."

The penalties for violating this act are contained in §206.9 and the exceptions to penalties are contained in §206.8.

§657.1 defines a nuisance as follows:

"Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof."

Based upon the above statutes it is the opinion of this office that it is not unlawful for the Twin Lakes Restoration Society to spray for mosquitoes and other insects providing said pesticide is applied in accordance with or at a rate less than the label requirements.

If the facts and evidence should show that the pesticide is causing widespread serious damage to crops or livestock then the Secretary of Agriculture would have the power, pursuant to §206.5(5) to hold a public hearing and ban the use of a pesticide in specific areas or during certain periods, if the facts and evidence so warrant such action. In addition private citizens would have relief under §657.1 if again the evidence is of a sufficient degree to show that the spraying is injurious to health so as to essentially interfere with the comfortable enjoyment of life or property. It would be the opinion of this office that one of the criterion for determining whether or not spraying for insects would be injurious to health would be if the pesticide is applied at a rate in excess of the label requirements.

For a recent action for personal injuries and property damage allegedly resulting from aerial insecticide spraying operations see Nizzi v. Laverty Sprayers, Inc., 143 N.W. 2d 312 (Iowa-1966).

There are no statutes in the state of Iowa or rules and regulations promulgated thereunder which require notice to residents of an area which may be affected by mosquito spraying to give intention to spray or notice of the spray to be used. Nor is there any such statute or rule or regulation which requires any party intending to spray for mosquitoes or insects to obtain permission of the residents in the area to spray.

It would appear, under the statutory law of Iowa, that a state does not regulate the spraying of areas for mosquitoes or insects except as expressly provided above. It is therefore the opinion of this office that the Twin Lakes Restoration Society may use pesticides for controlling mosquitoes and other insects by aerial spraying, providing the pesticide is applied in accordance with or at a rate less than the label requirements under Chapter 206. Neither advance notice nor consent of all the residents of an area need be secured, however, it would be the suggestion of this office that the Twin Lakes Restoration Society give some type of informal notice of intention to spray prior to spraying as there are some individuals who may be adversely affected by the spray which is used due to some personal health problem or allergy that they may have. This, however, is not a legal requirement, and is merely a suggestion. You are further advised that this opinion is issued upon the assumption that the label requirements provided in Chapter 206 have gone through sufficient tests so that examination has been made by qualified scientific investigation that such application within the label requirements is not injurious to health or detrimental to crops, livestock and other animals and birds.

May 19, 1967

STATE OFFICES AND DEPARTMENTS — CONSERVATION COMMISSION, ENCROACHMENTS — §111.5, 1966 Code of Iowa. Any encroachments such as walls, fences, and similar type structures, upon or over any lands owned or under the supervision and direction of the Conservation Commission may be removed by the commission, pursuant to statutory procedure, if in the commission's judgment removal would be for the best interest of the public.

The Hon. James T. Klein, House of Representatives: This office has received the following request for an opinion of this office as follows:

"Attached hereto is a copy of a contract between the Rice Lake Outing Club of Lake Mills, Iowa, and the State of Iowa.

"Attachment #2 is a copy of a letter from Mr. Ellerhoff, Chief of the Division Lands & Waters to Mr. E. B. Speaker, Director of the State Conservation Commission. This letter outlines what Mr. Ellerhoff calls encroachment on state park property.

"Your opinion is hereby requested as to what effect the attached copy of the contractual agreement may have on the alleged encroachment."

In addition to the copy of the contract between the Rice Lake Outing Club and the State of Iowa you have also furnished me with a plat prepared by the State Conservation Commission. The alleged encroachments appear to be in the southeast quarter of the southwest quarter of Section 13, and the southwest quarter of the southeast quarter of Setcion 13, Township 99, Range 23 West, Winnebago County. The property in question is bounded on the north by Rice Lake and completely surrounds the property above described except for the south border which would be the north line of Section 24. Prior to 1924 this property was owned by the Rice Lake Outing Club of Lake Mills, Iowa. The property line between private and state ownership on the part of the property abutting Rice

Lake would be the ordinary high water line or mark. Rice Lake is one of those lakes which is known as a meandered lake. Most if not all of the larger meandered lakes in the state of Iowa are also referred to as navigable lakes.

In Iowa, title to the soil under navigable waters to the ordinary high water line is in the state of Iowa intrust for the use and benefit of the public. State v. Nichols, 241 Iowa 952, 44 N.W. 2d 49. The Iowa court in the Nichols case also stated that the riparian owner, or littoral owner, of lands bordering on a navigable lake have title only to the ordinary high water mark, and not to the bed of such lake that is covered by water. In other words, in Iowa the dividing line between public and private ownership is the ordinary high water mark. Those riparian owners who have land abutting on the ordinary high water mark also have certain rights as riparian owners. One of the recognized riparian rights in the state of Iowa is the right of ingress and egress from the upland property owned in fee by the riparian owner across and below that part of the lake bed below the ordinary high water line to the water itself. Riparian owners also have certain rights to construct docks below the ordinary high water mark providing that certain requirements and regulations of the state are met for the regulating of dock construction under the police power of the state. See Peck v. Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131.

Rice Lake is one of those lakes which falls under the classification of a meandered navigable lake. The bed of the lake is owned in trust by the state for the use and benefit of the public. The bed of the lake within the ordinary high water line consists of approximately 702 acres. In examining the survey plats which you furnish me of the area in which Rice Lake is situated, you will note that the Conservation Commission has acquired approximately 760 acres of upland area which the state holds in a proprietary capacity. Except for one small area the state has acquired property in a proprietary capacity all around Rice Lake. The effect of the state acquiring such property is that since they have purchased the land which abuts the ordinary high water mark all riparian rights of the state's immediate grantors were acquired by the state through the deed of conveyance.

The property described in the July 1924 agreement between the Rice Lake Outing Club and the State of Iowa as far as the area of the alleged encroachments is concerned in approximately 150 feet in width and runs along approximately 4,000 feet of the lake shore. In other words, the strip of land is oval in nature and has a width of approximately 150 feet. The effect of this agreement was to convey upon certain conditions and limitations the equitable title or beneficial use of the property to the state of Iowa while legal title remained in the Rice Lake Outing Club. In this agreement the state agreed that the club shall have the right of way across the premises described therein and also that the club shall have the right to construct drains and lay sewer or water pipes across or through such premises as they shall deem advisable. The state also agreed that that portion of state lands which was now used by the Rice Lake Gold and Country Club as a part of the golf course could be continued to be used by the Rice Lake Golf and Country Club so long as they should desire to use it without payment of any rent. It was also

agreed that the club shall have the right to the permanent use of so much of the property described that they may desire to complete a site or location for a clubhouse or community house with boathouse and docks providing that this shall not be done in such a manner that it shall prevent the free passage of the public along the lake shore. It was further agreed that the state will not construct nor will it allow any other persons or organizations to construct any highway or public roadway of any kind along the lake shore in the premises so described. The state also agreed that the lands covered by the agreement shall be used continuously as open park lands and that at any time the state shall cease to use such lands they shall revert to the club in the manner provided by Iowa statutes as of the date of the execution of the agreement. The state also agreed to conserve the timber of such lands and to encourage lake improvement and otherwise promote the use of the land for park purposes. The club in return also agreed to furnish to the state a right of way for a road across the lands belonging to the club so that the state may have access to its lands but in so doing the club reserved the right of way across the state-owned lands to the south and east of the lands described in the agreement so that the club will have access to its 20-acre tract adjacent on the east.

There is nothing in the agreement that even remotely suggests that any of the lands which were granted to the state of Iowa to be used as park lands should in any way be devoted to a private use or purpose. The agreement itself by its express language places a duty upon the state to preserve the property as public property to be used as a state park and to otherwise promote the use of the land for park purposes.

It goes without saying that any private use of the land in question would be contrary and inconsistent with the park purpose for which the land was granted to the state through the agreement. This strip of land carried with it certain riparian rights most of which were conveyed by the agreement to the state of Iowa. The only riparian rights which the Rice Lake Outing Club retained was the right to build a boathouse or docks providing that they were consistent with the free passage of the public along the lake shore and certain rights of ingress and egress.

Any private lands abutting the 4,000 foot perimeter of the strip of land which was conveyed to the state by the agreement are not riparian owners nor do they have any incidents of riparian ownership. Their rights of ingress and egress are only those that they would have as members of the body public. Most of the encroachments which were outlined in the memorandum dated December 16, 1965, consist of such structures as a light pole, fireplace, stone-retaining wall, concrete patio, crushed rock areas, a clothesline, parts of certain structures such as houses or boathouses, flagstone steps to the lake and wooden steps to docks. Although not stated in the memorandum of December 16, 1965, it is my under standing that certain of the parties owning private land abutting the strip of land which the state acquired under the agreement also have constructed docks and other similar type facilities along the lake shore. It is the opinion of this office that all of the aforementioned structures, including any docks or similar type facilities that may have been placed on the lake shore, are encroachments upon lands either owned or under

the supervision of the state and are there without the consent of the state. The private property owners have no right to encroach upon the land under the supervision, control or ownership of the state under any alleged theory of riparian ownership as they are not riparian owners.

Section 111.5, 1966 Code of Iowa, provides as follows:

"Obstruction removed. The commission shall have full power and authority to order the removal of any pier, wharf, sluice, piling, wall, fence, obstruction, erection or building of any kind upon or over any state-owned lands or waters under their supervision and direction, when in their judgment it would be for the best interests of the public, the same to be removed within thirty days after written notice thereof by the commission. Should any person, firm, association or corporation fail to comply with said order of the commission within the time provided, the commission shall then have full power and authority to remove the same."

All of the aforementioned structures which are encroachments upon lands which are under the supervision and direction and control of the Conservation Commission are subject to removal under this statute providing in the judgment of the Conservation Commission removal of the same would be for the best interest of the public. In other words, the state can consent through a formal permit or agreement for the structures described in such statute to exist upon public lands. However, if it is the commission's judgment that their removal would be for the best interests of the public then the same may be removed pursuant to §111.5.

In an opinion of the Attorney General's office dated December 7, 1965, to the Honorable Adolph Elvers, the Attorney General ruled as to the application of §111.5. In that opinion the Attorney General specifically ruled with respect to certain cottages along the Mississippi River which were upon lands in which the state owned a fee interest that "It is in the public's name (referring to the land) that the state acquired them. Nor can the state extend to a few of its citizens special privileges: its obligation is to all."

In summary, it is the opinion of this office that the alleged encroachments upon lands which are under the jurisdiction and supervision of the Conservation Commission and that the Conservation Commission has authority pursuant to §111.5 to remove such instructions pursuant to the statutory procedure provided. You are advised, however, that removal of such alleged encroachments is not mandatory by the commission and if in their judgment their removal is not necessary for the best interest of the public then the same may be maintained. Such continuation however should be by formal agreement or permit so that the rights, duties and obligations of the private owners and the state are understood and agreed upon.

May 19, 1967

TAXATION: Validity of Tax Deeds. §§447.9 and 447.12, Code of Iowa, 1966. Notice by personal service upon chairman of State Board of Social Welfare is insufficient to cut off the right of redemption and renders the issuance of tax deed invalid. Affidavit of such service which fails to disclose under whose direction service was made, which fails to show that it was made by certificate holder, agent or attorney, and which fails to state whether affiant was agent or attorney of certificate holder renders issuance of tax deed invalid.

Mr. James N. Millhone, Page County Attorney: This is to acknowledge receipt of your letter of May 3, 1967, in which you requested an opinion concerning the validity of the issuance of a tax deed to certain property sold for taxes to Page County. The situation which you posed is as follows:

"The question has arisen as to whether the Notice of Expiration of the right of redemption and the affidavit filed with the County Treasurer in compliance therewith met the necessary pre-requisites of Chapter 447. As there was an Old Age Assistance Lien, notice was served upon the State Board of Social Welfare in compliance with 447.9. The affidavit filed by the Treasurer is hereafter set out, to-wit;

"RETURN OF SERVICE
State of Iowa, Polk County, SS. I hereby certify and make return; that I received the within and attached notice on the 25th day of Feb. 1966, and that on the 25th day of Feb. 1966 I served the same on the within named defendant Iowa State Department of Social Welfare in Des Moines, Polk County, Iowa, by delivering a true copy thereof, to Art Downing, Chairman of said Iowa State Department of Social Welfare.

(Signed) Ross R. Lewis, Deputy Sheriff

"Subscribed and sworn to before me this 25th day of February, 1966.
(Signed) Nadine Hall, Notary Public, Polk County, Iowa (Seal)

"NOTICE OF EXPIRATION, TAX SALE, COUNTY AS PUBLIC BIDDER (attached to foregoing Returns of Service). To Dollie Hazel Baker, Iowa State Department of Social Welfare, Des Moines, Iowa.
You are hereby notified that the following described real estate, situated in.....County, Iowa, to-wit;

East 70 feet of West 140 feet of the South Half of Block 43 in the Original Plat of the City of Clarinda

was sold for taxes of 1961, 1962, 1963 and suspended tax, on the 7th day of December, 1964, under the provisions of Chapter 83, 46th G. A., to Page County, Iowa, and that the right of redemption will expire, and a Treasurer's Deed for said land will be made, unless redemption from such sale be made within ninety days from the date of completed service of this notice.
You will govern yourself accordingly.
Dated 5th day of February, A.D., 1966.

(Signed) Aletha L. Hutchings, County Auditor"

You then posed two (2) questions which are paraphrased as follows:

1. Does personal service upon Mr. Downing, as Chairman of the Iowa State Department of Social Welfare, satisfy the provision of Section 447.9, Code of Iowa, 1966, which states that service upon the State Board of Social Welfare shall be made by certified mail?

2. Does the affidavit of return of service and the notice of expiration of redemption attached thereto comply with Sections 447.9 and 447.12, Code of Iowa, 1966?

Section 447.9, Code of Iowa, 1966, provides:

"447.9 Notice of expiration of right of redemption. After two years and nine months from the date of sale, or after nine months from the date of a sale made under the provisions of section 446.18, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is

situated, in the manner provided for the service of original notices, a notice signed by him, his agent, or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. When said notice is given by a county as a holder of a certificate of purchase the notice shall be signed by the county auditor. Service of such notice shall also be made by certified mail on any mortgagee, or his assignee, of record, whether resident or nonresident of the county, if his address is disclosed by the recorded instrument or by a certificate showing the address of the mortgagee or assignee duly filed with the recorder, or the state of Iowa in case of an old age assistance lien by service upon the state board of social welfare."

The Iowa Supreme Court has consistently held that the statutory requirements pertaining to the service of the notice of expiration of the right to redeem from a tax sale must be strictly complied with. *Grimes vs. Ellyson*, 130 Iowa 286, 105 N.W. 418 (1905); *Johnson vs. Miller*, 217 Iowa 295, 251 N.W. 747 (1934); *Murphy vs. Hatter*, 227 Iowa 1286, 290 N.W. 695 (1939). In *Smith vs. Huber*, 224 Iowa 817, 277 N.W. 557 (1938), the Court held that a notice by publication to resident land owners of the expiration of the period of redemption from a tax sale did not serve to terminate the right of redemption since the statute required that, under the circumstances, the notice be served by personal service. Therefore, a tax deed is void where notice regarding redemption is not given in the manner provided for by Section 447.9. *Inter-Ocean Reinsurance Co. vs. Bartleson*, 234 Iowa 335, 11 N.W. 2d 688 (1943). The statutory requirements as to the service of the notice of the expiration of redemption rights must be fully met to cut off such rights, and the Iowa Supreme Court has held that the statutory method and manner of giving the notice are mandatory requirements, and not merely directive. *Smith vs. Huber*, supra; *Ashenfelter vs. Seiling*, 141 Iowa 512, 119 N.W. 984 (1909).

It could be argued that the notice by personal service upon the State Board of Social Welfare, in the instant situation, is valid because personal service in Iowa is the best type thereof and supersedes the need for all other types of service. Cf. Rules of Civil Procedure, Rule 64. However, such an argument would be inconsistent with the construction of Section 447.9 as set forth in the aforementioned Iowa Supreme Court decisions. As was stated before, the Supreme Court holds that the statutory requirements with respect to the service of the notice of the expiration of the right to redeem from a tax sale must be strictly followed since those requirements are mandatory and absolute. Therefore, since Section 447.9 requires that the notice be served, in the case of an old age assistance lien, upon the State Board of Social Welfare *by certified mail*, any other type of notice is insufficient to terminate the right of redemption and the issuance of a tax deed will not be valid. Thus, your first question is answered in the negative.

Section 447.12, Code of Iowa, 1966, is particularly applicable in answering your second question. This statute provides:

"447.12. When service deemed complete — presumption. Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, and under whose direction the same was made; such affidavit to be made by the holder of the certificate or by his agent

or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; which affidavit shall be filed by the treasurer and entered upon the sale book opposite the entry of the sale, and said record or affidavit shall be presumptive evidence of the completed service of said notice, and the right of redemption shall not expire until ninety days after service is complete."

The affidavit of service of notice to redeem from the tax sale must be strictly construed and the showing of the making of the service and the manner thereof must be explicit. *Geil vs. Balb*, 214 Iowa 263, 242 N.W. 34 (1932). The filing of this affidavit with the county treasurer is a necessary prerequisite to the issuance of a valid tax deed. In *Re Hoyts Estate*, 246 Iowa 292, 67 N.W. 2d 528 (1955).

The affidavit must state that the person serving the notice did so as an agent of the certificate holder and it must further state under whose direction the service was made. *Fidelity Inv. Co. vs. White*, 208 Iowa 519, 223 N.W. 884 (1929); *Geil vs. Balb*, supra. Furthermore, Section 447.12 must be strictly followed even in seemingly immaterial or trivial matters. *Lyman vs. Walker*, 192 Iowa 982, 185 N.W. 607 (1921).

An affidavit, by an agent for the county holding the certificate of purchase from a tax sale, that the notice of expiration of the right to redeem was served on the president of the corporate owner of realty in such county by the sheriff thereof on a specified date was held to be insufficient to cut off the right of redemption. *Modern Heat & Power Co. vs. Bishop Steam Motor Corp.*, 239 Iowa 1267, 34 N.W. 2d 581 (1948). The following language of the Court at 239 Iowa 1276, 1277 is significant:

"We have many times construed Section 447.12 to require the affidavit of service to state that service of the notice was made by either the certificate holder or his agent or attorney. (cases cited) . . . This rule is applied where service of the notice is made by the sheriff . . .

"As the trial court held, the above affidavit of service fails to comply with Section 447.12 in that it does not show the manner of making service *nor that it was made by the agent or attorney of the certificate holder.* It is silent on both requirements. Under the decisions cited last above and several others the affidavit is insufficient in these respects, the redemption period was not cut off and the tax deed was invalid." (Emphasis supplied)

The affidavit in the instant situation is defective. It fails to show under whose direction the service of the notice upon Mr. Downing was made. Also, the affidavit does not show that it was made by the county as the certificate holder, its agent or its attorney as required by Section 447.12. Finally, the affidavit fails to state whether the affiant was the agent or attorney, as the case may be, of the holder of the certificate of purchase. Thus, in answer to your second question, although the contents of the notice of expiration of redemption attached to the affidavit are sufficient under Section 447.9, the affidavit is fatally defective under Section 447.12 and the tax deed is void.

May 22, 1967

COUNTIES AND COUNTY OFFICERS: DOMESTIC ANIMALS: Rabbits §352.1. Rabbits raised for market are not such domestic animals as to come within the meaning of §352.1 (Code of Iowa, 1966).

Mr. Walter J. Willett, Tama County Attorney: You have recently written, by letter of May 2, 1967, asking our opinion as follows:

"In Tama County, Iowa, we have some individuals who have built up a large business of raising rabbits for meat and which they supply a general market for this product through regular purchase. A large number of these rabbits including breeding stock was recently killed by dogs and they have presented a claim for the same under §352.1 of the 1966 Code of Iowa. * * *

"However, these rabbits are a business and raised for meat and the question that has presented itself is as follows, to-wit:

'Are rabbits raised and sold for meat, including their breeding stock, considered a domestic animal under Section 352.1 of the 1966 Code of Iowa?' "

I am of the opinion that rabbits are still wild by nature and are incapable of being domesticated within the meaning of §352.1. This being the case, a claim for damages resulting from the killing of rabbits by dogs cannot be allowed against the County in which the killing occurred.

The former opinion of the Attorney General, now cited as 1940 O.A.G. 39, is still authoritative and controlling; a photostatic copy of this opinion is annexed hereto as Exhibit A.

May 23, 1967

STATE OFFICERS AND DEPARTMENTS — Bonus Board — §§35.5 and 35.10, Code of Iowa, 1966. The bonus board may make payment on account of an indebtedness of a World War I veteran which was incurred prior to the filing by such veteran of an additional bonus and disability application.

Mr. Ray J. Kauffman, Executive Secretary, State of Iowa Bonus Board: You have requested our opinion with respect to the following question:

Can the bonus board make payment of an indebtedness of a World War I veteran where such indebtedness was incurred prior to his filing an additional bonus and disability application?

In our opinion the bonus board can make such payment.

The rules and regulations promulgated by the bonus board are silent on the question presented.

§§35.5 and 35.10, Code of Iowa, 1966, give the bonus board broad discretion in authorizing payment of claims and determining eligibility of applicants.

"When any award from such additional bonus and disability fund is made by said bonus board, payment shall be made in the manner provided in section 7*, chapter 332, Acts of the thirty-ninth general assembly."

"Sec. 7. Bonus Board — duties — payment of claims — assignments. There is hereby created a board to be known as the 'bonus board' to consist of the state auditor, the state treasurer, the adjutant general and the adjutant of the Iowa department of the American Legion. It shall be the duty of said board to examine into such applications and make any other examination necessary to establish facts, and approve or disapprove the same."

* * *

"Eligibility for aid hereunder shall be determined upon application to the Iowa bonus board, whose decision shall be final."

There is nothing in these provisions of law or elsewhere in Chapter 35 which would prohibit the bonus board from paying an indebtedness incurred prior to the filing of an application.

May 23, 1967

MINORS: Consent to adoption: Neither the release provided in Chapter 238, 1966 Code of Iowa, nor the consent to adoption by a divorced husband not having custody of a child and not "providing for the wants of the child" as stated in Section 600.3, 1966 Code of Iowa, is required. However, if no release is obtained the divorced husband must be notified of the adoption proceedings as required in Section 600.4, 1966 Code of Iowa.

Board of Control of State Institutions: I have before me your letter in which you asked for an opinion concerning the right of the Board of Control of State Institutions to place for adoption a baby girl born in November of 1966, to a mother who had been divorced by a decree filed in May, 1966.

The other facts you give in your letter are as follows: the divorce decree makes no mention of this child; the divorce petition had been filed in September of 1964; and there had been a hearing and order for support of another child in October, 1965 with an order for support filed November, 1965. In your letter you state that the divorced husband and the mother of the child were not living together at the time the baby was conceived and that the divorced husband knows nothing of the birth of the child. You further state that the baby's mother signed a release for the baby's placement at the Iowa Annie Wittenmyer Home in Davenport "giving the Iowa Annie Wittenmyer Home the right to place this baby in an adoptive home."

In your letter you further state:

"We question our legal right to place Baby Girl Martin for adoption without the release from Mr. Martin or a court order terminating the guardianship, with notice given to Mr. Martin.

* * *

"It is our understanding that the paternity of a child is not determined in a divorce decree and the granting of custody of a child is incidental to the divorce proceedings.

"The County Welfare Department, who referred the baby, discussed this case with their Judge who advised that a consent, from anyone other than the mother, is not necessary, and referred to the 'Alley' case."

Your attention is called to the Ellis case, decided by the Iowa Supreme Court last month and recorded in 149 N.W. 2d 804. In that case the Supreme Court said:

"[4] Of course an adoption does change the status of a child and may affect incidents of a divorce decree involving parental duties and privileges. But where the conditions and circumstances prescribed by Chapter 600 as warranting adoption are shown to exist, the fact the adoption may affect certain incidents of a divorce decree is not a bar to such adoption. In re Adoption of Chinn, 238 Iowa 4, 9; 25 N.W. 2d 735, 738."

In that case the court had before it the question of whether the father's consent was necessary as provided in Section 600.3 of the 1966 Code of Iowa. In that section of the Code "the consent of both parents shall be given to such adoption unless . . . if not married to each other the parent having the care and providing for the wants of the child may give consent."

This provision is similar to the provision relating to the release that the parents give to a child placing agency. Section 238.27 reads in part:

"Neither parent may sign such release without the consent of the other unless . . . the parents are not married to each other."

Section 238.28 of the 1966 Code of Iowa, reads:

"If the parents are not married to each other, the parent having the care and providing for the wants of the child may sign the release."

In the Ellis case, supra, the court in interpreting the language concerning a consent, as provided in Section 600.1, said:

"[7] It is clear that since the divorce, appellee and his former wife have not been married to each other. We have held this statute permitting consent of one parent only to adoption if parents are 'not married to each other' is not restricted to parents of illegitimate children and divorced parents are within it. In re Adoption of Karns, supra, 236 Iowa, at 935, 20 N.W. 2d, at 476.

* * *

"[9] . . . We believe under the circumstances she was the parent having the care and providing for the wants of the child.

* * *

"As previously stated, the divorce decree made no award of Dawn nor did it provide Rex (divorced husband) visitation rights, but required him to contribute $5 per week toward her support. He admitted on examination that he hadn't paid it, testifying 'since I did not have any idea where the child was, I didn't pay the sum. I would have paid this amount if I had known.'

"After our decisions in Re Adoption of Alley, 234 Iowa 931, 14 N.W. 2d 742; In re Adoption of Karns, 236 Iowa 932, 20 N.W. 2d 474, and In re Adoption of Chinn, 238 Iowa 4, 25 N.W. 2d 735, all supra, the 52nd General Assembly in 1947 overhauled and made a number of changes in our adoption statutes. The journals of that session show there was introduced an amendment to Code Section 600.3, I.C.A., plainly designed to require consent of a divorced father to the adoption. The amendment was defeated. The 52nd G. A. [Chapter 281, Section 4] amended Section 600.4, however, to provide for notice of the adoption proceedings 'to a divorced parent not having custody of the child.'

"It is therefore plain the legislature did not intend to require consent of a divorced parent not having custody unless he is 'providing for the wants of the child' as stated in Section 600.3. In re Adoption of Perkins, supra, 242 Iowa 1374, 1400, 49 N.W. 2d 248, 262.

* * *

"[10] We hold under the facts here Rex's (divorced husband) consent was not a necessary preliminary to appellant's maintaining an action for adoption of his child. In re Adoption of Cannon, 243 Iowa 828, 832, 53 N.W. 2d 877, 880."

In the Ellis case, however, the Supreme Court reversed the lower court and remanded the case with instructions to "investigate and hear the matter of appellants' petition for adoption and make such decree as may then be proper" and said:

"[11] The trial court shall prescribe the notice to be given Rex Ellis (divorced husband) of this hearing and afford him an opportunity to resist the adoption."

Therefore, it is the opinion of the undersigned that, while the divorced husband of the mother of a child need not give a release to an agency since "the parents are not married to each other" if "the parent having the care and providing for the wants of the child" signed the release to your agency, it still is necessary to give notice of a hearing on the petition for adoption as provided in Section 600.4 of the 1966 Code of Iowa, to the divorced husband.

May 23, 1967

SCHOOLS — Sale of real property — §297, subsection 22, 23, 24 and 25. Where voters authorize Board of Directors to sell and convey or lease or otherwise dispose of certain real estate such authorization does not give the board power to deal with the real estate differently than other property which they are otherwise authorized to sell or lease.

Mr. Ray A. Fenton, Polk County Attorney: This is in reply to your letter dated April 21, 1967 which included the following request for an opinion:

"At the request of the Des Moines Independent Community School District, I am asking for an Attorney General's Opinion relative to the power and right of the School district to sell real estate and whether there must be an appraisal and advertisement for bids where the electors have voted an authorization to the board to sell real property.

* * * *

"On September 13, 1965 the voters of the Des Moines Independent Community School District at a school election authorized the sale of Slinker School in Des Moines, the language of the ballot authorizing the sale reading as follows:

'Shall the Des Moines Independent School District by its Board of Directors sell and convey or lease or otherwise dispose of the following described real estate (describing first Whitaker School and then describing Slinker School) for such consideration and upon such terms as may in the judgment of said Board of Directors be for the best interest of said school district and apply the proceeds of said sale or lease to the school house fund of said district.'

"The specific question which the Des Moines Independent Community School District wants answered is whether when the authorization to sell has been voted under §278.1, paragraph 2, it is also necessary to have the property appraised, advertised for sale and bids taken."

It is our opinion that prior to the sale or disposal of any real estate the Board of Directors of the Des Moines Independent Community School District is required by the last paragraph of §297.22, and by §§297.23 and 297.24 of the Code of Iowa to obtain an appraisal of the real estate by three disinterested free holders residing in the school district and appointed by the County Superintendent of Schools; to advertise for bids

for the sale of such property by publication of at least one insertion each week for two consecutive weeks in some newspaper having general circulation in the district, and by taking bids made thereon not prior to two weeks after the second publication nor later than six months after the second publication.

Under the present state of the law, these sections specify the statutory methods for the school board to dispose of the property of the corporation. We are aware that under §297.25 the sections cited above are to be construed as independent and additional to the power vested in the electors by §278.1 to direct the sale of property owned by the school district. It is our view however, that the electors in voting the proposition set out above did not in any way authorize the Board of Directors to convey or lease or otherwise dispose of the real estate described in any mode or manner other than that which they are authorized to do by the laws of this state. Such direction by the voters was required because the value of the school property involved exceeded the amount with which the board had power to dispose of under §297.22.

It is our view that the use of the words ". . . for such consideration and upon such terms as may in the judgment of said Board be in the best interest . . ." merely recognizes that the Board has discretionary power within the limits of the law, and does not operate to invest the Board with powers to deal with this real estate differently than real estate which they are otherwise authorized to sell or lease.

Although it appears that there may be other questions involved in this matter, we undertake herein to advise only the question specifically raised by your request.

May 24, 1967

BOARD OF SUPERVISORS—DRAINAGE DISTRICT WASTE BANKS, §455.163 of the 1966 Code of Iowa: The landowner has the beneficial use and ownership of drainage district waste banks when such use does not interfere in any way with the easement or rights of the drainage district and the Board of Supervisors when acting in that capacity must pay a landowner for any dirt which is taken from a waste bank.

Mr. Ira Skinner, Jr., Buena Vista County Attorney: Receipt of your letter dated May 9, 1967, is acknowledged. You have requested an opinion of this office on the following situation:

"A question arises in Buena Vista County concerning the ownership of the waste or spoil banks along the drainage ditch in drainage district #181, and more particularly whether Buena Vista County is legally obligated to pay the landowner for any dirt removed from the waste or spoil banks of the drainage ditch.

"Also is there any legal prohibition preventing the county from paying for dirt taken from the waste or spoil banks of the drainage ditch?

"Also can the Board of Supervisors, acting as trustees of the drainage district, come in and remove dirt from the waste or spoil banks of the ditch and use the dirt as fill on county roads without paying the landowner upon whose land they enter for the purpose of removing the dirt from the waste or spoil banks?

"Factually what happened is that some of the landowners along the drainage ditch were given permission to come in and level the waste or

spoil banks and seed them down. Now the county has entered upon their land for the purpose of securing some dirt to use in road construction work throughout the county and not for the purpose of benefiting the drainage district as far as the ditch itself is concerned. In securing this dirt, they have gone in and torn up the seeded-down areas and taken the dirt without payment to the landowner for the dirt so removed. The landowners contention is that they own this dirt from the spoil or waste banks and the drainage district trustees contend that the dirt belongs to the drainage district and that they can remove it any time they want to remove it and for any purpose.

"Under Section 455.163 of the 1966 Code of Iowa, it is obvious that the landowner retains the beneficial use of the land which is occupied by the waste or spoil banks but the question is does he own the dirt out of which the waste or spoil banks are formed? If the landowner does own this dirt, then would the county be legally obligated to pay the going rate for dirt when removing it?"

Section 455.163 of the 1966 Code of Iowa sets forth the landowner's right of ownership in the waste bank adjacent to a drainage ditch. Section 455.163 reads as follows:

"Waste banks — private use. The landowner may have any beneficial use of the land to which he has fee title and which is occupied by the waste banks of an open ditch when such use does not interfere in any way with the easement or rights of the drainage district as contemplated by this chapter. For the purpose of gaining such use the landowner may smooth said waste banks, but in doing so he must preserve the berms of such open ditch without depositing any additional dirt upon them."

As stated in the case of *Boat v. Van Veen*, 241 Iowa 1152, 44 N.W. 2d 671, this statute has never been construed by the courts. 241 Iowa 1152, 1158. Though the Supreme Court in the case of *Boat v. Van Veen* discussed §455.163 it sheds no light on the question presented in your letter.

It is recognized law in the state of Iowa that a drainage district is a legislative creation which has no rights or powers other than those found in the statutes which gave and sustain its life. *Board of Trustees of Monona — Harrison Drainage District No. 1 in Monona and Harrison Counties v. Board of Supervisors of Monona County of Iowa*, 232 Iowa 1098, 5 N.W. 2d 189, and cases therein cited.

Since the drainage district has acquired an easement only for the purpose of constructing and maintaining a drainage district its rights are limited to those rights prescribed by the statutes creating it. It is the opinion of this office that §455.163 must be interpreted to be consistent with the general law in this area and consequently the landowner has complete title to the waste banks of an open ditch when such use does not interfere in any way with the easement or rights of the drainage district. Not only may the landowner smooth the waste banks but he may also make any other use not inconsistent with the section, such as selling the dirt or utilizing it in any other manner. See Words and Phrases, Volume 5, Page 324 for definition of the terms "beneficial use or beneficial ownership or interest" in property. It is therein stated that such expression is quite frequent in the law and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another and where such right is recognized by law the right of beneficial use can be enforced in court by the owner.

The Board of Supervisors wears two hats in that they also act as trustees of the drainage district. However they have different rights, duties and obligations when they act in their different capacities. There is nothing whatsoever in the statutes which allows the Board of Supervisors, when acting in that capacity, to go upon the land of another and take dirt, gravel or other similar material for the purpose of building a road. They must pay the landowner for the dirt from a waste or spoil bank just as they would have to pay a farmer for gravel taken from a gravel pit on land under his ownership.

May 24, 1967

DOMESTIC RELATIONS — Marriage — legal age — §§595.2. There is no authority for the court to grant an order authorizing issuance of a marriage license by the Clerk of the District Court if the female is below the age of sixteen and not pregnant. If birth of the child has already occurred, a female may not be considered pregnant or within the exception, provided in §595.2.

Mr. Michael S. McCauley, Dubuque County Attorney: In regards to your letter of May 8, 1967 in which you enclosed a letter from the Clerk of the District Court requesting an opinion from this office on two questions, please be advised that the following is submitted for your information.

The first question upon which an opinion is requested is as follows:

"Under the law, a male under 18 or a female under 16, the legal ages in Iowa, can apply for a marriage license if the female is pregnant and the District Court Judge signs a Court Order authorizing the Clerk to issue the license. My question is: Do the parents still have to give their consent for underage applicants when this Court Order is signed?"

Your attention is invited to an Attorney General's opinion issued December 2, 1964, wherein your question is answered in the negative in said opinion.

Your second question upon which you requested an opinion of this office is stated as follows:

"Can the Judge issue the Court Order of Authorization for underage applicants if the female has already given birth to their child and she is not pregnant?"

Initially, it is fundamental that the legislature is endowed with the power to regulate the qualifications of the contracting parties, the forms or proceedings essential to constitute a marriage, and the duties and obligations it creates with respect to matrimonial contracts. 55 CJS page 809.

Thus, Chapter 595.2, 1966 Code of Iowa, provides in part:

* * *

"Notwithstanding the foregoing, the District Court may, when application is made by parties, one or both of whom are under the age thus fixed and the *female of whom is pregnant*, grant an order authorizing issuance of a marriage license by the Clerk of the District Court to said applicants and the marriage under such license shall be valid. . . ." (emphasis added)

The above provision was added to Chapter 595.2 by Chapter 276 Acts of the 59th General Assembly. Prior to said amendment there were no provisions providing for the Court to authorize a marriage license outside of the prescribed age limits contained in the statute. The legislature, when providing an exception within the statute, authorized the exception only in cases where the female is pregnant at the time the application is made to the Court.

The term pregnant is defined by Webster's New Collegiate Dictionary (7th Edition) as "containing unborn young within the body" and it has been universally held by the courts, that pregnancy is the existance of a condition beginning at the moment of conception and terminating with delivery of the child. *State v. Colmer*, 132 A2d 325 (N. J. 1957); *Gray vs. State*, 178 S.W. 337 (Tex. 1915); *State vs. Ausplund*, 167 P. 1019 (Ore. 1917).

The statute appears clear and unambiguous and, therefore, it is our opinion that within the provisions of the foregoing statute, as it is presently worded, the Court is authorized to order an issuance of a marriage license only in the event the female is pregnant. Therefore, if birth of the child has already occurred, then by definition the female is no longer pregnant and the exception within Chapter 595.2, 1966 Code of Iowa, is no longer applicable.

In view of the foregoing, the remaining questions contained in your letter are no longer applicable.

May 24, 1967

TAXATION — Soil Conservation Subdistricts, 467A.20, 1966 Code of Iowa. Tax monies derived from the special annual tax provided for in Section 467A.20 may be spent by the governing body of the entire subdistrict in such a manner to benefit the entire subdistrict without regard to county boundaries.

Mr. William H. Greiner, Director, State Soil Conservation Commission: Receipt of your letter dated May 4, 1967, pertaining to expenditures of funds raised under the provisions of §467A.20 is acknowledged. You have requested the following opinion of this office: In the event a subdistrict embraces territory within two or more counties can the money raised in one county be spent in other?

To be more specific, you have asked that if a subdistrict embraces three counties can funds raised in two of the counties be used to take care of a maintenance problem for that portion of the district that lies in another county?

It is the opinion of this office that the first paragraph of §467A.20 grants authority to a subdistrict to impose a special annual tax to be used for the repayment of actual and necessary expenses incurred to maintain present works of improvement within its boundaries. The statute does not make any distinction when referring to a subdistrict which embraces one county or more than one county. Thus a subdistrict, regardless of the number of counties that may be within its boundaries, is treated as one entity for purposes of imposing special annual tax.

The statute provides that if portions of the subdistrict are in more than one county then the governing body after arriving at the estimate in dollars deemed necessary for the "entire subdistrict" shall ratably apportion such amount between the counties and transmit and certify the prorated portion to the respective boards of supervisors of each of the counties.

It is the opinion of this office that if a subdistrict embraces more than one county the special annual tax is used to defray the actual and necessary expenses of maintenance within its total boundary without respect to whether the maintenance is in one county or more than one county. In other words, we are again forgetting about the counties as being separate entities and the main emphasis is on the "entire subdistrict." The procedure for prorating the special annual tax is merely a procedure and does not affect the expenditure of the funds but rather the collection of the funds through the special annual tax. The governing body of the "entire subdistrict" which is provided for in §467A.19 need not ratably apportion the expenditure of the funds for maintenance of the portions of the subdistrict which are in several counties. Again county boundaries are not to be considered in expending monies for maintenance as such expenditure should be made to benefit the "entire subdistrict" without regard to how much land within the district may be in each county.

In summary, the collection of the special annual tax must be ratably apportioned between the counties pursuant to the formula imposed by §467A.20, however, the expenditure of the funds raised by the special annual tax should be spent by the governing body in such a manner to benefit the "entire subdistrict" without regard to county boundaries.

May 25, 1967

CONSTITUTIONAL LAW — State board of regents — Article VII, §5, Constitution of Iowa. Senate Files 531 and 532 which would authorize the state board of regents to issue bonds to finance the acquisition and construction of various buildings and facilities at state institutions of higher education and to pay the interest and principal of such bonds from various sources of income other than state appropriations are constitutional. Both bills specifically negative any charge against the state so that no state debt is created which would be prohibited by Article VII, §5, Constitution of Iowa.

Hon. Donald E. Voorhees, Hon. Charles E. Grassley, State Representatives: You have each requested our opinion as to the constitutionality of Senate Files 531 and 532. Mr. Voorhees raised a further question as to whether or not an amendment to §13 in the original Senate File 531 by Senators Kruck and Hill which was adopted and later rejected would have been unconstitutional and in addition whether it would have detracted from the marketability of any bonds issued in the event the bill became law.

In our opinion both Senate Files 531 and 532 are constitutional.

These two bills, which are substantially similar, would authorize the state board of regents to issue bonds to finance the acquisition and construction of various buildings and facilities at state institutions of higher education and to pay the interest and principal of such bonds from various sources of income of such institutions other than state appropriations.

The principal point of departure between Senate File 531 and 532 is that under the latter bill the regents would acquire medical and hospital buildings and facilities at the State University of Iowa and pay the interest and principal of the bonds issued to finance the same solely from the income generated by the University medical facilities, whereas Senate File 531 would be used to acquire and construct academic and administrative buildings at a number of state institutions of higher learning and the bonds would be paid out of student fees and charges.

The case of *Iowa Hotel Association* v. *State Board of Regents*, 253 Iowa 870, 114 N.W. 2d 539 (1962) is directly in point and clearly dispositive of any constitutional questions which may be presented by these two bills. In that case plaintiffs attacked the constitutionality of a statute authorizing the state board of regents to pay the interest and principal of bonds issued to finance construction of an addition to the Iowa Memorial Union at the State University of Iowa out of income producing activities of the union and student fees.

In challenging the validity of this statute appellants urged (1) that the statute and the method of financing therein provided were repugnant to and not in compliance with Article VII, §5 of the Constitution which provides:

"Except the debts herein before specified in this article, no debt shall be hereafter contracted by, or on behalf of this State, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; * * *."

In rejecting appellants' contention that the statute involved in the *Iowa Hotel Association* case created a state debt and was therefore unconstitutional and void the court noted:

"It should be kept in mind that the constitutional prohibition relates to debts 'contracted by, or on behalf of this State.' In this case we are not concerned with what might be the authority of the board of regents in the absence of enabling legislation. The board in this case is acting within the scope of legislative authority and while so acting is limited thereby. The undertaking of the board of regents is not a debt for which the state is responsible because the enabling statute so provides. Section 6, Chapter 185, Laws of the Fifty-eight General Assembly, I.C.A. §262.48, says: 'No obligation created hereunder shall ever be or become a charge against the state of Iowa * * *.' There is no appropriation under the law. There is no obligation, express or implied, by or in behalf of the state. The state does not promise to pay. There is no alternative procedure by which the state would be required to pay. The state, speaking through the legislature, says that no one may obligate the state to pay. When the enabling act specifically negatives any charge against the state, there is no state debt within the meaning of the Constitution. For a comprehensive discussion and citation of authorities see Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770, 146 A.L.R. 315."

Senate File 531 provides in §9:

"Sec. 9. Under no circumstances shall any bonds or notes issued under the terms of this Act be or become or be construed to constitute a debt of or a charge against the state of Iowa within the purview of any constitutional or statutory limitation or provision. No taxes, appropriations, or other funds of the state of Iowa may be pledged for or used to pay such bonds or notes or the interest thereon but any such bonds or notes shall be payable solely and only as to both principal and interest from the student fees and charges and institutional income received by the institutions of higher learning under the control of the state board of regents as provided in this Act, and the sole remedy for an breach or default of the terms of any such bonds or notes or proceedings for their issuance shall be a proceeding either in law or in equity by suit, action, or mandamus to enforce and compel performance of the duties required by this Act and the terms of the resolution under which such bonds or notes are issued."

Senate File 532 contains a similar provision.

Thus, both bills specifically negative any charge against the state and in such a circumstance as the supreme court states, "there is no state debt within the meaning of the Constitution."

In seeking reversal plaintiffs in the Iowa Hotel Association case also relied on the contention that the plan of paying off the debt and service charge was not self-liquidating in that approximately 75% of the total debt was to be paid off by student fees in the form of assessments against every student until the year 1992. The court found that the project was self-liquidating and in so doing discussed the nature of student fees at the state university.

"The constitutionality of laws authorizing self-liquidating projects has long been settled. Plaintiffs do not challenge this proposition but insists that the proposed construction in the instant case is not self-liquidating. A project is self-liquidating if its cost is paid from revenues therefrom or incident thereto. An agreement to make rates sufficiently high to raise the required revenue is not the contracting of a general debt or a financial obligation. Interstate Power Co. v. Town of McGregor, supra.

"The State University of Iowa is the property of the state. It is primarily tax supported by appropriations by the legislature. The service rendered, however, in the many fields of activity is not free. Tuition and fees of various kinds are charged. The fact that a student may not participate or take advantage of every facility available does not mean that he is or should be relieved from paying student fees allocated to various projects. The present Memorial Union was a gift to the state for the use of the university. It is used as an integral part of the whole university function. Its value as a part of the university service is not challenged.

"For the privilege of attending the university there is a charge for tuition. In addition, each student is assessed what is called a student fee. The student fee is collected for special and not general purposes. These include a season athletic ticket, subscription to the Daily Iowan and yearbook, hospitalization, concert and theater tickets, alumni magazine and class and organization dues. The funds so collected are allocated to the several purposes for which collected. For years there has been included a Union student fee. This is now $8.50 per student per semester and $4.00 per summer session. The funds so collected are paid to the Memorial Union Fund. This income has been estimated and projected to show that it will, during the period of the proposed indebtedness, retire 75 per cent thereof. Earnings from the operation of the Union have been

estimated to be sufficient to meet the remaining 25 per cent. The receipts of the Memorial Union Fund from the various sources are from and incident to the Union building. The receipts being adequate to retire indebtedness, the project is self-liquidating."

The question of whether the Kruck-Hill amendment to §13 of Senate File 531 would either enhance or diminish the constitutionality of the proposal is, of course, academic and moot since the amendment was eventually rejected. It is not our practice to render opinions on moot questions. The question, which we do not decide, is whether such amendment would cause an unconstitutional exercise of executive power by the legislature in violation of Article III, §1, Constitution of Iowa, relating to distribution of power. See opinion, Attorney General, May 10, 1967.

It is true, as pointed out in Representative Voorhees' letter to me that, as a practical matter, the present general assembly would, if it enacted Senate File 531 and/or 532, in a sense be committing subsequent sessions of the legislature to make increased appropriations to state institutions to make up for the diversion to debt service funds heretofore relied on by such institutions to meet their operating expenses. The wisdom of this policy is for the legislature, not us, to decide. But, in a legal sense, these bills would not bind subsequent general assemblies since such later legislative sessions could, if they saw fit, refuse to make increased appropriations or, for that matter, any appropriation to these institutions.

May 31, 1967

STATE OFFICERS AND DEPARTMENTS: Employment Safety Commission — Rules and regulations — §§88.8, 88A.11 and 88A.12, Code of Iowa, 1966. (1) Where a statutory provision, §88.8 sets forth specific safety requirements for grinding operations, the commission may not adopt rules establishing less stringent standards. (2) All rules adopted by the commission must be set forth in full and nothing may be incorporated by reference except other commission rules. (3) The commission must hold public hearings on every proposed rule or amendment.

Mr. Dale Parkins, Commissioner, Bureau of Labor: Your letter of May 2, 1967, requests our opinion with respect to a number of questions relative to the rule-making power of the Employment Safety Commission.

The questions you have presented may be stated as follows:

1. Where a statutory provision, §88.8, Code of Iowa, 1966, sets out specific safety requirements for grinding and polishing operations, may the Employment Safety Commission in the exercise of the rule-making authority conferred on it by §88A.11 adopt rules which are less stringent than such statutory provision?

2. Can the Commission by reference incorporate into the safety rules adopted by it certain so-called Threshold Limit Values approved and published by the American Conference of Industrial Hygienists or must such Threshold Limit Values be set forth at length in the rule adopted?

3. The American Conference of Industrial Hygienists makes yearly changes in its Threshold Limit Values. Must the Commission hold public hearings each time it wants to amend its rules to reflect such changes in the Threshold Limit Values?

4. May the Commission adopt safety rules and regulations without first holding public hearings on the rule to be adopted?

In response to these questions we wish to advise as follows:

1. In our opinion the Commission may not adopt safety rules and regulations containing standards less stringent than those required by law. §88A.11 provides:

"Safety rules. The commission shall adopt reasonable rules, regulations, and codes to carry out and give effect to the policy and provisions of the employment safety laws, including but not limited to section 88A.1. The commission may amend the rules from time to time.

"The rules shall take into consideration and shall be based on applicable and recognized safety codes, standards, and regulations, including, without limiting the generality of the foregoing, any such codes, standards, and regulations heretofore or hereafter adopted by the American Standards Association, United States Bureau of Standards, American Society of Mechanical Engineers, National Fire Prevention Association, American Insurance Association, and other safety organizations.

"Rules shall be set forth in full; and incorporation of any code, standard, or regulation by reference thereto shall not be sufficient, except that other rules of the commission may be incorporated by reference.

"If any rule of the commission shall conflict with any applicable rule or regulation adopted by any other state agency, board, bureau, officer, or department, the rule or regulation requiring the higher standard shall prevail if such rule or regulation is applicable to employment safety and is authorized by law.

"All rules shall be enforced as provided in this chapter."

The penultimate paragraph of this provision makes it clear that where there is a conflict between a rule adopted by the Commission and a corresponding rule or regulation promulgated by any other state agency, board, bureau, officer or department, the rule or regulation requiring the higher standard shall prevail. *A fortiori* where, as in the instant case, a standard of safety has been enacted into law by the legislature, the Commission may not through its rule-making power frustrate the legislative will manifested in such enactment by adopting a rule or regulation embodying a lower standard. See 73 C.J.S. Public Administrative Bodies and Procedure, §§59, 94, 103 and 104.

2. The answer to the second question you have posed can readily be found by mere reference to the statute. The antepenultimate paragraph of §88A.11, hereinbefore set forth, makes it clear beyond cavil that all rules must be set forth in full and that incorporation by reference, except for other Commission rules, is flatly prohibited.

3. Assuming that the Commission did adopt a rule and set forth at length therein the Threshold Limit Values of the American Conference of Industrial Hygienists in effect at the time of adoption of such rule, the Commission could nevertheless only change such rule to reflect subsequent yearly changes in Threshold Limit Values by following the statutory process for rule-making including notice and public hearing.

§88A.12 provides in pertinent part as follows:

"Before adopting or *amending* any rule pursuant to section 88A.11, the commission shall hold a public hearing on the subject matter of the proposed rule or amendment. Any interested person may appear and be heard at such hearing, in person or by agent or counsel.

"The labor commissioner shall maintain a mailing list for hearings, and at least thirty days before the hearing the labor commissioner shall mail a notice of the hearing by ordinary mail to each person on the mailing list. Such notice shall include a copy of the proposed rule or amendment.

* * *

"Failure to comply with the notice requirements of this section shall not affect the validity of any rule unless such failure shall have been willful."

Plainly a change in Threshold Limit Values would constitute as much of an amendment to a rule as any other change and the statute makes no provision for waiving or dispensing with the requirement for notice and public hearing.

4. As indicated above notice and public hearing are an essential part of the rule-making process with which there must be compliance. It is to be observed however that the first sentence of §88A.12 requires that the Commission hold a public hearing on *"the subject matter"* of a proposed rule or amendment as distinguished from the proposed rule iteslf, although elsewhere §88A.12 does require that copies of the latter accompany notices of any hearings. Thus the Commission need not adopt precisely the proposed rule forming the basis of the public hearing. It may make changes as a result of the hearings. Obviously that is the purpose of the hearing. Of course, there must be reasonable limits on how far the Commission may go in this regard. It may not, for example, hold public hearings on one subject and then as a result thereof adopt rules relating to a substantially different subject.

May 31, 1967

PUBLIC HEALTH—Public health nurses—Chapter 148A. Public health nurses may administer physical therapy treatments but may not refer to same as physical therapy treatments or charge for physical therapy treatments.

Arthur P. Long, M.D., Dr. P.H., Commissioner of Public Health, State Department of Health: On March 9, 1967 this office issued an advisory letter to Ann L. McColley, secretary of the Therapy Examining Board purporting to answer the following question:

"Is it not a violation of Section 2 paragraph 2 of Chapter 148A of the 1966 Code of Iowa for public health nurses to administer physical therapy treatments in homes and to call the treatments physical therapy, and to charge for physical therapy treatments?"

You will recall that the letter of March 9, 1967, advised that it was not a violation of subsection 2 of chapter 148A.2, Code of Iowa, 1966, for public health nurses who are registered nurses, to administer physical therapy treatments as defined in chapter 148A.

You have now suggested that certain facets of the original question were not answered and have requested that we review this opinion.

I am in agreement that certain portions of the question remain unanswered and will attempt to answer the remaining portions that were unanswered and specifically:

a. May a public health nurse who administers physical therapy treatments refer to such treatments as physical therapy and charge for physical therapy treatments?

It is clear that the legislature, in adopting chapter 148A, intended to restrict through licensing, persons who might engage in the practice of physical therapy. In excluding from coverage those persons set out under §3 of chapter 148A, the legislature recognized that there is an overlapping of services between the practice of physical therapy and other professions and or businesses. The category of professions eliminated under subsection 1 of §3, includes "nurses" but with reference to all professions, states, "who are engaged in the practice of their respective professions." These are words of limitation not simply difinitive.

It is my opinion that the legislature, in excluding the categories set out under §3 of chapter 148A, from the licensing requirements of chapter 148A, did not intend to grant to any of those professions an unfettered right to engage in the practice of physical therapy or enlarge upon any rights they had to engage in certain phases of the practice of physical therapy.

While it is agreed that public health nurses and indeed all nurses, may administer physical therapy treatments as prescribed by a physician licensed as such in Iowa, it is my opinion that it is improper for them to refer to any such treatment as physical therapy or to charge for physical therapy treatments. Rather, they should be referred to as nursing services and charged for as nursing services.

May 31, 1967

ELECTION: Ballot, information required — §403A.25, Code of Iowa, 1966. In an election held pursuant to the low-rent housing law, chapter 403, Code of Iowa, 1966, the ballot itself must contain all of the information required by the last paragraph of §403A.25 notwithstanding the part that the notice of election may have contained all of such information.

Mr. Richard R. Jones, Taylor County Attorney: By your letter of May 18, 1967, you have requested our opinion with respect to the following question:

In an election held pursuant to the low-rent housing law, Chapter 403A, Code of Iowa, 1966, must the ballot itself contain all of the information required by the last paragraph of §403A.25 if the notice of election contained all of such information.

In our opinion the ballot itself must contain all of the information required by the last paragraph of §403A.25 notwithstanding the fact that such information may have been included in the notice of election.

§403A.25 provides:

"Election required. No municipality nor any low-rent housing agency shall proceed with the acquisition of any property for, or with the erection or operation of any low-rent housing project unless authorized by a vote of at least fifty percent of the electors of such municipality voting on the proposition at any regular, primary or general election or by special election called by the governing body of the municipality.

"Notice of the time and place of such election shall be given by publication once each week for three consecutive weeks prior thereto in some newspaper having a general circulation in such municipality. Such elec-

tion may be called by the governing body of the municipality, and shall be called when a petition asking for such election, signed by at least two percent of the electors of the municipality voting for governor at the last preceding general election, has been filed with the clerk of the municipality.

"The form of the question to be presented for a vote of the electors shall include the name of the proposed project, describe its location with reasonable certainty, specify the maximum number of housing units in said project, state whether new construction or rehabilitation of existing structures is contemplated, or a combination of same, state the maximum amount of funds to be expended for the contemplated construction or rehabilitation or both, and state the type of occupancy contemplated whether it be without limitation as to age or designed for the elderly."

The language employed in the last paragraph of this section is so plain and unambiguous that it clearly is not susceptible of any interpretation which would lead to the conclusion that the ballot could omit some of the information required by §403A.25 merely by reason of the fact that the notice of election contained such information.

There are numerous provisions in the code for the submission of various questions to the voters. However, we have been able to find none where language such as that employed in §403A.25 has been construed.

The general rule is set forth in 29 C.J.S. Elections §170 as follows:

"A ballot by which a question or proposition is submitted to popular vote by the electorate must be in such proper form that the voter will have at hand some means for making up his mind whether to vote to approve or disapprove the measure; and the test as to the form in which a public question is submitted is whether the voters are afforded an opportunity and do fairly express their will. The question must be specific, and in all essential particulars in compliance with the requirements of the statute; but it is not customary to print in extenso on the ballot the thing to be voted for, and it is sufficient if enough is printed to identify the matter and show its character and purpose. The general rule with reference to the submission of propositions is that the ballot, in submitting questions or propositions, must be free from uncertainty or ambiguity, and must not be misleading."

This general rule would be of assistance in resolving a question as to what information must be contained on a ballot submitting a question to the voter where the statute authorizing the submission of such proposition was silent or vague on the matter of what information a ballot in a particular case must contain. However, in the case of §403A.25 the legislature has set forth in some detail what information must be contained in the form of the question to be presented for a vote of the electors in order to enable the voters to make an intelligent choice either for or against a particular measure. In such an instance there is no basis for deviating from this statutory mandate relative to the contents of the ballot.

May 31, 1967

STATE HISTORICAL SOCIETY OF IOWA—by virtue of chapter 304.13, Code of Iowa, 1966, can acquire title to real estate by gift, but not by purchase, and use the same as a historical site.

Mr. William J. Peterson, State Historical Society of Iowa: You have recently posed the following question to this office:

"The question has been raised as to whether or not the State Historical Society of Iowa could receive and own through gift or purchase historic sites in Iowa."

The above really constitutes two questions, the first which deals with the right of your society to receive and own through gift, historic sites in Iowa and the second, the right of your society to receive and own through purchase, historic sites in Iowa.

The objects and purposes for which the society was formed are set out in chapter 304, Code of Iowa, 1966. §1 of that chapter is the specific section wherein the objects and purposes are defined. A careful reading of this section would indicate to me that no provision has been made for the society to own real estate for any of the objects and purposes set out in chapter 304, §1. However, the 61st General Assembly adopted what is now chapter 304, §13, Code of Iowa, 1966 which reads as follows:

"The board of curators may accept gifts, appropriations, and bequests and shall use such gifts, appropriations, and bequests in accordance with the wishes of the donor if expressed. Funds received shall be paid into the state treasury and shall be paid out on order of the board. . . ."

In my opinion this amendment to chapter 304 did enlarge the objects, purposes, powers and duties of the State Historical Society.

In normal usage the words "gifts, appropriations, and bequests" apply to personal property only as the court said in *Rountree v. Pursell*, 11 Ind. App. 522, 39 N.E. 747, 749; "A gift is not a devise, nor a devise a gift; and property which came by descent could not have come either by gift or devise. . . . The word "gift" ordinarily applies to personal property only, but in its larger signification it applies to either reality or personalty."

In Iowa, the Iowa Supreme Court, as early as 1909, ruled that the gift of land is proper. *Fitzgerald v. Tvedt*, 142 Ia. 40, 120 N.W. 465 (1909). Subsequent thereto a series of cases have recognized that it is proper in the state of Iowa to make a gift of land. See *Lembke v. Lembke*, et al, 194 Ia. 808, 187 N.W. 863 (1922) and *Lynch v. Lynch*, 239 Ia. 1245, 34 N.W. 2d 485 (1948) wherein the court said:

"There can be no question that an oral transfer of real estate followed by the taking, possession and occupancy, constitutes the valid conveyance. Oral gifts have frequently been recognized in this state as valid. . . ."

From the above Iowa cases, it seems obvious that the word "gift" is not limited to an application to personal property only and applying this to chapter 304, §13, it is apparent that the legislature has granted the board of curators of your society the power to accept real estate by gift as well as the power to use such real estate *in accordance with the wishes of the donor if expressed.*

I can find no authority in the law of Iowa for the society to acquire real estate for historical sites or any other purpose by purchase. Since the State Historical Society of Iowa is a creature of statute, it can only have those powers granted to it by the legislature.

It is therefore my opinion that your society, through its board of curators, may acquire by gift, historical sites in the state of Iowa and use such gifts within the framework of the objects and purposes set out in chapter 304, as well as in accordance with the wishes of the donor of such real estate if any such wishes are expressed. It is further my opinion that the society has no power to acquire real estate by purchase.

June 2, 1967

WELFARE: Duties of County Board pursuant to §§239.3, 239.4 and 239.5, 1966 Code of Iowa — may be delegated to the County Director of Social Welfare, since he is an employee of the State Department of Social Welfare and since the County Board is an agent of said State Department of Social Welfare, except the decision of the County Board on eligibility and determining the amount of assistance; and the amount of assistance is subject to approval of the State Board of Social Welfare (§239.5, 1966 Code of Iowa).

Mr. George J. Knoke, Pottawattamie County Attorney: I have before me your letter dated May 3, 1967, in which you refer to the duties of the county boards of social welfare, set forth in Chapter 239 of the 1966 Code of Iowa, from which you recite the following excerpts:

"Section 239.3 of that Chapter provides in part as follows: 'Application for assistance under this chapter shall be made to the *County Board*. . . .' Section 239.4 provides for investigation whenever the *County Board* receives notification of dependency of a child or an application for assistance has been made. Section 239.5 in part provides: 'Upon completion of investigation the *County Board* shall . . . notify the person with whom the child is living . . . of the decision made . . . the *County Board* shall fix the amount of assistance necessary . . . No payment for Aid to Dependent Children shall be made until the *County Board of Social Welfare* with the advice of the County Attorney, shall certify that the parent receiving the aid for the children is cooperating in legal actions or other efforts to obtain support money for said children from the persons legally responsible for said support.'"

You ask the question, "Whether the County Board itself is required to perform the duties prescribed above or whether the Board may delegate these duties to the County Director of Social Welfare."

The answer is that the Director of the County Department of Social Welfare may perform such duties, since the county boards of social welfare are agents of the State Board of Social Welfare and the county directors are employees of the State Board of Social Welfare. Thus, in each county, the county director and the county board should cooperate toward the joint responsibility and purpose of performing services for the State Board of Social Welfare, its principal in the case of the county board, and its employer in the case of the employee. In doing this the county board may personally make investigations, as well as the director or other investigators or caseworkers in the office.

The county board of social welfare, however, shall make the decision whether a child is eligible and fix the amount of the assistance, which decision is "subject to the approval of the State Department" (Section 239.5). It is the opinion of the undersigned that that duty cannot be delegated to the employee of the State Department of Social Welfare.

For references as to the relationship between the State Department and employees working at the county level, and the relationship between the state and county boards, I refer you to the following citations.

Section 239.16 states that all employees of the State Board, in the administration of this chapter, shall be governed by the provisions of Section 234.8.

Section 234.8, 1966 Code of Iowa reads:

"All employees of the state board shall be selected from among those who have successfully qualified in an examination given by the state board or under its direction, covering character, general training, and experience. Such examinations shall be open to all persons, and persons taking such examinations, upon successfully qualifying, shall be classified according to the fields of work for which said persons are fitted, all in accordance with rules and regulations of the state board adopted and published by the state board."

Section 239.18, 1966 Code of Iowa, reads:

"Questions of policy and control respecting administration of this chapter shall vest and remain in the state agency of the State of Iowa for the purposes of administering all provisions of this chapter. In order to provide a uniform state-wide program for aid to dependent children, the state board shall promulgate such rules and regulations as may be necessary to make the provisions of this chapter uniform in all of the counties of this state."

In the leading case decided by the Iowa Supreme Court, *Hjerleid vs. State*, 229 Iowa 818, 295 N. W. 139, it is held that the county boards of social welfare are agents of the State Board of Social Welfare and that the one each county board "employs" as its director is an employee of the State Department of Social Welfare.

If you have further questions in connection with this matter, please feel free to write again.

June 8, 1967

MINIMUM WAGE AND HOUR LAW—Senate File 176 not applicable—no jurisdiction of this office to interpret Federal Minimum Wage and Hour Law.

Hon. Hugh H. Clarke, State Senator: In your letter of May 31, you have asked this office to explore the potential wage and hour problem faced by funeral directors in the State of Iowa in relation to their providing ambulance service in the various counties throughout the state.

We assume that you are not referring to coverage under the Iowa Minimum Wage Act, Senate File 176, passed by the Senate on March 16, 1967. As you probably know, this particular bill was referred to the House Industrial and Human Relations Committee on March 28, 1967. It is my understanding that it did not reach the calendar in the House.

We, of course, are not at liberty to interpret the Federal Minimum Wage and Hour Act as it affects funeral directors within the State of Iowa. This law is administered in Iowa by the Department of Labor, Wage and Hour Division, 522 Federal Office Building, Des Moines, Iowa. In order to provide you with some information, I contacted Mr. Paul

Lynn at the above mentioned address and discussed the status of funeral directors under the federal act. He reported that for many years funeral directors were not considered covered under the federal act since they were classified as retail establishments. However, since 1961 various changes in the federal law have brought many of the funeral directors under this coverage since the jurisdictional yardsticks have been continually lowered in relation to the gross volume of business done by said directors. For example, several years ago any director who did a gross volume of business in excess of $1,000,000 was covered under the act. This jurisdictional amount has been dropped to $500,000 per year and within the next two years will be further lowered to $250,000 a year. In Mr. Lynn's opinion, the $250,000 figure will bring most of the funeral directors in Iowa under the coverage of the act. Of course, as far as the individual funeral directors are concerned they still have the right to contest the fact of coverage with the Department of Labor but again, it would be impossible for this office to determine just who and what director would be covered under the federal law. If it were determined that a director was covered under the federal act, and if Senate File 176 is passed by the House, Section 16 of said Senate File 176 provides that any employer covered by the provisions of the federal act would not be subjected to the provisions of the Iowa act.

Regarding your query as to whether or not, if the funeral directors fail to provide the service, do we have any suggestions for the County Board of Supervisors to follow in providing this service. Senate File 51, amended Section 332.3, Code of Iowa, 1966 and added the right to provide this service to the general powers and duties of the local boards of supervisors. You will note in said amendment that the board is given the right to "purchase" the necessary vehicles to provide the service if they so choose to do. There is a further provision that a sufficient charge may be assessed to those who use the service which would "substantially" cover the cost of operation. In other words if the county were to purchase an ambulance, the only cost to the county would be the difference between what it costs to maintain the service and the amount paid by the users thereof. Of course, this office is not in a position to either advise or recommend how the local counties could finance an operation of this type.

If we can be of further assistance, please advise.

June 9, 1967

SCHOOLS — Merger of county systems — Publication of notice required by §273.22 should be made by the boards of education of each of the counties involved in the proposed merger.

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: This will acknowledge your letter of May 22, 1967 in which you requested an opinion on the following:

"Because of the impending merger of Cerro Gordo, Floyd, Mitchell and Worth counties school systems into one system, to be effective July 1, 1967, under the provisions of Section 273.22 of the 1966 Code, I should like to ask your opinion as to the extent of publication required.

"Section 273.22, in the first paragraph, indicates that publication is to be made in accordance with Section 618.14 of the Code. The question is,

will the requirements of Section 618.14 be fulfilled by publication in one newspaper of general circulation, located within the mergered school district, or will it require publication in a newspaper in each of the four merging counties.

"Since this publication is required to be made at least 20 days prior to the proposed July 1 merger date, your help on this matter as soon as possible would, indeed, be appreciated."

The pertinent part of §618.14 provides as follows:

"The governing body of any municipality or other political subdivision of this state is authorized to make publication . . . of any matter of general public importance, not otherwise authorized or required by law, by publication in one or more newspapers, as defined in section 618.3 published in and having general circulation in such municipality or political subdivision.

It is our opinion that inasmuch as the merger does not become effective until after publication is made, that the board of education of each county to be joined in the merger should cause the notice of the merger to be published in that county as provided by law. Therefore, the merger notice should be published in a newspaper in each of the four merging counties rather than only in one newspaper of general circulation within the merged school district.

June 10, 1967

CONSTITUTIONAL LAW: Division of powers, delegation of legislative authority appropriations, Art. III, §§1, 24 and 29 — Constitution of Iowa; §§7.9, 8.2(4), 8.39 and Chap. 123A, 123A.8, Code of Iowa, 1966. There is no constitutional or legislative authority for the joint establishment by the governor and the federal government the Iowa Comprehensive Alcoholism Project (I.C.A.P.) (1) The Alcoholism Study Commission established by Chap. 123A was an existing agency which could have received and administered the funds received by the governor from the federal government and used to establish and carry on the activities of the Iowa Comprehensive Alcoholism Project (I.C.A.P.), §7.9 by its terms furnishes no authority for the governor to accept federal funds where the legislature has already established an agency capable of accepting and administering such funds. (2) Where no state agency has been established by the legislature which is capable of accepting federal funds the only authority conferred upon the governor by §7.9 is to accept and conserve such funds. Such §7.9 does not authorize the governor to create new agencies to administer such funds. The legislature has laid down no guidelines for the administration of funds accepted by the governor under §7.9 and any interpretation of §7.9 which would permit the governor to disburse these funds or create new agencies to administer them would be an unconstitutional delegation of legislative power not permitted under Art. III §1 of the Constitution of Iowa. (3) An appropriation of state matching funds required by the terms of a federal grant may not be implied from §7.9 (4) Funds received from the federal government under §7.9 become state funds which may not be disbursed except as required by Art. III, §24, of the constitution pursuant to an appropriation made by law. Such funds are not segregated or trust funds and are not special funds under §8.2(4). (Turner to Leroy Miller, State Rep.), 6/10/67 S67-6-1

Hon. Leroy S. Miller, State Representative, Page County: By your letter of May 5, 1967, you request an opinion of the attorney general in the following words:

"Among the list of standing appropriations in the Governor's Budget Report, 1967-69, on page 47, appears the following

'Iowa Comprehensive Alcoholism Project
OEO Funds 7 9
VRA Funds 7 9

"I have not been able to find any statutory or other official authorization for an agency entitled 'Iowa Comprehensive Alcoholism Project.' Section 7.9, Code of Iowa, 1966, merely says:

"'Federal funds accepted. The governor is authorized to accept for the state, the funds provided by any Act of Congress for the benefit of the state of Iowa, or its political subdivisions, provided there is no agency to accept and administer such funds, and he is authorized to administer or designate an agency to administer the funds until such time as an agency of the state is established for that purpose.'

"I can't see how that language authorized the establishment of an agency such as this or authorizes the Governor to do anything except to receive and hold the federal funds. It does not seem to me that this section authorizes or creates any standing appropriation. Also, couldn't the Alcoholism Study Commission receive and administer these funds under Chapter 123A.8?

"Will you please give me the opinion of the Attorney General as to the proper construction of Section 7.9 and the status of the Iowa Comprehensive Alcoholism Project?"

The questions you raise first came to my attention when I received a letter from the Acting Secretary of the Executive Council, W. C. Wellman, dated February 26, 1967, requesting an opinion as to a lease proposed to be executed by the Iowa Comprehensive Alcoholism Project (hereinafter referred to as the I.C.A.P.) for the office space in Sioux City. Assistant Attorney General Oscar Strauss returned the lease without approving it, because he could find no authority for the existence of such an agency.

Before returning the lease, Mr. Strauss, at my direction, conferred with former Justice and Chief Justice of the Iowa Supreme Court, G. K. Thompson, who wrote to Mr. Strauss as follows:

"Yours of March 28 is at hand. I have given attention to it and have studied the provisions of Sections 34, 35 and 41 of Title 29, U.S.C.A. It is my conclusion that your analysis of the existing situation is correct, and the governor is without power to enter into the lease agreements and the research contract.

"I suppose that a chronic alcoholic comes within the meaning of Section 41(b) of the above Title. Section 35, which deals with state plans, provides that the federal authority may approve state plans for vocational rehabilitation under certain conditions. Section 35(a) (3) lays down as one of the conditions that the plan must 'provide for financial participation by the State, * * *.' I understand this to mean that state funds must be made available to bear part of the cost.

"If the sole question here were whether federal funds alone are involved, it might well be argued that the United States Government could do as it wishes with its moneys; and if it decided to turn them over to the governor of a state to be expended without standards of any sort, it might do so and citizens of the state would have no grievance and right to question. I am not sure this view is right; but the federal legislative procedures seem to be so broad when the matter of giving away money is concerned that I would not like to rest an entire opinion on the presumed invalidity of the federal statute.

"But if, as I assume from the language of the Section from which I have quoted above, there are also state funds which have been appro-

priated as a complement to the federal funds, then we do have the duty to question the validity of Chapter 70, [Acts, 61st General Assembly, which is now §7.9, Code of Iowa, 1966]. There can be no real dispute here that standards are entirely lacking. The governor is apparently attempting to administer and spend the funds as his own judgment dictates without any guide lines whatever.

"The use of these funds might be upheld if they were to be paid over to and administered by the Commission on Alcoholism under Chapter 123A of the 1966 Code. But as I understand your letter, either the federal government or the governor, or both, do not consider this Chapter applicable, and they are not being administered under it."

I have heretofore expressed reservations about the constitutionality of the project, and have urged Governor Hughes to request implementing legislation. On May 5, 1967, at a meeting called by the Governor, members of my staff and I discussed the problems with Professors Allan Vestal and Arthur Bonfield of the Iowa Law School; Lt. Gov. Fulton; Senator George O'Malley; Val Schoenthal and William Sueppel, all of whom are able and respected lawyers. Professors Vestal and Bonfield submitted memoranda with supporting arguments which I have carefully studied.

The importance of the question is suggested by a statement made privately to me at the conclusion of the meeting by a lawyer from the regional office of the U. S. Office of Economic Opportunity (OEO). He said that if the project is unconstitutional in Iowa, we may lose millions of dollars and "if Iowa doesn't want the money, there are plenty of other states which do."

Constitutional questions cannot be controlled or decided by reference to the amount of money which the state stands to gain or lose. Economic benefits, in quantitative terms, are not entitled to weight in determinations of a strictly legal nature. Moreover, constitutional questions do not depend on the wisdom of the project, or the good or evil effects of the program proposed.

Iowa Comprehensive Alcoholism Project

According to the project manuals quoted by the State Auditor in his report for the ten months ended April 30, 1967, page 8:

"The Iowa Comprehensive Alcohol Project was developed as a statewide program to combat alcoholism in Iowa. The Project is a joint program of the Office of Economic Opportunity [OEO], the Vocational Rehabilitation Administration [VRA] and the State of Iowa. The director of the organization is responsible directly to the Governor of Iowa. The Project is experimental and is currently budgeted through February 28, 1969.

"The comprehensive statewide program will draw upon the combined resources of the sponsors for the establishment of:

1. A system of coordination and interagency cooperation, at all levels of State government, to stimulate the development of services for alcoholics.

2. An interagency system for the provision and expansion of services to the alcoholic at the community level.

3. A community based support staff of subprofessional alcoholism aides.

"This project will also establish eight alcoholism community service centers which will serve two basic purposes: One, act as a catalyst for local planning, programming, and coordination in the respective geographical areas; and two, provide direct services to the indigent alcoholic through assessment, referral, intensive follow-through, follow-up, and residential care.

"Three residential settings (half-way houses) will be established to provide the transition between existing facilities and the community, prevention of institutionalization in some cases, and post-institutional care in others.

"A prime objective of the Project is the development of maximum services to alcoholics through the coordination of, and full utilization of, all State and local, public and private agencies."

The proposal which Governor Hughes submitted to Sargent Shriver, Director of Office of Economic Opportunity, on June 3, 1966, provides background information for the project; defines the problems; suggests methods and ideas for solving the problems; describes the organization, staffing and physical facilities desired; establishes a research and evaluation staff; prescribes the duration of the program and how its development is to be scheduled and sets out a budget, including OEO and VRA Grant Periods for which funds are requested. In addition, there are several pages of exhibits attached, including copies of letters from other departments and agencies of the state. Among these is a letter from Russell L. Wilson, Chairman of Board of Control, to the governor dated June 3, 1966, stating "we have arranged for the transfer of $17,000.00 from above the ceilings in our mental health funds to provide matching money for the $150,000.00 of Vocational Rehabilitation Expansion Funds for the project." Another letter from the State Comptroller, dated June 10, 1966, to the Federal Vocational Rehabilitation Administration states:

"At the request of the Board of Control of State Institutions, I herewith agree to transfer $17,000.00 from Board of Control Mental Health Funds to the State-wide Alcoholism Project.

"This money is to provide the 10% matching funds for Federal Vocational Rehabilitation Administration participation in the Project."

Governor Hughes has supplied me a copy of the master budget detailing the way the money is proposed to be expended in each of the grant periods and the contributions therefor to be made by the Office of Economic Opportunity [OEO], the Vocational Rehabilitation Administration [VRA] and the State of Iowa. Copies of all these documents will be submitted herewith.

The total length of the project is 32 months, commencing June 30, 1966 and ending February 28, 1969. See page 33 of proposal which says, "This timing extends the project over into early 1969 and makes it possible for legislative changes to be presented and portions of the project funded by the legislature which convenes in January, 1969." The project is to be funded by the following contributions for the 32 months as shown at pages 17a-17b of the master budget:

OEO Contributions	$1,315,172.92
VRA Contributions	375,868.53
State of Iowa contributions	45,333.33
Total all sources	$1,736,374.78

Iowa's matching contributions to June 30, 1967, the end of the first VRA grant period, are shown at page 17a to total $17,000.00, which is the amount transferred from Board of Control Funds as shown by Exhibit B, Page 3 of the State Auditor's Report. The audit also shows $145,702.00 has been received from VRA to April 30, 1967, which corresponds with the amount which page 17a of the master budget indicates is due for the period ending June 30, 1967. Apparently a substantial part of the VRA funds have been transferred to the OEO fund account. Contributions from OEO shown at page 17a of the budget appear to be running considerably in arrears and behind schedule. Expenditures of all funds to April 30, 1967, total about $138,000.00, (See pages 2 and 3 of the audit) although there are about $37,500.00 in unpaid bills and salaries. (Page 8).

The audit uncovered some questionable and inadequate accounting practices, growing pains and employee misconduct, the latter of which may be of a criminal nature, and requires further investigation. The foregoing represents the bulk of my knowledge about the nature and administration of this project.

There is no specific statutory authority for the Iowa Comprehensive Alcoholism Project. It is an agency created by the Governor with the help of the federal government. The Governor says his power to create this agency is based on §7.9, Code of Iowa, 1966, as quoted in your request. He says that it is implied from his power to accept federal funds under this statute that he has the power to match funds from available state money not otherwise appropriated, where necessary to meet the conditions of the federal grant. In his statutory budget report, he shows §7.9 among the list of code sections which provide for standing appropriations. See Governor's Budget Report 1967-69, Page 47. He treats the federal funds received by him as not a part of the state treasury for he makes no mention of these funds in his budget message or report.

The Governor's position is that there are no other state agencies in existence capable of accepting and administering the funds provided by the federal government to the State of Iowa for treatment of alcoholism and rehabilitation of alcoholics and that the federal government will make no grants for this purpose to any existing agency.

In his proposal to the federal government, Governor Hughes sets out in full two Iowa laws (Chapter 278, 61st General Assembly, relating to treatment of drunk drivers and Chapter 280, 59th General Assembly, relating to study of alcohol in the schools) as "Legislation pertinent to alcoholism in Iowa" but makes no mention of Chapter 123A, Code of Iowa 1966, enacted by the 59th G. A. in 1961 (Ch. 104) which appears to provide for an Alcoholism Study Commission which could accept and administer the funds here in question.

Your question gives rise to the following major problems:

1. Was there an existing state agency "to accept and administer such funds"?

2. Does the power to administer the funds given the governor by §7.9, include the authority to change the Iowa Comprehensive Alcoholism Project and a new agency?

3. Is an appropriation of matching funds implicit in §7.9?

4. Do federal grants accepted by the governor under §7.9 become a part of the state treasury or general fund which can be expended only by legislative appropriation?

I

Whether an agency exists which could accept and administer the funds, must obviously be determined from examination of the statutes. The only statute in Iowa dealing with this subject of alcoholism is Chapter 123A, Code of Iowa, 1966. This is a comprehensive statute enacted by the 59th General Assembly in 1961 (Acts 59th G. A. Ch. 104) under a title providing:

"An act relating to alcoholics and alcoholism, providing for the creation of a state commission to study and disseminate information on alcoholism; to develop a program of prevention and rehabilitation through research, education and treatment in cooperation with existing agencies and facilities; to encourage the formation of alcoholic information centers in the various counties of the state to work with the state commission and to perform such duties at the local level to help carry out the purposes of this act, and to provide for an appropriation."

§123A.8 thereof provides:

"Grants and funds. It may furnish grants from its available funds to private or public *treatment centers* and institutions to further the treatment of alcoholics and to carry out the provisions of this chapter. The *commission may accept funds*, property, or services *from any source*, and all revenue received by the commission in any manner including gifts, *grants in aid*, reimbursement, or sale of articles or services *is hereby appropriated* and shall be used in carrying out the provisions of this chapter. Expenditure of any funds available to the commission shall be made upon vouchers signed by the chairman or the executive director of the committee." (Emphasis added).

Chapter 123A expressly creates an agency to accept and administer the funds here under consideration and to accomplish practically everything, including the establishment of treatment centers, which is now proposed to be done in the name of the I.C.A.P. The governor cannot constitutionally establish policy and create or enlarge upon legislative goals for any purpose whatever. He is obliged to recognize existing agencies and the law creating them, and to support the execution of powers vested in the agency by the legislature. Otherwise there would be no limit to the number of agencies created, officers and employees engaged, salaries paid or powers exercised thereunder. The test of the validity of a statute is not what has been done under it, but what may be done by its authority. *Chicago, Rock Island and Pacific R. R. Co. v. Liddle*, (1962) 253 Iowa 402, 112 N. W. 2d 852.

The Governor has, as will be noted from the organizational provisions and the table of organization (pages 25 and 32) of his proposal, made the Alcoholism Study Commission one of four "advisory groups" under the overall project. He proposes thereby, to subordinate an existing state agency created by law, with its own personnel, to an agency of his own creation which has no legitimacy under any statute.

Moreover, it may be fairly said that the Board of Control, with its mental health institutions is also an existing agency authorized to accept and administer these funds. As has been pointed out, the $17,000.00 in matching funds was transferred to the project from this agency. This agency has been responsible and deeply involved in the treatment of alcoholics who make up 25% of the total inmates in its mental hospitals. Dr. James O. Cromwell, Director of Mental Health of the Board of Control of State Institutions, in a letter to Governor Hughes dated June 3, 1966, states:

". . . 25% of the admissions to the hospitals have alcoholism as a major contributing factor to their illness.

"Our hospitals will continue their present treatment programs and increase these *as finances and availability of trained personnel allow.*"

Removal of the treatment of alcoholics from these hospitals, which have historically been charged with this responsibility, to treatment centers, half-way houses, detoxification spaces, rehabilitation houses and residential care settings, is a policy matter for legislative determination.

I have concluded that the funds must properly have been accepted and administered by the Alcoholism Study Commission under the provisions of Chapter 123A, or possibly by the Board of Control. There is no reason to decide whether any other agency could properly be designated to do so within adequate guidelines established by law.

II

The second question is whether the power to administer the funds given the governor by §7.9 includes the authority to rebate an administrative agency such as the Iowa Comprehensive Alcoholism Project for this purpose and if so, whether this is an unconstitutional delegation of legislative power. The answer must turn upon whether adequate guidelines are required and provided.

Again, §7.9, Code of Iowa, 1966, provides:

"Federal funds accepted. The governor is authorized to accept for the state, the funds provided by any Act of Congress for the benefit of the state of Iowa, or its political subdivision, provided there is no agency to accept and administer such funds, and he is authorized to administer or designate an agency to administer the funds until such time as an agency of the state is established for that purpose."

Assuming that there is no existing agency to accept and administer the funds, it is my opinion that the power to create such a state agency for that purpose cannot be fairly implied. The governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant. 81 C.J.S. 981, States §60. §7.9 and the statutes relating to the Governor's powers are constitutionally devoid of essential guidelines to measure the limits of the power of such an agency or the governor in the manner in which the funds are to be administered. Such guidelines are a constitutional requisite to the delegation of power both to create the agency and to administer the funds. Guidelines being requisite and absent, no implication of power to create an agency is possible. An unconstitutional power cannot be implied.

Declaring an act of the legislature unconstitutional is a "delicate function." *Miller v. Schuster*, 1940, 277 Iowa 1005, 289 N. W. 702. It is well settled that a statute is presumed to be constitutional. The presumption is strong and the courts will not declare an act of the legislature unconstitutional unless the conclusion is unavoidable. They will do so then only when the violation is clear, plain, palpable and free from doubt. The Iowa court has even gone so far as to say that a person challenging the constitutionality has the burden of negativing every conceivable basis which might support it. *Dickinson v. Porter*, 1948, 240 Iowa 393, 35 N. W. 2d 66. Where a statute is fairly open to two constructions, one of which will render it constitutional, and the other doubtful, or unconstitutional, the construction upon which it may be upheld will be adopted. *Eysink v. Board of Supervisors of Jasper Co.*, 1941, 229 Iowa 1240, 296 N. W. 376. If any reasonable state of facts can be conceived which will support constitutionality, it will be sustained. An attacker must negative every possible hypothesis of constitutionality. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118.

Guided and bound by the foregoing well-established rules, I must conclude that §7.9 is constitutional as an act which empowers the governor to accept and *conserve* the funds until such time as appropriate guidelines are established by the legislature for its administration. The legislature, it is true, empowered the governor to "administer" the funds, but such power is devoid of guidelines. The constitutionality of the delegation of power to administer, in absence of guidelines, must depend upon an interpretation of the word "administer."

To "administer" ordinarily connotes more than to "conserve." According to Webster (Third New International Dictionary of the English Language, Unabridged), "administer" means to manage the affairs of; to direct or superintend the execution, use, or conduct of; to act in lieu of an executor in settling (an intestate estate); to mete out: dispense; to give ritually; to give remedially (as medicine).

If the word "administer" is taken in the ordinary liberal sense of English usage, as defined above, the delegation to the governor of the power to administer the funds would be repugnant to the constitution. It would be a delegation of legislative authority. Although it is a well settled rule of statutory construction that words of a statute shall be given their plain, ordinary meaning, the rules say with still greater force that a construction which would be constitutional must be adopted and a construction which would be unconstitutional must be rejected. I am reluctant to so interpret the meaning of the word "administer" as to render it meaningless or superfluous. But it is possible, whether reasonable or not, to construe the word "administer" to mean no more than "to conserve" or "to hold." That construction enables it to be consistent with the constitution.

There is no *rigid* presumption that identical words used in different parts of the same statute are intended to have the same meaning. The meaning may vary where the subject matter is not the same in the several places where such identical words are used. *Patterson v. Iowa Bonus Board*, 1955, 246 Iowa 1087, 71 N. W. 2d 1. The legislature in §7.9 in-

tended to use the word "administer" in a much more limited sense as applied to the governor than as applied to an agency created by a statute where guidelines are prescribed. Since, under these rules, the word "administer," must be construed in determining the legislature's purpose in §7.9, so as not to render the section unconstitutional, the governor is not empowered to do more than accept and conserve or hold the funds.

Only this limited construction of legislative intent as it applies to the Governor's powers under §7.9 is consistent with the title the legislature gave to the bill by which that section was enacted. The title as found in Chapter 70, Acts 61st General Assembly, page 98, is:

"*AN ACT authorizing the governor to accept federal funds.*"

These are words of limitation. Nothing is said therein about administering the funds or appropriating state funds.

Article III, §29, Constitution of Iowa provides:

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

In *Green v. City of Mount Pleasant*, 1964, 256 Iowa 1184, 131 N. W. 2d 5, the Iowa Supreme Court said:

"We have consistently held this section (Art. III, Sec. 29) should receive a broad and liberal construction, and not a narrow, technical, critical construction . . . The details as to land and construction are germane to the title of Chapter 247 (60th G. A.)"

In *Long v. Board of Supervisors of Benton County*, 1966, ... Iowa ....., 142 N. W. 2d 378, the court said:

"The constitutional provision in Article III, Section 29, embodying the one subject rule also contains an independent requirement that each bill contain a title which expresses the subject of the bill. Although these requirements have independent operation, have an independent historical base, and a separate purpose, they are closely related. . . . The primary purpose of the title requirement is to *prevent surprise* and fraud upon the people and the legislature. Thus if the title fails to express adequately the subject matter of the act or is misleading in its expression of the subject of the act, then a portion or all of the act must be held invalid. While it is the purpose of the title requirement to prevent legislation by stealth, the one-subject rule also aids in the eradication of this practice and so compliments its sister requirement. . . ." (Emphasis added)

Looking to the title of Chapter 70, 61st G. A., certainly the people of Iowa, as well as the legislature, would be *surprised*, indeed, to learn that, in addition to granting the governor the power to accept federal grants, the act also, for the first time in Iowa's history, empowered the governor to:

1) Create one or an unlimited number of new agencies of Iowa government.

2) Appropriate on a continuing basis such funds as are necessary to match the federal grant to each.

3) Expend the federal money and matching funds in his discretion, subject only to conditions, if any, imposed by the federal government.

4) Employ personnel in numbers, and at salaries, limited only by the funds available and such regulations, if any, imposed by the federal government.

5) Extend the credit of the state for the benefit of an individual.

6) Obligate the state for debts and leases where there has been no legislative appropriation or authorization.

7) Receive public moneys and expend the same without reporting or accounting for them.

8) Subordinate the operation of legally existing boards and commissions created by the legislature to the discretion and control of a project director who holds his office at the pleasure of the governor alone.

For these reasons, only that part of the statute which authorizes the governor to "accept for the state" the funds provided, is constitutional.

To the extent that the statute may be construed to authorize the governor to act, or to the extent the governor does act, beyond holding or conserving the funds until an agency of the state is legally established to administer them, the statute, or the action of the governor thereunder, violates Article III, Section 1, Constitution of Iowa, relating to distribution of powers. This is true because there are no guidelines directing how the funds are to be used. *O.A.G. 6-29-65; Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118; *Goodlove v. Logan*, 1933, 217 Iowa 98, 251 N. W. 39; *State v. Van Trump*, 1937, 224 Iowa 504, 275 N. W. 569; *Bulova Watch Co. v. Robinson Wholesale Co.*, 1961, 252 Iowa 740, 108 N. W. 2d 365; *State ex rel Klise v. Town of Riverdale*, 1953, 244 Iowa 423, 57 N. W. 2d 63; 92 ALR 400, 54 ALR 1104, 12 ALR 1435; *Panama Refining Co. v. Ryan*, 1935, 293 U. S. 88, 55 Sup. Ct. 241, 79 L. Ed. 446.

Article III, Constitution of Iowa, relating to distribution of powers provides:

"Departments of government. Section 1. The powers of the government of Iowa shall be divided into three separate departments — the Legislative; the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

Aside from the separation of powers and the express prohibition against the exercise by one department of powers belonging to another, provided in the constitution, the maxim "Delegata potestas non est delegari" is frequently applied as preventing the delegation of delegated power. The people, who hold in their hands all power of government, speaking through our constitution, have delegated the law and policy making power to the legislature, which in turn cannot again delegate it to others. Article III, §1, Legislative Department. This is in keeping with the most fundamental precept of free government. "The first maxim of a free society is that the laws be made by one set of men and administered by another," is a statement attributed to Paley, and painted high on the wall of the Polk County district courthouse.

On June 29, 1965, then Attorney General Scalise released an opinion to the Governor that a bill enacted by both houses (S.F. 335, Acts, 61st G. A.) delegating to the highway commission discretionary power to authorize oversized vehicles to move on the public highways was unconstitutional as a delegation of legislative power. Citing as his authority the *Lewis School* and *Goodlove* cases, supra, Mr. Scalise opined that the law was unconstitutional because it "omitted standards or basic rules by which the highway commission or appropriate local authorities may proceed in considering the issuance or withholding of a permit" and because there was "an omission of guide lines." Following that opinion, Governor Hughes vetoed the bill.

The *Lewis School* case held unconstitutional a statute delegating to the state superintendent of public instruction the power to adopt minimum standards for schools and to withhold state aid for failure to comply with such standards. Finding the guidelines insufficient, the Supreme Court said:

"All the last quoted statute seems to do is to give the superintendent, with the approval of the board unlimited authority to do whatever he deems best in furthering the educational interests of the state. He may 'adopt such policies as are authorized by law'; he may adopt rules and regulations for carrying out the provisions of the laws and prescribe any minimum standards therefor. Is it sufficient that an administrative officer, or body, be given power to do whatever is thought necessary to carry out their purposes and to enforce the laws, without other guide than that they must keep within the law? We think something more is required. * * * where standards or guide lines are readily possible we think the legislature may not abandon them altogether, and say in effect to the administrative body: 'You may do anything you think will further the purpose of the law: in so doing you may set up whatever standards you deem necessary and you may punish for violation of those standards.' "

"Perhaps the most efficient form of government is an intelligent and benevolent dictatorship. But, passing the point that such dictatorships rapidly lose their intelligence and benevolence, we must observe that it is not the kind of government provided for by our constitution. Some check must be put upon administrative bodies; they must be required to follow some sort of pattern designed by the legislature. The law-making body may not entirely abrogate its functions, and surrender them to administrative officials."

"If we are to have a constitutional government, we must adhere to the constitutional processes provided for it. It is the declared policy of the school statutes 'to encourage the reorganization of school districts into such units as are necessary, economical and efficient and which will insure an equal opportunity to all children of the state.' Section 275.1, Code of 1962. This is a desirable goal; but it must be reached by laws and procedures which do not transgress the Constitution. *The end does not always justify the means; in fact it never does, if constitutional precepts must be disregarded to reach it. Nor will we torture the Constitution out of any fair construction or meaning to promote or permit what may be thought to be a beneficial result.* More harm will come from such procedure, which in effect sets aside basic safeguards, than will be gained by the supposed desirable end to be achieved beyond the Constitution in the particular case." (Emphasis added).

Professor Vestal in his opinion asserts that a prime consideration in determining whether a law is an unconstitutional delegation of legislative power is what is or may be done by its authority. This is sound

constitutional doctrine. But he extends this concept to suggest that only when the exercise of the authority takes away, regulates, restricts or results in punishment, will the Courts hold a delegation, without guidelines, unconstitutional. He says that if the exercise of the delegated authority is of a "*benefactory nature*" or if it *gives* or *creates*, as opposed to taking away, it will be held constitutional even without guidelines. Such instances do not, he claims, involve the exercise of legislative power.

Professor Vestal bases his conclusion on what he believes the courts have done rather than on what they have said. He points to no language and I can find none where any court or learned authority suggests a distinction based on the benefactory, as compared to the regulatory, nature of the power exercised. Even looking to what the courts have actually done, the distinction is not tenable. See *Lewis School* case, above.

In *State ex rel Klise v. Town of Riverton*, 1953, 244 Iowa 423, 57 N. W. 2d 63, the Supreme Court held unconstitutional a statute which delegated to the district court the power to uphold a petition for annexation of territory to a municipality if the court, in the exercise of its discretion, found such annexation desirable. The Court said in rejecting it's invitation to exercise legislative power of a benefactory nature:

"The incorporation of a municipality is purely a legislative function. The power to *create* municipalities cannot be delegated to the judicial branch of government. The power to extend the boundaries of a municipality is an exercise of the power to *create* a municipality and is with the exclusive power of the legislative branch of government." (Emphasis added).

The *Klise* case is not merely an ingenious theory. It is the law of Iowa and it is contrary to the theory that a delegation is unconstitutional only if it takes away and not if it creates or confers a benefit. But, in any event, there is no sound reason for making any such distinction. In the final analysis, all laws, whether regulatory and prohibitive or "benefactory," while theoretically conceived to be enacted as desirable and for the public good, take something away from someone. This is the very essence of power. Under our system of government, what is "desirable," "necessary," "for the public good" or "beneficial" are questions of policy exclusively for the legislature to determine and declare through the laws it enacts. The *Klise* case says:

"*What is desirable is not a question of fact* that can be judicially determined. *It is a question of policy or public interest exercisable by the legislature alone.* In this plan of annexation the legislature is not giving the court the permissible function of determining whether facts prerequisite to annexation have been established. It is endowing the court with the power to make the conditions precedent to annexation. The court might decide the city's ability to furnish fire protection alone would make annexation desirable. Or the court might decide annexation would not be desirable unless and until every proper municipal service can be extended into the territory annexed. No one knows what the legislature meant by its requirement of desirability. *It probably meant the court was to decide what would best promote or be conducive to the public good. Plainly this is legislation. The legislature has been entrusted with the power to pass laws for the public good. It cannot delegate to the courts,* as a condition to the law's taking effect, the choice of determining

whether the law will have a salutary effect. Under this statute the court must say: it is desirable that the city limits be or not be extended. This is no true finding of fact. It gives the municipality power to extend if the court thinks best.

"The question of 'desirability' is not unlike the question of 'necessity.' *It is well settled that there can be some delegation of legislative power in a circumscribed field to an administrative agency to be exercised in accordance with standards and limitations fixed by the legislature.*" (Emphasis added.)

In *Bulova Watch Co. v. Robinson Wholesale Co.*, 1961, 252 Iowa 740, 108 N. W. 2d 365, citing the *Klise* case, the Supreme Court held the nonsigner provisions of Iowa's fair trade act to be an unconstitutional delegation of legislative power to manufacturers, saying:

"A purely fact-finding authority may be vested in a nonlegislative body, but a discretionary power involving matters of policy is legislative in nature and may not be delegated."

The statements of these decisions of Iowa's highest court allow for no distinction in a constitutional sense between laws of a benefactory, as opposed to a regulatory, nature.

The classic and best known test of improper delegation of legislative power is found in the following words quoted in *Spurbeck v. Statton, Commissioner of Public Safety*, 1960, 252 Iowa 279, 106 N. W. 2d 660:

"The plaintiff thinks the commissioner is given authority to act without any proper guide. The true rule is expressed in Locke's Appeal, 72 Pa. St. 491, quoted with approval in Field vs. Clark, 143 U. S. 649, 12 S. Ct. 495, 505, 36 L. Ed. 294. *'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'*"

Aside from the constitutionality of the statute itself, there can be little doubt that this rule applies with equal force to test whether those charged with administering the statute are acting unconstitutionally by exercising legislative functions. It applies to the exercise of power as well as to the statutory authority for the power. *Gilchrist vs. Bierring*, 1944, 234 Iowa 899, 14 N. W. 2d 724, 727. Although a statute not objectionable on its face may be adjudged constitutional, its effect in operation, by its improper application to a permissible subject matter may render it unconstitutional. (16 CJS 353, Constitutional Law §97 and 12 Am. Jur. 257, Constitutional Law §566). "A statute, constitutional when applied to a permissive subject-matter, may become unconstitutional when applied to a forbidden subject-matter." *State v. Bevins*, 1930, 210 Iowa 1031, 230 N. W. 865. And that, indeed, is precisely the situation here.

12 Am. Jur. 257, supra, says:

"A law, though fair on its face and impartial in appearance, which applies and administers with an evil eye and unequal hand so as to make unjust and illegal discrimination is within the prohibition of the Federal Constitution. Hence, in a consideration of the classification embodied in a statute, regard should be given not only to its final purpose, but, likewise, to the means provided for its administration — whether, for example, it confers upon the administrative authorities arbitrary power and, without regard to discretion in the legal sense of that term, permits unjust discriminations, founded on differences of race or other unjustifiable basis, between persons otherwise in similar circumstances."

Perhaps the strongest and leading Iowa case on the subject of delegation of legislative power is *Goodlove v Logan*, 1933, 217 Iowa 98, 251 N. W. 39. It held unconstitutional a statute delegating to the highway commission the power to prohibit the stopping of vehicles on the public highway. Therein, the Court said

"If the Legislature has a right to pass §5066, granting to the highway commission the authority to adopt rules and regulations governing the stopping of cars upon a paved highway, the Legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way and all duties of automobile drivers. If the Legislature can delegate to the highway commission the right to do these things, then, of course, the Legislature can delegate the same power to the board of control, to the insurance commissioner, superintendent of banking, and all other administrative departments of the state may be likewise empowered to enact rules and regulations to be given the force of statutes, which said commission might in their judgment determine to be for the general protection of the public. Once such bureaucracy has fastened itself into the life of legislative power, little else need be done by the Legislature than to meet and create boards."

The prohibition against delegation of legislative powers in these areas is equally applicable to power to protect the public health. 16 CJS 617, Constitutional Law §138 says:

"It is the function of the legislature, as a part of its police power, to make laws for the protection of the public health, and the power to make such laws, or laws for the public safety, may not be delegated to an executive officer or board The legislature may, however, enact laws in general terms for the public health or safety, and vest in administrative agencies a large measure of discretion in enforcing them, it being sufficient that a definite policy be established for their guidance."

The prohibition also applies to delegations to the federal government. 16 CJS 563, Constitutional Law §133 provides:

"The state legislatures may not delegate their sovereign powers to the federal government. While a statute is valid which adopts existing statutes, rules, or regulations of congress by reference, an attempt to make future regulations of congress part of the state law is generally held to be unconstitutional."

And, in two old Iowa cases, the Supreme Court held it unconstitutional for the legislature to delegate to the governor its power to determine when laws would take effect by authorizing him, when he deems it necessary, to add a publication clause. *Scott vs. Clark*, 1855, 1 Iowa 70; *Pilkey v. Gleason*, 1856, 1 Iowa 521

The case I have found which seems most nearly comparable to the problem before me is *In re Opinion of the Justices*, 1947, 249 Ala. 637, 32 So. 2d 539. There the Constitution of Alabama provided that it was the governor's duty, from time to time, to give the legislature information of the state of the government and to recommend for its consideration such measures as he might deem expedient. The Governor asked the Supreme Court for an opinion as to whether his constitutional duty to advise the legislature invested him with authority to appoint an interim committee of legislators to make investigations and to inform him in respect to needed legislation so as to better enable him to perform his constitutional duties in advising the legislature. The Supreme Court held that in absence of statute so authorizing, the constitutional pro-

visions did not clothe the governor with authority to appoint a legislative interim committee or to name any other committee and clothe it with a cloak of official status so as to authorize paying it or its members for services rendered, out of public funds of the state. In so holding, the Court cited the following two provisions of the Alabama Constitution of 1901:

§42 "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

§43 "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; *to the end that it may be a government of laws and not of men.*" (Emphasis supplied).

Article III, Section 1 of the Iowa Constitution, relating to distribution of powers, quoted on page 13 of this opinion, is identical in meaning to these two sections of the Alabama Constitution.

Finally, the legislature cannot empower an executive officer to exercise unlimited discretion in appointing officers and employees. *State v. Wetz*, 1918, 40 N. D. 299, 168 N. W. 835.

In addition to the numerous Iowa cases involving the delegation of legislative authority, see also authorities cited in 12 ALR 1435, 54 ALR 1104 and 92 ALR 400.

Governor Hughes, in creating the Iowa Comprehensive Alcoholism Project, is exercising what Mr. Justice Cardoza of the United States Supreme Court described in the Panama Refining Company case, supra, as a "roving commission" and a "vagrant and unconfined" power to establish and make law. *State v. Van Trump*, 1937, 224 Iowa 504, 275 N. W. 569. Under this program, his actions are clearly unconstitutional, the leases are void and the expenditures are unlawful.

III

The third question for determination is whether an appropriation of matching funds is implicit in §7.9. I can find no legal basis or justification for the concept of "implied" appropriation insofar as §7.9 is concerned.

Article III, §24 of the Constitution of Iowa is not dissimilar to the corresponding provisions found in the constitutions of other states and provides:

"Appropriations. No money shall be drawn from the treasury but in consequence of appropriations made by law."

The general rules with respect to appropriations and the disbursement of public funds may be stated as follows:

"Authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. State Constitutions frequently contain provisions to the effect that no money shall be paid out of the treasury of the state, or from any of its funds, or from any of the funds under its management, except in pursuance of an appropriation by law. The object of such provisions is to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor. . . ." Am. Jur., Public Funds, §42. See also *Mason-Walsh-Atkinson-Kier Co. v. Dept. of Labor and Industries, et al*, 5 Wash. 2d 508, 105 P. 2d 832, 835.

"In specific terms, an 'appropriation' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. . . ." Id. §43

"No particular form of words is necessary to constitute a valid appropriation, but the legislative intent to appropriate funds must be clear and certain; it cannot be inferred by a construction of doubtful acts or ambiguous language. It is sufficient if an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation. . ." Id. §45

It is apparent from the foregoing that in certain situations, an appropriation may be inferred. Thus an appropriation may, in some states, be implied where "an intention to make an appropriation is clearly evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making the necessary appropriation." But §7.9 does not contain language *clearly* evincing an intention to make an appropriation.

Furthermore, §7.9 is not rendered incapable of being given effect without an appropriation of matching funds being implied. It is more probable that the power to accept contained in §7.9 was calculated only to empower the governor to participate in federal programs under which the federal government provided 100% of the funds necessary to implement the same. Results which are both absurd and potentially disastrous could occur if the power to accept was to be construed as carrying with it the power to match. All federal programs do not require only a 10% contribution by the participating states. With the staggering sums involved in some of the federal projects, it is conceivable that the governor, acting under §7.9, could commit this state to participate in a project requiring 50% or more matching funds; and of such magnitude that it would virtually empty the state treasury.

The Iowa case coming closest to giving judicial recognition to the doctrine of implied appropriation is *Graham v. Worthington*, ... Iowa ———, 146 N. W. 2d 626 (1966). However, in that case, which dealt

with the constitutionality of the Iowa Tort Claims Act, Chapter 25A, Code of Iowa, 1966, the statute provided in §25A.11 for the payment of awards or judgments "out of any money in the state treasury not otherwise appropriated." In upholding the constitutionality of the Act, the court treated §25A.11 as amounting to an *express* appropriation, and limited itself to deciding that an appropriation, to be constitutional, need not be specific in amount.

In the *Worthington* case, the court, in upholding §25A.11 as an appropriation, relied to great extent on the case of *Prime v. McCarthy*, 92 Iowa 569, 61 N. W. 220 (1894). In the *Prime* case, the statute in question granted to the Executive Council authority to pay "such other necessary and lawful expenses as are not otherwise provided for" and provides that "warrants drawn therefor be paid by the treasurer of the state." The language of the statute did not contain the word "appropriation" but did grant specific authority for payment of "such other necessary and lawful expenses as are not otherwise provided for." The authority conferred on the Council to pay these expenses was, upon showing that they were necessary and lawful, considered an appropriation of funds not otherwise appropriated.

In the *Worthington* case, the statute contained the *express* words, ". . . otherwise to be paid out of any money in the state treasury not otherwise appropriated" and this was held sufficient language to constitute an appropriation under Iowa law.

§7.9, however, contains no similar language and, in fact, no language of any kind that can conceivably create even an implied appropriation. To this extent the Governor's power to accept is effectively limited to grants requiring no matching funds.

Certainly it would require extending *Worthington* well beyond its holding to conclude therefrom that §7.9, which makes no mention of state funds or the purposes or sources thereof, and contains no direction of payment, nevertheless impliedly appropriates from the state treasury the unlimited sums necessary for the Governor to participate in any and all federal programs requiring matching funds.

Here, the manner in which the Governor obtained matching funds indicates he did not assert the existence of any such implied appropriation. On the contrary, his acts, allegedly under authority of §8.39, demonstrate his belief that he is empowered to transfer to his own budget, or to any agency requiring such transfer, matching funds to the extent necessary to meet the conditions of a particular grant. Such a power would be inconsistent with the clear language of Art. III, Sec. 24 of the Constitution.

Even in the case of an express appropriation, the *Worthington* case indicates there must be some limitation by the terms of the Act. The Court said:

"In the case now before us the amount of the appropriation cannot be predetermined *but is limited by the terms of the Act* to the amount of awards and judgments to claimants under the provisions of the Act which is a limitation similar to that considered in Prime v. McCarthy, supra." (Emphasis added).

Whether or not the *Worthington* case would support the proposition that the terms of the Act (in this case §7.9) limit the appropriation to the amount of matching funds required by a particular federal grant, thereby satisfying the constitutional requirement of adequate guidelines, is a question which need not be answered in this opinion; for I have already held that no appropriation under §7.9 may be implied. However, if the guidelines or limitations are constitutionally inadequate, no appropriation could be implied for the reasons stated in part II of this opinion. An unconstitutional power cannot be implied.

IV

The final issue is whether the moneys accepted by the Governor under §7.9 become a part of the state treasury and thereby come within the purview of Article III, Section 24, Constitution of Iowa.

Professor Bonfield, in his memoranda, seeks to establish two propositions which would remove such funds from the mandate of Article III, Section 24; namely that the funds are simply accepted and held in trust under the terms of the federal act creating the grant, and, secondly, that the funds are special funds devoted to special purposes and therefore not subject to appropriation. Both of the propositions are contrary to the law of Iowa and the authorities cited by Professor Bonfield do not support either.

On the contrary, the authorities he cites, as well as those cited herein, say that all funds, from whatever source, are state treasury funds and unless otherwise segregated by law, are a part of the general fund.

Segregation of funds by law in Iowa, as in other jurisdictions, can be accomplished either by Constitution or by statute, and in all cases the segregation is accomplished in clear, understandable language.

As examples of Constitutional segregation of funds, see Article IX, Sections 2, 3 and 4; and the 1942 Amendment to Article VII, Section 8. These sections constitute clear segregation, of the funds they describe, for special purposes.

A typical statute that segregates funds is that discussed in *Iowa Hotel Association v. State Board of Regents*, 253 Iowa 870, 114 N. W. 2d 539 (1962). Again, this statute set up a special purpose for special funds.

§444.21, 1966 Code of Iowa, establishes and defines "general fund" as follows:

"The amount derived from taxes, levied for state general revenue purposes, and all other sources which are available for appropriations for general state purposes, and *all other money in the state treasury which is not by law otherwise segregated* shall be established as a general fund of this state." (Emphasis Supplied).

§8.2(2), 1966 Code of Iowa, defines "state funds" as follows:

" 'State funds' means any and all moneys appropriated by the legislature or money collected by or for the state, or an agency thereof, pursuant to authority granted by any of its laws."

The Comptroller says he handles ICAP funds as special funds under §8.2(4), Code of Iowa, 1966, on the assumption that all federal funds are

segregated by law and need not be appropriated prior to expenditure. This is confirmed by the Governor's Budget Report, 1967-69, page 45, which says:

" 'Private Trust Funds' and 'Special Funds' means any and all endowment funds and any and all moneys received by a department or establishment from private persons to be held in trust and expended as directed by the donor, or any and all government fees and other revenue receipts earmarked to finance a governmental agency to which no general fund appropriation is made by the state."

OEO and VRA funds received under ICAP are mentioned under the heading "special accounts" on page 47, although no amount is set out and such funds are not budgeted for appropriation. §8.2(4) says:

" 'Special fund' means any and all *government fees* and *other revenue receipts* earmarked to finance a *governmental agency* to which no general fund appropriation is made by the state." (Emphasis added).

To place ICAP funds within the purview of this definition, it is necessary to assume 1) that ICAP is a governmental agency and 2) that no general fund appropriation is made by the state.

The first assumption is obviously incorrect. As we have shown in part II, §7.9 does not empower the establishment of ICAP or any other governmental agency. Nor is there any statutory authority for the legal existence of ICAP. Rather, §7.9 contemplates the legislative creation of an agency to administer funds after they have been accepted by the governor. When such agency has been created to administer the funds, general funds will be appropriated to that agency for matching or other purposes. For this reason, the second assumption is entirely misleading.

Moreover, the Governor and Comptroller have said that matching funds were obtained for ICAP under §7.9 by a transfer of funds under authority of §8.39. Matching funds are required in the bulk of federal grants. If the governor and comptroller can, under §8.39, match funds for federal programs, they can do indirectly what they have no power to do directly; namely, appropriate funds from the treasury. §8.39 provides:

"Use of appropriations — transfer. No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtained, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency.

"Provided, further, when the appropriation of any department, institution, or agency is insufficient to properly meet the legitimate expenses of such department, institution, or agency of the state, the state comptroller, with the approval of the governor, is authorized to transfer from any other department, institution, or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency."

It is evident from a reading of this section that any transfer made by the Comptroller and Governor by virtue of it must be made to a *department, institution or agency* and only *when the appropriation of any department, institution, or agency* is insufficient to properly meet the legiti-

mate expenses. Can it be said that the I.C.A.P. appropriations was insufficient? There was no such appropriation; no such department, institution or agency.

It is argued that I.C.A.P. is only a part of the "office of the governor" and that the transfer was therefore to the "office of the governor." It must necessarily follow, then, that the *appropriation* to the Governor was *insufficient to properly meet the legitimate expenses.* We have not been advised that this was factually determined. But, returning to the last words of §8.2(4), specifically the words *"governmental agency to which no general fund appropriation is made by the state,"* it is apparent that either the transfer of funds was improper under §8.39 or the I.C.A.P. funds are not "special funds" within the meaning of §8.2(4). A general fund appropriation is made to the Governor so the I.C.A.P. funds, if they are really funds of the Governor, cannot meet the definition in §8.2(4) as special funds. If they are not funds of the Governor, then the transfer of matching funds was not made under the guidelines of §8.39, which, as pointed out above, is a transfer power to supplement an *appropriation* that is sufficient.

Article III, Sec. 24, Constitution of Iowa, provides:

"No money shall be drawn from the treasury except in consequence of appropriations made by law."

In discussing a like provision of the Constitution of the State of Washington, the Supreme Court held:

"The purpose and effect of Article VIII, Section 4, of the Constitution are aptly stated in *State ex rel Peel v. Clausen,* 94 Wash. 166, 162 P. 1. 3, as follows:

'The object of the Constitution (Art. 8, Sec. 4) is to prevent expenditures of the public funds at the will of those who have them in charge and without legislative direction. . . .

'It is well understood that these provisions — and they are common to most, if not all (of) our written Constitutions — are mandatory, and that no moneys can be paid out without the sanction of the legislative body.' " *Mason-Walsh-Atkinson-Kier Co. v. Department of Labor and Industries, et al,* 5 Wash. 2d 508, 105 P. 2d 832, 835.

The question of whether or not special taxes on motor vehicles and motor fuels *necessarily* find their way into the state treasury was raised in Kansas in 1934. There the legislature by statute provided that these funds, as collected, be transmitted to the Treasurer and disbursed on proper orders of the highway commission. The court stated:

". . . When our people by amending Article II, Sec. 8 of our Constitution . . . so that the state could construct and maintain a state system of highways and levy special taxes . . . for that purpose, they made no specific provision that the moneys so raised and used should necessarily find their way into the state treasury, but left the legislature free to provide for the collection and disbursment of such funds in the way it deemed best. . . ."

The court later states:

". . . Since these funds are not required by the Constitution to find their way into the state treasury, and *by statute do not do so* (emphasis

supplied) Art. 2, Sec. 24, requiring appropriation of moneys from the state treasury, has no application. . . ."

State ex rel Boynton, Atty. Gen. v. Kansas State Highway Commission, 139 Kan. 391, 32 P. 2d 493 (1934)

Similarly, the Supreme Court of Montana in *State ex rel State Aeronautics Commission et al v. Board of Examiners of State et al*, 121 Mont. 402, 194 P. 2d 633 (1948) was faced with a constitutional argument mounted against a statute described by the court as follows:

"Section 20 of Chapter 152 provides that all costs and expenses of administering the Act shall be paid out of the state aviation fund . . . It provides that the aviation fund shall be made up of the following revenues:

"All gifts and all legislative appropriations for said fund; all moneys received from any branch or department of the federal government. . . ."

The court then referred to the following section of the Act:

"(d) Disposition of federal funds — All monies accepted for disbursement by the commission pursuant to subdivision of this section shall be deposited in the state treasury, and, unless otherwise prescribed by the authority from which the money is received, kept in separate funds, designed according to the purpose for which the monies were made available, and held by the state in trust for such purposes. *All such monies are hereby appropriated for the purposes for which the same were made available. . . .*" (Emphasis Supplied) *State ex rel State Aeronautics Commission et al v. Board of Examiners of State et al*, 121 Mont. 402, 194 P. 2d 633 (1948).

While the court, in the above-cited case, holds that the statute under attack was constitutional, it does not hold for the proposition cited by Professor Bonfield that because federal funds were involved they never reached the general fund, and therefore do not require appropriation prior to expenditure.

Rather, both of the above cases hold that where the constitution and statutes are silent with regard to a special fund, all funds become general state funds, no matter what the source of the funds may be. And there are other cases which support this proposition and require appropriation before expenditure as required by our Constitution. *State ex rel Western Bridge & Construction Co. v. Marsh, State Auditor, et al*, 111 Nebr. 185, 196 N. W. 130 (1923).

In the Nebraska case, the court held that it was a "fanciful interpretation" of the contract between the state and the United States to say that, in dealing with the federal government the state was exempt from the direction of its constitution and the operation of its statutes.

See also *State v. Lucas et al*, 390 Ohio 519, 85 N. E. 2d 154 (1949) wherein the state of Ohio appropriated funds for a specific purpose, paid them over to political subdivisions which deposited them in special funds, and provided for a reverter of any unused funds at the end of a specified period to revert to the state treasury. The court in this case held that the funds lost their identity as state funds upon being paid over to the subdivisions. See also, *State ex rel State Employees Retirement Board v. Zelle*, 31 Wash. 2d 87, 201 P. 2d 172 (1948); *Ellis v. Stephens et al, State Board of Engineering*, 185 Cal. 720, 198 Pac. 403

(1921); *California Highway Commission et al v. Riley, State Controller*, 192 Cal. 97, 218 Pac. 597 (1923).

Summary

On behalf of the State of Iowa, Governor Hughes has accepted federal funds from the Office of Economic Opportunity (OEO) and the Vocational Rehabilitation Administration (VRA) for the treatment of alcoholism. $17,000.00 was transferred from the Board of Control's appropriation to provide the requisite state matching funds for the first portion of the VRA grant. To initiate the program, the Governor has established the Iowa Comprehensive Alcoholism Project (ICAP), which purports to act as a state agency, with its own director appointed by the governor, and its own personnel. The Alcoholism Study Commission, a state agency under Chapter 123A, Code of Iowa, 1966, has been subordinated to ICAP as a mere advisory group thereof.

There was no statutory authority for the establishment of ICAP. §7.9; Code of Iowa, 1966, by which the Governor claims power for his acts, authorized the governor only to accept and conserve funds provided there is no existing state agency to do so. The Alcoholism Study Commission and the Board of Control were such existing state agencies. In absence of such an existing state agency, however, §7.9 does not empower the governor to establish ICAP or any other state agency. The Governor's actions were an unconstitutional exercise of legislative power in violation of Article III, Section 1, Constitution of Iowa relating to the distribution of powers. An appropriation to match federal funds is not implicit in §7.9. The federal grants became a part of the state treasury and expenditure of them, as well as of the state's matching funds, in absence of appropriation is a violation of Article III, Section 24, Constitution of Iowa.

I have urged the Governor to request the enactment of appropriate legislation. I am now obliged to renew my recommendation that the factual situation be resolved by such action as the legislature deems proper.

June 12, 1967

HOSPITALS — Trustees — §741.11. Trustees are prohibited from accepting an advantageous low bid for supplies or contractual services where one of the trustees has direct or indirect pecuniary interest in the award of the low bid.

Mr. Stanley R. Simpson, Boone County Attorney: This is in reply to your request for an opinion on an interpretation of section 347.15, 1966 Code of Iowa, which reads as follows:

"No Trustee shall have, directly or indirectly, any pecuniary interest in the purchase or sale of any commodities or supplies procured for or disposed of by said hospital."

The question posed in your letter is set out as follows:

"The legal question is, if in a situation supplies or contractional services are made and the low bidder is a firm or business where a trustee may be employed with or has ownership interests, does the above statute prohibit the hospital from accepting a low bid?"

The prohibition in §374.15 is similar to that of §741.11, which provides:

"Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees."

In interpreting this section of the Code, the attorney general, in 1963, ruled that a county board of supervisors cannot accept the bid submitted after calling for sealed bids by advertisement, if any member of the board owns stock in the company submitting the bid, even though the bid might be most advantageous. I am enclosing a copy of the opinion and you will note that it contains a number of pertinent citations.

It is our opinion that the question which you raise must also be answered in the affirmative, that the hospital would be prohibited by the statute cited from accepting a low bid, where one of the trustees of the hospital is employed or has ownership interest in the company submitting such low bid.

June 12, 1967

There is no statutory authority in a Community School District to employ an Attorney on a retainer basis for advising such District on anticipated legal problems and for attendance at Board meetings. Section 279.35, Code of 1966, does not provide such authority.

Mr. Ben A. Galer, Attorney at Law: This is in reply to your letter of May 18, 1967 in which you sought information relative to whether or not the Mount Pleasant Community School District Board of Directors has authority to engage an attorney on a retainer basis for advice on anticipated legal problems and attendance at board meetings.

§279.35, Code of Iowa, 1966, which you cite in your letter authorizes the employment of counsel "where actions may be instituted by or against any school officer to enforce any provision of law," and while this language does permit a liberal interpretation including any and all possibilities of litigation, it cannot reasonably be interpreted to permit the employment of an attorney to merely attend school board meetings. In this connection, I am enclosing a copy of an Attorney General's opinion dated January 2, 1912 which provides a more restrictive interpretation of the section of the Code cited. It appears to us that in the intervening years, the practice has "grow'd like topsy" until it is now customary for an attorney to be employed before suit is actually commenced although the statutory authorization has not been amended.

June 13, 1967

CONSTITUTIONAL LAW — Art. III, §§4 and 5. The term "subdistrict" in House File 736 means "district" within meaning of above constitutional sections and candidate for office of state senator and/or representative must reside in "subdistrict" he seeks to represent. Sixty day residence requirement in Art. III, §4, does not apply to primary election.

Hon. John M. Ely, Jr., State Senator: I have your letter of June 2, 1967, in which you request an opinion of this office as follows:

"Your attention is called to House File 736 and to Article III, Sections 4 and 5 of the Constitution of the State of Iowa. I request your opinion in answer to the following questions:

1. Must a candidate for state senator or state representative actually reside in the senatorial or representative subdistrict he is seeking to represent if he does, in fact, reside in the county which has been subdistricted?

2. Excluding special elections, does the sixty day residence period referred to in Article III, Section 4 of the Constitution of the State of Iowa refer only to the general election?"

The underlying purpose of House File 736 entitled, "An Act to provide for representation in the senate and house of representatives in the sixty-third general assembly," may be found by reference to the following explanation which accompanies this bill:

"This bill establishes senatorial and representative districts for the election of members of the Iowa General Assembly in the 1968 general elections. Those counties which in the past have elected more than one senator and those counties and districts which have elected more than one representative have been subdivided into senatorial and representative subdistricts respectively so that no more than one senator or one representative shall be elected from any one district or any one subdistrict."

and to §2 of such bill which sets out the principles which are followed in the bill in seeking to accomplish this objective. §2 of House File 736 reads as follows:

"The general assembly hereby determines that during the interim period before a constitutional amendment becomes effective and in order to provide fair and equal representation to all citizens of Iowa, the apportionment of the general assembly for the 1968 general election and any special election to fill any vacancy in the sixty-third (63rd) general assembly shall be based upon the following principles:

1. The senate and the house of representatives shall be apportioned on a population basis to insure that the one (1) man, one (1) vote principle shall be implemented and maintained in the apportionment of the general assembly.

2. All senators to be elected in the 1968 general election shall be elected from single-member senatorial districts or in any county with a population entitling that county to elect more than one (1) senator, each senator within the county shall be elected from a single-member senatorial subdistrict.

3. All senators elected in 1966 shall in the sixty-third (63rd) general assembly represent the single-member senatorial district from which they were elected, or if elected from a county from which more than one (1) senator was elected in 1966, they shall represent a single-member senatorial district within the county.

4. All representatives shall be elected from single-member representative districts and in any county or in any district with a population entitling that county or district to elect more than one (1) representative, each representative shall be elected from a single-member representative subdistrict.

5. No county shall be divided and attached to another county or part of a county in forming a senatorial or representative district or subdistrict except where the attachment is necessitated to maintain the one (1) man, one (1) vote principle.

The general assembly hereby declares that the foregoing provisions have been followed in this Act and that the provisions are necessary and reasonable to provide fair and equal representation in the general assembly to all citizens of Iowa."

Subsections 27, 29 and 30 of §3 of House File 736 illustrates so far as the senate is concerned the three basic situations which would exist if the bill became law:

"27. Story county shall constitute the twenty-seventh senatorial district with one (1) senator.

* * *

"29. Carroll county and Crawford county shall constitute the twenty-ninth senatorial district with one (1) senator.

"30. Dubuque county shall constitute the thirtieth senatorial district and shall be subdivided into the two (2) following senatorial subdistricts with one (1) senator for each subdistrict: * * *"

The bill elsewhere provides for similar redistricting of representative districts. The first question you have raised relates only to the situation exemplified by §3(30) of House File 736, as set forth above, in which a county is subdivided to form two or more election districts out of what was formerly but one such district. The answer to this question hinges on whether or not the draftsmen of House File 736 can by resorting to the semantic device of characterizing the new election districts created by this bill as "subdistricts," overcome the requirements of Article III, §§4 and 5 of the Constitution of Iowa, as to the residence of candidates for election to the general assembly, which are here set forth:

"Qualifications. Sec. 4. No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the County, or District he may have been chosen to represent.

"Senators — qualifications. Sec. 5. Senators shall be chosen for the term of four years, at the same time and place as Representatives; they shall be twenty-five years of age, and possess the qualifications of Representatives as to residence and citizenship."

In our opinion the authors of House File 736 have, by recourse to the shibboleth "subdistricts," failed to overcome the constitutional mandate that a candidate for the senate or house of representatives share in common with those whose votes he seeks, residence in a common election district, by whatever name called, and that for purposes of §§4 and 5 of the constitution a subdistrict is nothing more nor less than an election district. Accordingly, in reply to the first specific question you present it is our opinion that in the event House File 736 became law, a candidate for state senator or state representative would have to actually reside in the senatorial or representative subdistrict he is seeking to represent regardless of the fact that such candidate might reside in the county which has been subdistricted to form such so-called subdistrict.

We might make the parenthetical observation that it is improbable that the authors of House File 736 contemplated that it should be possible in a district composed of two subdistricts, one rural and one urban in character, that a candidate residing in the urban subdistrict would be elected to represent the rural constituency — or *vice versa*.

In order to afford the citizens of a state fair and equal representation, the Supreme Court of the United States in *Reynolds v. Sims*, 377 U. S. 533, 84 S. Ct. 1362 (1964) has required that states should be divided into senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one senator.

House File 736 was apparently conceived as a legislative response to the case of *Kruidenier v. McCulloch*, ... Iowa....., 142 N. W. 2d 355 (1966), which found that while the 1965 temporary reapportionment plan, Acts 61st G. A., C. 88, was insufficient to meet the requirements of the United States Constitution, as interpreted by the United States Supreme Court, that both houses of a state legislature be elected on the basis of population, it was adequate as an interim measure; and that the Sixty-second General Assembly would be the appropriate body to devise a scheme of apportionment more consonant with the ukase of the U. S. Supreme Court, i.e. the so-called "one-man, one-vote" rule laid down in *Reynolds v. Sims, supra*. As stated by the court in *Kruidenier v. McCulloch, supra*, in summarizing its decision:

"The Sixty-second General Assembly of Iowa will have the power to and is the appropriate body to provide such subdistricting.

"The equal protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable."

It was stated in *Kruidenier v. McCulloch, supra*, and held by the Pennsylvania Supreme Court in *Butcher v. Bloom*, 415 Pa. 438, 203 A 2d 556, (1964) that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of district where the population principle cannot otherwise be satisfied. Pennsylvania also recognized the principle that apportionment should be among the several counties and that counties should be utilized as units of representation to the maximum extent consistent with the equal-population principle. As in Iowa, Pennsylvania held that no provision of the Pennsylvania constitution prohibited the division or combination of counties in the formation of districts where the population principle could not otherwise be satisfied.

In complying with these principles, House File 736, would create single member subdistricts to comply with the principle of fair and equal representation. The question then arises as to whether "subdistricts" are to be interpreted and have the same definition as "district." If such is the case, then under Art. III, §§4 and 5 the candidate in order to qualify for office, must reside in the subdistrict 60 days next preceding the election.

The portion of the *Kruidenier* decision hereinbefore quoted is but one instance where the word "subdistrict" has been used as a verb in that opinion.

However, the opinion of the court in *Kruidenier* is replete with numerous instances in which the word "subdistrict" is used in the predicative sense but nowhere is the expression used as a noun. In speaking of the subdistricting process the court always described the resulting geographical entities as "districts." At one point in its opinion in *Kruidenier* the supreme court of Iowa defined subdistricting in the following terms:

"Defendants assert and the trial court held this provision prohibits *subdividing a county in forming a senatorial or representative district wholly within that county, i.e., what is commonly called subdistricting.* Plaintiffs contend, however, section 37 prohibits only dividing a county and attaching the divided part to all or part of another county or other counties in forming a legislative district. Otherwise stated, the contention is that section 37, supra, does not proscribe establishing more than one district within a single county so long as it is not combined with territory outside the county." (emphasis supplied)

It is apparent that the supreme court regards the process of subdistricting as resulting in the creation of new election districts, not subdistricts.

The court in that case held that dividing a county in forming a legislative *district* was not unconstitutional under Art. III, §37 unless the divided part was attached to part or all of another county or counties. The apparent intent of the court was that the subdivision of the county would create new legislative districts constituting independent legal entities. Specifically, the court required the subdivision of Polk County (subdistricting) after the 1966 elections. *Kruidenier v. McCulloch*, 142 N. W. 2d 355, 369. In carrying out the order of the court in *Kruidenier*, House File 376 provides at page 20 that Polk County should be the twentieth district and contain several subdistricts. However, the apparent intention of the house was to avoid the previous multi-member district and to adopt a one-member one-vote principle. Under this principle, residents of the subdistrict are allowed to vote *only* for representatives "from a single-member senatorial subdistrict." House File 736, p. 1. It would follow that electors residing in a certain subdistrict would not be able to vote for candidates in another subdistrict. As a result, subdistricts have attained the status of a separate independent legal entity and, in fact, can be interpreted as districts. To reiterate the definition of subdistricting in *Kruidenier* subdistricting is the method by which a county (i.e. Polk County) is divided into senatorial or representative *districts* wholly within that county. The fact that Polk County is designated as a district under House File 736, p. 20 is done simply to define the area which shall be divided in forming voting districts.

It is true that the legislature may be its own lexicographer. *Graham v. Worthington*, ... Iowa..... ....., 146 N. W. 2d 626, 632 (1966) and cases and authorities cited therein, and that it "may enact any law desired" provided it is not clearly prohibited by some provision of the Federal or State Constitution, Id. at 631. However, it is equally axiomatic and too well settled to require citation of authorities that in interpreting an act of the legislature where two constructions are possible, the one will be adopted which does not lead to consequences which would serve to make the act unconstitutional. Thus, we are under a duty to use every reasonable effort to attribute to the word "subdistrict" a meaning in harmony with the constitution.

The word "subdistrict" is alien to the Constitution of Iowa. The term used in Article III, §4 is "District." In determining whether or not the term "subdistrict" as used by the legislature is synonomous with the expression "District" in the constitution a relevant line of inquiry would

involve an examination into the underlying purposes for the residence requirement for candidates for the state house of representatives and senate as articulated by the people in their constitution.

The apparent policy reason behind Art. III, §§4 and 5, is that electors under the fair and equal representation doctrine under the 14th amendment should have the opportunity to be represented by individuals who share the same interests and who by reason of their residence are close to and understand the problems of their constituencies.

In a recent decision, *Dusch v. Davis*, ...U. S....., ...S. Ct. .....(1967) the United States Supreme Court upheld a plan adopted by the Virginia legislature under which the City of Virginia Beach was consolidated with adjoining Princess Anne County in forming a borough form of government. Under the plan adopted a council of eleven was established with all members to be elected at large. There was no requirement as to residence insofar as four members were concerned. However, the plan required that each of the remaining seven members be a resident of one of the seven boroughs comprising the new City of Virginia Beach. In rejecting a challenge to the validity of the residence requirements of this plan the court quoted with approval a portion of the opinion of the district court below:

"The principle and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area. . . . the history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems in handling the affairs of one of the largest area-wide cities in the United States. Bluntly speaking, there is a vast area of the present City of Virginia Beach which should never be referred to as a city. District representation from the old County of Princess Anne with elected members of the Board of Supervisors selected only by the voters of the particular district has now been changed to permit city-wide voting. The 'Seven-Four Plan' is not an evasive scheme to avoid the consequences of reapportionment or to perpetuate certain persons in office. The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population."

While it is certainly true that the plan before the court in *Dusch v. Davis, supra*, is entirely different from the reapportionment scheme embodied in House File 736 the language of the opinion above quoted does manifest a recognition by the United States Supreme Court that there are valid and persuasive reasons for a residence requirement for candidates, even in a multi-member district.

For these reasons, the adoption of the bill under House File 376 into law would necessiate the residence of the candidate in the subdistrict he may have been *chosen to represent* 60 days preecding the election.

In answer to the second question you have raised, it is my opinion that the sixty day residence period referred to in Article III, §4 of the Constitution of Iowa refers only to general elections. In framing your ques-

tion you have expressly excluded special elections so that the only question remaining is whether the term "election" as used in Article III, §4 includes primary elections.

This issue was squarely presented to and decided by the Iowa Supreme Court in *State v. Carrington*, 194 Iowa 785, 190 N. W. 390 (1922). As stated by the court therein:

"*A primary election is not an election, within the meaning of the Constitution;* nor is it such within any meaning known to the common law. It is purely a legislative creation, that involves neither life, liberty, property, nor franchise. It is enacted solely for the benefit of orderly procedure in the administration of political parties respectively, whereby each may select candidates for office, to be submitted to the consideration of all the electors at the general election. In its creation the legislature was subjected to no constitutional inhibition; nor are its imperfections, if any, subject to attack on constitutional grounds. Prior to its legislative creation, the primary election never was or could be the subject of judicial cognizance; nor in its creation has the legislature conferred or taken away any right which has been heretofore, or can be hereafter, the subject of judicial cognizance, except so far as such right may be later conferred by legislation." (emphasis supplied)

Thus the court recognized that a primary election is not an election as that term is used in the constitution. Accordingly, Article III, §4 imposes no requirement on a candidate in a primary election contest that such person shall have had an actual residence of sixty days prior to such primary election in the county or district from which he hopes to become a candidate in a general election.

June 16, 1967

AREA HOSPITALS — S.F. 447. An area hospital, once established, may not increase or decrease the boundaries of the area it serves.

Hon. James T. Klein, State Representative: This will acknowledge your letter of June 8, 1967 in which you ask an opinion of this office with reference to Senate File 447 and the possibility of increasing or decreasing the area included in an area hospital after such area hospital has been incorporated.

The only language contained in Senate File 447 that deals in any way with the question you pose, is that contained in section 3 and reads as follows:

". . . and in planning for such hospitals, a county board of supervisors may exclude any township of the county which the board of supervisors determines would not sufficiently benefit by the merger."

In all other respects Senate File 447 is silent with regard to the questions you pose.

Under Iowa law, all political subdivisions are creatures of statute and possess only those powers granted to them by the legislature. In this regard, I would call your attention to sections 362.26-.31, inclusive, Code of Iowa, 1966, which is the statutory authority granted by the legislature to cities and towns by which the corporate limits of a city or town may be extended. Section 362.32 is the statutory authority under which the city limits of a city or town may be reduced. Without the benefit of these two authorizations cities and towns in Iowa would be unable to change their municipal lines.

In addition, your attention is called to section 455.128, Code of Iowa, 1966, which grants to levy and drainage districts, the power to annex additional land and similarly sections 274.13-.15, inclusive and section 274.37, which sections allow school districts to adjust their boundaries.

All of the above are typical sections found in the Code of Iowa, which do allow political subdivisions to change the territory which they govern. Without such express legislative authority, a political subdivision has no such power.

It is therefore my opinion that once an area hospital has been established under Senate File 447, absent further legislation authorizing a change in the size of the area, there is no authority to increase the size by adding additional townships nor is there any authority for any township to remove itself from the approved area.

June 16, 1967

A special fuel user holding a license is entitled to the credit provided for in §324.16, Code of 1966.

Mr. Wayne J. Fullmer, Director, Motor Vehicle Fuel Tax Division: Reference is herein made to yours of the first inst., in which you submitted the following:

"Chapter 324.16, Code of 1966, Iowa Motor Vehicle Fuel Tax Law, in part, sets out the following:

A licensee having received motor fuel or special fuel which thereafter (1) he uses for any purpose other than as fuel for propelling motor vehicles or (2) while owned by him is lost or destroyed through accountable leakage or through fire, accident, lightning, flood, storm, act of war or public enemy or other like cause, shall upon application to the treasurer supported by proof as the treasurer may reasonably require, be entitled to a memorandum of credit which he may apply against subsequent liability under this chapter.

"It would appear that the above statute would apply *only* to a person licensed as a distributor of motor fuel or special fuel based on the fact that the statute sets out the wording "a licensee having received motor fuel or special fuel."

"Licensee" defined, 324.2, Subsection 3.

"The word "received" defined 324.2, Subsection 5.

"Your opinion is requested on the following: May a person licensed as a special fuel user under 324.36 (a person so licensed defined as a "licensee" 324.33, Subsection 5), who, having paid the fuel tax, apply for a memorandum of credit for fuel used or lost as is set out in 324.16."

In reply thereto I answer your question in the affirmative, i.e. that a licensee of special fuel has an equal status with the licensee of motor fuel insofar as the benefits of Section 324.16, Code of 1966, is concerned. This statute is plain and unambiguous and needs no interpretation so to conclude. The license of a distributor of motor fuel is described in Section 324.2(3) and is wholly separate and distinct from a license to act as a special fuel dealer which is described in Section 324.33(5), Code of 1966. The word "received" as used in Section 324.16 has significance only as identifying the motor fuel licensee as entitled to the credits provided by Section 324.16. A "licensee having received motor fuel" as used in Section 324.16, has reference to Section 324.2(5), which describes in

specific terms the different situations involved in the designation of "motor fuel deemed received." There is no such statutory designation as far as special fuel is concerned. Thus Section 324.16, Code of 1966, correctly identifies the beneficiaries of Section 324.16 as "licensee having received motor fuel or" a licensee of special fuel as entitled to the credits provided in Section 324.16. Therefore in answer to your question a user in special fuel is entitled to the benefits of Section 324.16.

June 16, 1967

INSTITUTIONS: Legal Settlement: Minor Child: §§230.1, 252.16(5), 633.3(19), (20), 633.556, 633.570, 1966 Code of Iowa. Legal settlement of a minor child remains that of his deceased mother having his custody, and not of grandmother with whom he resided who is not appointed guardian of the person, but only guardian of the property of said minor.

Mr. M. J. Brown, Administrative Assistant, Board of Control of State Institutions: Your letter dated May 24, 1967 addressed to the Attorney General's office, regarding Danny Coburn, a minor child who was admitted to the Mental Health Institute at Independence, Iowa on January 30, 1967 from Fayette County, has been turned over to me for attention.

In your letter you state the facts to be:

"A dispute has arisen between Fayette and Black Hawk counties concerning the legal settlement of the above named minor child who was admitted to the Mental Health Institute, Independence, Iowa, on January 30, 1967 from Fayette County.

"The parents were divorced and the whereabouts of the father is unknown. The mother, who lived in Black Hawk County at the time, was killed in an accident on February 11, 1964. She had been receiving Aid to Dependent Children from Black Hawk County.

"The four minor children went to live in the home of their grandmother who lives in Fayette County, and she became guardian of their property. (Copy of the court order is attached.) It is my understanding that Black Hawk County has paid the Aid to Dependent Children allowance since the guardianship was opened in January, 1964.

"I would appreciate an opinion from the Attorney General as to the county of legal settlement of Danny Coburn for the purposes of determining which county is financially responsible for the costs of his care at the state institution."

In your letter you enclosed a certified copy of Letters of Appointment of the grandmother as "Guardian of Property," dated January 2, 1964, of Danny Coburn and his brothers and sisters.

The probate code, Chapter 633, 1966 Code of Iowa, was in effect at the time the grandmother was appointed guardian of the property of the minors.

Section 633.3, Definitions and Use of Terms, 1966 Code of Iowa, reads:

"19. Guardian — the person appointed by the court to have the custody of the person of the ward under the provisions of this Code.

"20. Guardian of the property — at the election of the person appointed by the court to have the custody and care of the property of a ward, the term 'guardian of the property' may be used, which term shall be synonymous with the term 'conservator.' "

Section 252.16(5), 1966 Code of Iowa, reads:

"A legal settlement in this state may be acquired as follows: . . .

5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

Section 230.1, 1966 Code of Iowa, provides:

"The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment and support of a mentally ill person admitted or committed to a state hospital shall be paid:

"1. By the county in which such person has a legal settlement, or

2. By the state when such person has no legal settlement in this state, or when such settlement is unknown.

"The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

You state that the parents were divorced and that the mother, prior to her death was receiving "Aid to Dependent Children" assistance from Black Hawk County. Presumably, then, their custody had been granted to the mother in the divorce decree. Assuming that fact, the legal settlement of said minor children would be that of their mother and not their father. In the case State vs. Peisen, 233 Iowa 865, 10 N. W. 2d 645, the Supreme Court at page 871 said:

"Where, as here, the family ties are broken and the father is deprived by court order of the right to custody and control of the children, the reason for the rule no longer exists. The settlement of the children is then not affected by a subsequent act of the father which might change his own settlement.

"Our holding that a father who has been legally deprived of the custody of his children can no longer control their settlement finds support in decisions that the settlement of a wife who has been confined in an asylum or abandoned by her husband remains unchanged by any subsequent act of the husband. Breaking the family unity destroys the premise that the settlement of the father or husband controls that of members of the family who have been legally separated from him. Polk County v. Clarke County, 171 Iowa 558, 561, 151 N W. 489; Scott County v. Townsley, 174 Iowa 192, 194, 156 N. W. 291; State ex rel. O'Connor v. Clay County, 226 Iowa 885, 892, 893, 285 N. W. 229
* * *

"Our holding also finds support in the rule that the domicile of a father who has been legally deprived of the custody of his child does not control the child's domicile. The general rule that the domicile of an infant is that of his father rests upon the idea of parental custody of the infant, and when the reason for the rule fails the rule is not applied. (Citation)"

In an Attorney General's opinion, dated February 19, 1963, we find the following statement:

"Neither the Code of Iowa nor the courts have provided that legal settlement can be acquired by a minor child through grandparents of such child *where the grandparents have not been appointed guardians*, or both the parents are deceased [Emphasis supplied]

It is possible for grandparents to change the domicile of minor children, providing they make application for and obtain an appointment as guardian of the person of the minor children in the county of residence of the minor children. In Iowa the term "guardian of property" is syn-

onymous with "conservator," as above noted. (Section 633.3, 1966 Code of Iowa) The only type of guardianship obtained in this instance was that of a conservator or guardian of property. A guardian of property cannot change the legal settlement of a minor. There is no showing that the grandparents ever made application for or were appointed guardian of the person of said minors.

Therefore, it is the opinion of the undersigned that since the mother of said minors had their legal custody and she had her legal settlement in Black Hawk County at the time of her death, the minors also had legal settlement in said county.

Since no guardian of the person has been appointed for said minors, who changed their legal settlement, the minors continue to have their legal settlement in Black Hawk County although they have been residing with their grandparents in Fayette County.

Since Danny Coburn, a minor with legal settlement in Black Hawk County, was admitted to the Mental Health Institute at Independence, Iowa, while living in Fayette County, nevertheless, the county of Black Hawk is liable for such institutional expenses as his legal settlement was in Black Hawk County at the time of his admission to the said state institution. (Section 230.1, 1966 Code of Iowa)

June 16, 1967

COURT COSTS — Complete Record §624.21. Provisions of this section do not apply to divorce action even though decree deals with ownership of real estate. It applies to proceedings wherein ownership of legal and/or equitable title is the subject of the main action.

Mr. Carroll Wood, Hamilton County Attorney: This will acknowledge your letter of June 6, 1967 in which you request an opinion with reference to the meaning of §624.21, Code of Iowa.

The specific facts on which you propose the question are apparently as follows:

In a divorce action, the plaintiff and defendant who were sole owners of a parcel of real estate entered into a stipulation of settlement including an agreement on the part of the defendant to execute and deliver a quit claim deed to the plaintiff for the defendant's interest in the joint tenancy real estate. The stipulation as is normal, was incorporated into the court's decree by reference. Thereafter the party required to pay court costs, objected to paying for a complete record which the clerk had prepared under §624.21.

§624.21 reads:

"In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause, except abstracts of title attached to the pleadings, and enter it in the proper book. In no other case need a complete entry be made, except at the request of either party, which party shall pay the costs of said entry."

In the case of *Smith v. T. Cumins & Co.*, 52 Ia. 143, 2 N. W. 1041 (1879), the court in discussing the section above set out stated:

"We think the statute contemplates only that class of cases where the plaintiff upon the one side claims that he has title legal or equitable, and the defendant disputes the plaintiffs title and claims title in himself or another."

Typical of the type of action under which the clerk would be justified in making a complete record, is a quiet title action.

I do not find that the set of facts you relate in your letter would justify the preparation of a complete record under the section involved.

June 19, 1967

The Opinion of this Department dated December 1, 1958, Erbe to Stiles, denying the power of the State to assume obligations of the United States as a violation of Article VII, Section 1, Constitution of Iowa, remains the view of the Department, unaffected by the case of Graham vs. Worthington, 146 N. W. 2d 626.

Joseph G. May, Col., GS, Iowa ARNG, Assistant Adjutant General: Reference is herein made to yours of March 9th, 1967, in which you submitted the following:

"This headquarters directed a letter to the District Engineer, Corps of Engineers, Rock Island District, on February 9, 1966, requesting consideration for a License, to the State of Iowa, for an area in the Coralville Reservoir for the purpose of constructing of a 25-meter small arms range for the training of the Iowa National Guard.

"The District Engineer, by letter dated October 18, 1966, indicated willingness to cooperate with the Iowa National Guard conditioned upon the State providing certain prescribed liability insurance for the reason that the Standard Form of License includes a "hold harmless" clause, as set forth hereafter, that must be deleted from a license running to the State because of an Iowa Attorney General Opinion (1 December, 1958) holding that such clause is contrary to Article 7, Section 1, of the Iowa Constitution.

"The standard "hold harmless" clause provides as follows:

"That the Government will not be responsible for any injury to persons or damage to property arising out of or incident to the use or occupancy of the licensed property by the licensee, howsoever such injury or damage may be caused, and the licensee shall indemnify and save the Government harmless from any and all claims for any such injury or damage, excepting claims for injury or damage arising from activities of the Government on the said property which are being conducted exclusively for the benefit of the Government. Nothing contained in this condition shall be construed to be in derogation of the rights and remedies afforded aggrieved parties by Federal statute."

"The Iowa Supreme Court filed a Decision November 15, 1966, (Graham v. Worthington, 223-52330) upholding the constitutionality of the State Tort Claims Act. This decision reveals that the Court considered the indicated provision of the Iowa Constitution, which was the basis for the Iowa Attorney General's Opinion of 1 December 1958, and further appears to expressly hold that the new Tort Claims Act does not conflict with the Constitutional provision.

"An opinion of the Attorney General is respectfully requested as to the impact of this recent Supreme Court Decision on the Attorney General's Opinion of 1 December 1958 with particular reference to the objection to the "hold harmless" clause in the Federal License Form."

In reply thereto I advise as follows:

The provision of such standard form of license, that the licensee (in this situation the State of Iowa) shall hold the United States harmless from any and all such claims being so described in the foregoing form, has been held by this department in an opinion issued December 1, 1958, to deny power of the state to assume obligations of the United States of the nature there under consideration as a violation of the provisions of Article VII, §1 of the Constitution of Iowa providing as follows:

"The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the State shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the State."

This opinion remains as the view of this department unaffected by the Tort Claims Act, Chapter 25A, Code of Iowa, 1966.

The Supreme Court of Iowa had this ACT under consideration in connection with a claim of unconstitutionality and invalidity of the Iowa Tort Claims Act in the case of J. Wesley Graham v. Lorne R. Worthington, et al, opinion filed November 15, 1966, appearing in 146 N. W. 2d 626, where the court addressing itself to the question:

"Whether the Act serves to make the state responsible for the debts or liabilities of others."

stated, after discussion of the claims made therefor, that:

". . . the Act does not cause the state to assume or be responsible for the debts or liabilities of any individual, association or corporation, and does not violate Article VII, section 1, of our state constitution."

June 20, 1967

TAXATION — Platted Ground — §409.48. This section applies to all platted ground, no matter when plat was made, filed and recorded.

Hon. C. Joseph Coleman, State Senator: Under date of June 13, 1967, you have posed the following question:

"Are all additions or subdivisions platted, made, filed and recorded under Section 409.48, prior to July 4, 1965, automatically subject to assessment under Chapter 428 and 441 as a result of the passage of Chapter 339 of the 61st G. A.?"

§409.48 was first added to the Code in 1955, see Acts, 56th G. A., chapter 201. Prior to its adoption, all real estate was subject to the assessment procedures under chapter 428 and chapter 441.

When the 61st general assembly adopted chapter 339, §409.48 was repealed and then replaced in the Code with the present §409.48.

It is my opinion that the present §409.48, Code of Iowa, 1966, is the only section applying to the assessment method on platted lots no matter when the plat was filed for record.

June 22, 1967

CONSTITUTIONAL LAW: Division of powers, delegation of legislative authority — Art. III, §1, Constitution of Iowa. House File 720 which seeks to confer on the governor power to do all things necessary to secure to the state the full benefits available under the federal high-

way safety act of 1966 and any and all amendments thereto and to designate an appropriate state agency to administer through him the programs contemplated therein, would if enacted amount to an unconstitutional delegation of legislative authority. Neither House File 720 nor the federal act contain guidelines sufficient to render the bill constitutional and the secretary of transportation has not issued standards as required by the highway safety act of 1966. While the legislature may adopt requisite guidelines by reference it may not adopt as such guidelines standards which are to come into existence in the future. The legislature may not constitutionally delegate to the governor the authority to create a new agency nor, to designate without guidelines, any existing state agency to administer the program.

The Hon. Edgar H. Holden, State Representative, Scott County: By your letter of May 10, 1967, you request an opinion as to the constitutionality of House File 720 (which is the same as Senate File 820), and which is quoted as follows:

"An Act relating to acceptance of federal funds for highway safety.

"Section 1. Chapter seven (7), Code 1966, is hereby amended by adding thereto the following:

"The governor, in addition to other duties and responsibilities conferred upon him by the constitution and laws of this state, is hereby empowered to contract and *to do all other things necessary* to secure the full benefits available to this state under the federal highway safety act of 1966, and in so doing, to cooperate with federal and state agencies, private and public organizations, and with individuals, to effectuate the purpose of *that* enactment, *and any and all subsequent amendments thereto.* The governor shall be responsible for and is hereby empowered to administer through such appropriate agency of this state *as he shall designate* within thirty (30) days from the date hereof, the highway safety programs of this state and those of its political subdivisions, all in accordance with said act and federal rules and regulations in implementation thereof." (Emphasis added)

The problems presented are similar to those with regard to §7.9, Code of Iowa, 1966, on which I rendered an opinion to Representative Leroy Miller on June 10, 1967. A copy of that opinion is submitted herewith.

The delegation of power to the governor "to contract and to do all other things necessary to secure the full benefits available to this state under the federal highway safety act of 1966" is unconstitutional as a delegation of legislative power without limitation. Instead of empowering the governor to contract and do all other things necessary, the power should be spelled out and limited by standards or guide lines or it should be provided that the governor is empowered "to do what is expressly required by the terms of the federal highway safety act of 1966 in order to secure the benefits of said act." *State ex rel Klise vs. Town of Riverdale* (1953), 244 Iowa 423, 57 N. W. 2d 63.

If the bill is so amended as I have suggested, it is then necessary to determine whether the federal highway safety act of 1966 provides sufficient guide lines for this delegation. The law was enacted on September 9, 1966, and empowered the secretary of commerce to administer it. On October 15, 1966, the act was amended when the department of transportation was created, and the secretary of transportation is now charged with the responsibility of its administration. The parts of the act pertinent to our consideration are as follows:

§402. Highway safety programs

"(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with *uniform standards promulgated by the Secretary.* Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, *but not limited to,* driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance. In addition such uniform standards shall include, *but not be limited to,* provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, *to the extent determined appropriate by the Secretary,* be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. *The Secretary shall be authorized to amend or waive standards on a temporary basis* for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, where the Secretary finds that the public interest would be served by such amendment or waiver.

"(b)(1) The Secretary shall not approve any State highway safety program under this section which does not —

"(A) provide that the Governor of the State shall be responsible for the administration of the program.

"(B) authorize political subdivisions of such State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program *if such local highway safety programs are approved by the Governor and are in accordance with the uniform standards of the Secretary promulgated under this section.*

"(C) provide that at least 40 per centum of all Federal funds apportioned under this section to such State for any fiscal year will be expended by the political subdivisions of such State in carrying out local highway safety programs authorized in accordance with subparagraph (B) of this paragraph.

"(D) provide that the aggregate expenditure of funds of the State and political subdivisions thereof, exclusive of Federal funds, for highway safety programs will be maintained at a level which does not fall below the average level of such expenditures for its last two full fiscal years preceding the date of enactment of this section.

"(E) provide for comprehensive driver training programs, including (1) the initiation of a State program for driver education in the school systems or for a significant expansion and improvement of such a program already in existence, to be administered by appropriate school officials under the supervision of the Governor as set forth in subparagraph (A) of this paragraph; (2) the training of qualified school instructors and their certification; (3) appropriate regulation of other driver training schools, including licensing of the schools and certification of their instructors; (4) adult driver training programs, and programs for the retraining of selected drivers; and (5) adequate research, development and procurement of practice driving facilities, simulators, and other similar teaching aids for both school and other driver training use.

"(2) The Secretary is authorized to waive the requirement of subparagraph (C) of paragraph (1) of this subsection, in whole or in part, for a fiscal year for any State whenever he determines that there is an insufficient number of local highway safety programs to justify the expenditure in such State of such percentage of Federal funds during such fiscal year. (Emphasis added)

* * *

"Sec. 203. The Secretary of Commerce [Transportation] shall report to Congress, not later than *July 1, 1967*, all standards to be initially applied in carrying out section 402 of title 23 of the United States Code." (Emphasis added)

While the Federal act, itself, appears to delegate to the Secretary of Transportation the power to make the law in this area, by empowering him to promulgate "uniform standards," I assume, without deciding, that this delegation provides sufficient limiting guide lines so as not to render the Federal act unconstitutional as a delegation of legislative power. But guide lines for the Secretary's power to promulgate uniform standards, do not constitute requisite guide lines for House File 720. If this Iowa bill is to obtain its requisite guides lines through incorporation by reference, it should provide that they come from the uniform standards promulgated by the Secretary, as well as by the Federal law itself

Section 203, quoted above, provides that the Secretary report to Congress, not later than July 1, 1967, all standards to be applied in carrying out the Federal law. Our search indicates that such standards have not been so promulgated to this date. For that reason, there are no adequate existing guide lines for standards. The General Assembly cannot delegate its power to the Secretary of Transportation to make the law of Iowa. The legislature can adopt by reference the Secretary's uniform standards promulgated under the Federal law as its own guide lines, if they are in existence when the bill is enacted. But it cannot adopt, as guide lines, such standards which do not already exist or which may hereafter be promulgated. And, it cannot even adopt, as the bill specifically attempts to do, "subsequent amendments" to the Federal act itself. 16 Am. Jur. 2d 495, Constitutional Law §245, says:

"The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. Thus, it is generally held that the adoption, by or under authority of a state statute, of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power." See also 133 A.L.R. 401 and the cases cited thereunder

To this extent, the bill is clearly a violation of Article III, Section 1, Constitution of the State of Iowa, relating to distribution of power, and of Article III, Section 1, Constitution of the State of Iowa, relating to the legislative department.

The Federal act provides that the Secretary shall not approve any state highway safety program which does not "provide that the governor of the state shall be responsible for the administration of the program." House File 720 says "The governor shall be responsible for and is hereby empowered to administer through such appropriate agency of this state as he shall designate" the highway safety programs of Iowa. I have previously said that the legislature cannot delegate to the governor its

power to create state agencies without providing guide lines. See Opinion of the Attorney General, June 10, 1967. Moreover, without guide lines, the legislature cannot delegate to the governor the power to designate which of the *existing* state agencies is the appropriate agency to administer the Federal program. It could, however, delegate to him the power to choose between two or three state agencies it names, such as the Highway Commission or the Department of Public Safety. And, there is no reason why it cannot be provided that the governor "shall be responsible" for administration of the Federal program through the designated agency.

June 22, 1967

LIQUOR, BEER AND CIGARETTES: Report and return of tax — §§123.98 and 123.99, 1966 Code — The report and return of tax required to be filed pursuant to §123.98 are not timely filed unless they are actually in the hands of the commission on or before the fifteenth day of the month following the period for which rendered. Because reports of licensees have in the past been treated as timely filed if postmarked on or before the fifteenth this opinion should be given only prospective effect.

Mr E. J. McCarthy, Liquor Control Commission: This is response to your telephone request of June 16, 1967, for an interpretation of Section 123.98, Code of Iowa, 1966. I understand your specific question to be:

"Does the word 'render' in Section 123.98, Code of Iowa, 1966, require that the licensee have his report and return of tax posted on or before the fifteenth day of each month or must the commission have received it on or before that date?"

Section 123.98, Code of Iowa, 1966, states in part:

"On or before the fifteenth day of each month every such licensee shall render to the commission a report . . "

Section 123.99, Code of Iowa, 1966 states:

"A penalty of five percent per month of the amount of the tax shall be added thereto if the report is not filed and the tax paid to the commission by said fifteenth day of the calendar month."

A question of whether or not a licensee is in compliance with §123.98 of the 1966 Code of Iowa, by placing his report and return of taxes for the preceeding calendar month, in the mail of the United States in a properly addressed cover, with sufficient postage so that it will be postmarked not later than the 15th day of the month, is certainly not a question of first impression. It is common knowledge that the United States government has historically accepted this method of filing federal income tax returns in compliance with a statute not dissimilar from chapter 123. The United States government has now formalized by way of a regulation, their acceptance of a properly postmarked filing. Int. Rev., Code of 1954, §7502, Regs. §301.7502 — 1 (c).

In discussing this same problem with regard to the filing date for Iowa Income Tax Returns, Professor Edward Hayes, professor of Law, Drake University Law School, said:

"What constitutes the filing of a return has not been defined in prior or present statutes nor in prior regulations. In the past, a return ap-

parently was assumed to be filed on the date of its receipt if on a proper or acceptable form and if duly signed by the taxpayer (or assumed to be filed on the due date if posted in time to arrive by that date but received after the expiration of the time for filing). Because a substantial number of taxpayers submitted returns but failed to include the tax due, in 1955, it was felt necessary to define "filing" to include not only the submission of the signed returned, but also the submission with that return of such portion of the tax as is due and payable at the time of filing. The return is not considered to be filed until the payment is received, and if payment is not received until after the time for filing, the taxpayer is delinquent and subject to the penalties appropriate to late filing."

The United States mail has long been trusted with the transmittal and delivery of important business. A contract may be completed by agreement being communicated to the offeror. If this is by mail, the sending and not the receiving, completes the transaction. *Hayne v. Cook*, 252 Ia. 1012, 109 N. W. 2d 188.

Chapter 324 of the Iowa Code deals with motor vehicle fuel tax and §324.60 states:

"The reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked on or before midnight of the day on which due and payable. If the final filing date falls on a Saturday, Sunday or legal holiday, the next secular or business day shall be the final filing date."

This is the only section in the Iowa Code dealing with the collection of taxes but clearly spells out the definition of the timely compliance by a taxpayer for the requirements of the code sections.

It does seem clear that either by statute or regulation, those agencies which are responsible for the collection of the various taxes, both state and federal, have defined what will constitute a timely filing. I think it would be appropriate for the Iowa Liquor Control Commission to establish regulations defining this area.

Pending establishment of such regulations, it is my opinion that the language of §123.98 requires a licensee to render a report and pay the tax on or before the 15th day of the calendar month following the period for which the report is rendered and that the same is not timely filed unless it is in the commission's hands on or before the 15th day of that month. Because this is an area that is difficult of definition and because the present licensees have apparently been led to believe that a properly postmarked report is a timely filing, we believe that §123.99 should be invoked only on taxes collected for the month of June, 1967 and months subsequent thereto.

June 23, 1967

CRIMINAL LAW: Fireworks, §§732.17 and 732.18. The sale or use of any fireworks of a frivolous nature except those expressly excluded by law is unlawful

Mr. David A. Opheim, Webster County Attorney: This letter is in response to your inquiry of June 2, 1967, in which you request our opinion with respect to the following:

Is §732.17, Code of Iowa 1966, meant to include in its definition of "fireworks" a cherry-size device, the ignition of which produces quantities of smoke?

The prohibitory statute is §732.18 which declares that:

"Except as hereinafter provided it shall be unlawful for any person, firm, copartnership, or corporation (to sell) . . . or use or explode any fireworks; . . ." except "such fireworks as are not herein prohibited; . . ."

The fireworks not prohibited in §732.18 are those to be shipped out of the state; or blank cartridges to be used for:

". . . a show or theater, or for signal purposes in athletic sports or by railroads, trucks for signal purposes, or by a recognized military organization; and provided further that nothing in said sections shall apply to any substance or composition prepared and sold for medicinal or fumigation purposes."

§732.17 provides the definition of "fireworks" which are prohibited by §732.18:

"The term 'fireworks' shall mean and include any explosive composition, or combination of explosive substances or article prepared for the purpose of producing a visible audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges, toy pistols, toy cannons, toy canes, or toy guns in which explosives are used, balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, or other fireworks of like construction and any fireworks containing any explosive or inflammable compound, or other device containing any explosive substance."

In this definition, the inclusion of specific types of fireworks is followed by language of a more general character. And following this general language of inclusion is a statement of specific exceptions to the definition of "fireworks."

"The term 'fireworks' shall not include gold-star-producing sparklers on wires which contain no magnesium or chlorate or perchlorate, nor flitter sparklers in paper tubes that do not exceed one-eighth of an inch in diameter, nor toy snakes which contain no mercury."

The general language defining fireworks as "any fireworks containing any explosive or inflammable compound, or any device containing any explosive substance," is qualified by the nature of the specific types of fireworks which are mentioned as being either included or excluded.

"Where an enumeration of specific things in a statute is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. . . ." *State v. Bishop,* 257 Iowa 336; 132 N. W. 2d 455, quoting 28 C.J.S. "Ejusdem Generis" 1049, 1050.

In my opinion the fireworks specified in the statute are of a frivolous nature. None of those mentioned has any apparent legitimate usefulness. I think that the common understanding of the public and of the legislature is that frivolous fireworks of the kind used to celebrate the Fourth of July in days past are the kind meant to be prohibited. Signal flares (§321.447, §321.449), dynamite and blasting caps (§695.27) and other explosives and inflammables are deemed of sufficient usefulness to escape prohibition. At any rate, their potential utility is sufficient to remove them from the operation of a statute prohibiting "fireworks" as that term is defined in §732.17.

With this understanding, I am of the opinion that §732.18 prohibits all frivolous fireworks except for those which are expressly excluded by the statute. The following then appear not to be prohibited:

(1) sparklers (§732.17)

(2) toy snakes (§732.17)

(3) caps, cap guns (by virtue of a partial repeal of the statute) (56 O.A.G. 64)

(4) blank cartridges when used for legitimate purposes (§732.18)

(5) compounds used for medicinal and fumigation purposes (§732.18)

(6) and other explosives and inflammables used for legal and legitimate purposes and not designed for frivoluos use. That is to say, any combustibles which fall outside the contours of the class of frivolous fireworks suggested by the examples in §732.17.

From the information you have furnished me, it would appear that the little smoke bomb is prohibited by §732.18.

Regarding your question as to an interpretation of "explosive" I refer you to a legislative definition of the word for purposes of the Chapter on Motor Vehicles: §321 1, sub. 31.

" 'Explosives' mean any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that on ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contigous objects or of destroying life or limb."

Black's Law Dictionary affords a helpful interpretation:

"The word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Every combustion of an explosive substance, whereby other property is ignited and consumed, would not be an 'explosion' within the ordinary meaning of the term. It is not used as a synonym of 'combustion.' An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemance of the report vary in intensity as often as the occurrences multiply. Hence an explosion is an idea of degrees; and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort."

June 23, 1967

MOTOR VEHICLE FUEL TAX REPORT. §§324.8 and 324.60, Code of 1966, are mandatory and require the filing of the reports therein referred to to be filed with the Treasurer of State strictly in accordance with the provisions of the statute. Oral permission of the Treasurer to file after such time is of no force or effect.

Mr. Jon P. Sexton, Deputy Treasurer: Reference is made herein to yours of the 9th inst. in which you submitted the following:

"Quite recently, a licensed distributor under the Motor Vehicle Fuel Tax law hand delivered his monthly reports required under Section 324.8 and Section 324.38. This delivery was made the day after the due date as specified by these two sections. The delivery also followed a phone call from the licensee to State Treasurer Paul Franzenburg in which the licensee requested an extension of time in which to file.

"State Treasurer Franzenburg suggested that the gentlemen deliver the reports to the State Treasurer's office. The Treasurer advised the licensee that this did not constitute acceptance of the report without a late filing fee but rather that this would indicate that the licensee was making every conceivable effort to comply with Iowa law. State Treasurer Franzenburg pointed out to the licensee that there were some ambiguities in Section 324.60 which would decide whether the report was filed on time or whether a verbal application and extension could be granted.

"With this information in mind, we respectfully request an opinion on the following questions:

"1. May an application for an extension of time for filing under 324.60 be verbal as well as written?

"2. May an extension of time be granted verbally or must it be in writing?

"3. Section 324.60 states, in part, "reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked." Is this merely one fashion in which a report may be considered filed? What date governs the hand delivering of a required report?

"There is little question but that the licensee has in good faith attempted to comply. We await your word on whether the efforts he has made place him in compliance."

In reply thereto I advise:

It appears from the foregoing that a Motor Vehicle Fuel distributor has filed his monthly statutory report, but not at the time it is due by statute, and that such filing was accomplished by the oral permission of the Treasurer, not to be deemed, however, as an acceptance of the report. There is a statutory obligation upon such distributor to file this report. §324.8, Code of 1966, so far as presently applicable, provides:

"Tax reports — computation and payment of tax-credits. For the purpose of determining the amount of his liability for the tax herein imposed, each distributor shall, not later than the last day of the month next following the month in which this division becomes effective and not later than the last day of each calendar month thereafter, file with the treasurer a monthly report, signed under penalty for false certificate, which shall include the following: . . ."

Such filing with the treasurer may be made by the distributor by the use of mailing through the post office. This is provided by §324.60 as follows:

"Timely filing of reports — extension. The reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked on or before midnight of the day on which due and payable. If the final filing date falls on a Saturday, Sunday or legal holiday the next secular or business day shall be the final filing date.

"The treasurer upon application may grant a reasonable extension of time for the filing of any required report or tax payment, or both."

Such filing may also be made by a filing consisting of a delivery of the report to the treasurer and by him received to be kept on file. See *Mills vs. Board of Supervisors, Monona County*, 227 Iowa 1141, 290 N. W. 50.

Chapter 324, Code of 1966, and specifically the question of timely delivery of this monthly report was litigated in the case of Miller Oil Com-

pany vs. Treasurer of State, M. L. Abramson, 252 Iowa 1058, 109 N. W. 2d 610 (1961) and concerning the filing of the monthly reports by the distributor and §§324.8 and 324.60 stated:

"Section 324.8, Code, 1958, relating to motor vehicle taxes provides, in substance, that for the purpose of determining the amount of his liability for the tax imposed, each distributor shall not later than the last day of each calendar month 'file with the treasurer a monthly report,' showing certain prescribed data, and 'pay to the treasurer the full amount of the motor fuel tax due from the distributor.

"Section 324.60, Code, 1958, involved herein, provides: 'The reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked on or before midnight of the day on which due and payable. If the final filing date falls on a Saturday, Sunday or legal holiday the next secular or business day shall be the final filing date. * * * Although this section provides also that the treasurer can grant a reasonable extension of time for filing, no such application was made or granted herein."

Filing in the Miller case was attempted by mailing through the post office and with respect to the filing of such report by mail strict compliance with the statute was required. It was there said:

"It is indeed difficult to find in the language used any meaning other than that, if one desires to use the United States mail to file his report and remittance to the State Treasurer, he must (1) see that the envelope is properly addressed (2) see that the postage is sufficient, and (3) see that it is postmarked on or before midnight of the last day of the calendar month, unless extended by a legal holiday or other listed cause. No other exception appears, and we must assume the legislature meant just what it said when it placed these specific obligations upon the reporter when it chose to use that method of reporting. Obviously the rule advocated by plaintiff, i.e., it is sufficient when one in good faith places his properly addressed and stamped letter in a post-office box in time for it to be postmarked before midnight in the usual course of postal practice, is not what is required. It is clear such a requirement would bring numerous controversies and is just what the legislature wished to avoid."

Undoubtedly the same strictness required of filing by mail is required where filing is by personal delivery of the report. Filing by either method at the time required by statute is mandatory. These statutes plainly have not been complied with and under the statement made herein there remains the question whether such belated filing may be validated under the following provisions of Section 324.60:

"The treasurer upon application may grant a reasonable extension of time for the filing of any required report or tax payment, or both."

This statute creates no problem herein if the oral permission was given by the treasurer after the due date of the report. In such case such permission given by the treasurer was valueless and vested no right in the distributor to file after the due date required by statute.

In view of the foregoing there is no necessity of answering your separate questions. In the event the permission of the treasurer was given prior to the due date for filing the report questions 1 and 2 are then pertinent and answers thereto will be undertaken.

June 23, 1967

CORPORATIONS. PENALTIES. The penalties set out in §496A.130(3) apply to a foreign corporation seeking reinstatement after the cancellation of its certificate of authority to do business in this state.

The Hon. Melvin D. Synhorst, Secretary of State: In your letter of May 26, 1967, you requested an opinion interpreting the penalty provisions of §496A.130, as that section affects foreign corporations authorized to do business in the State of Iowa. Your letter stated that the certificate of authority of a foreign corporation to transact business in the state may be revoked by the Secretary of State for failure to file annual reports within the time required and for other reasons as stated in §496A.118.

Your letter then stated:

"Where a certificate of authority has been revoked as to domestic corporations, the penalty of $100.00 designated in Section 496A.130(3) has been universally required from domestic corporations as a condition for reinstatement, after revocation of their certificate of authority.

"We feel that this is an unjust discrimination against domestic corporations and not within the intent of the General Assembly and that said penalty should apply equally and universally against foreign corporations as well as domestic corporations."

There appears to be nothing in §496A.130 which would permit a more favorable treatment to be accorded to foreign corporations than that received by domestic corporations. The penalty provisions of §496A.130 apply to "each corporation, domestic or foreign that fails or refuses to file its annual report for any year within the time prescribed."

This section of the Code then authorizes the secretary of state to cancel the certificate of incorporation of any corporation that fails to file such report and provides for the reinstatement of such corporation upon application, the filing of reports due and the payment of all license fees and penalties due and the "additional penalty of one hundred dollars." Although the authority to revoke a certificate of authority of a foreign corporation is set out separately in §496A.118 rather than with the provisions of §496A.130, it appears that the provisions of the latter section were intended to apply to both domestic and foreign corporations seeking reinstatement.

The view that the "additional" penalty of $100 applies to all corporations seeking reinstatment pursuant to §496A.130 is further substantiated by reliance on §496A.104 which provides:

"A foreign corporation which shall have received a certificate of authority under this chapter . . . except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, *penalties* and liabilities now or hereafter imposed upon a domestic corporation of like character." (Emphasized)

We conclude therefore, that the penalties set out in §496A.130(3) apply to a foreign corporation seeking reinstatement after the cancellation of its certificate of authority to do business in this state.

June 26, 1967

HIGHWAYS: Vacating highways and bridges; §4.1(5), §306.4, 1966 Code of Iowa. When the Board of Supervisors legally vacates a highway which has a bridge thereon the vacation proceedings do not affect existing bridges and title to said bridges must be separately conveyed.

Mr. Pat Myers, Marion County Attorney: Receipt of your request for an opinion dated May 23, 1967, is acknowledged. You have stated the following situation:

"Iowa law (306.4) gives Board of Supervisors power to vacate secondary roads or highways. Section 4.1(5) states that the word "highway" includes public bridges. When the Board of Supervisors legally vacates a road or highway which has a bridge thereon, does the vacation proceedings include the bridge structure?

"The Corps of Engineers has advised our County Engineer that vacation proceedings will not vacate a bridge structure and the county must issue a quit-claim deed to the abutting property owner. Since we are in the heart of the Red Rock Dam area, this problem has arisen several times."

The question presented turns upon whether or not a bridge is treated as personal property for purposes of the vacation proceedings. This office has previously ruled on this question. See Report of Attorney General (1930) at page 333. In this opinion the Attorney General ruled that upon vacation of a county highway, title to the bridge remains in the county and does not vest in the owner of the fee title upon which the bridge is erected.

There have been no subsequent Attorney General Opinions overruling this opinion nor has there been any case law which would require a change in the opinion. You are therefore advised that the county must dispose of the bridge by proper legal instrument after a road has been vacated.

June 26, 1967

§775.4, Court appointed attorneys — County has no authority to pay fees of court appointed attorneys from the "Poor Fund" established under Chapter 252. Fees should be paid from the "Court Fund."

Hon. Lloyd R. Smith, Auditor of State: This letter is in response to your letter of May 31, 1967, wherein you request an opinion with regard to the content of the enclosed letter from the legal counsel of the Board of Supervisors of Woodbury County.

In that letter, the legal counsel for the Board of Supervisors expresses the opinion that your office has the discretion to permit counties to make payment of attorney fees for court appointed attorneys in criminal cases from the poor fund rather than the court fund. He further states in his letter that the reason for wanting to make this change is to enable the county, where it later becomes appropriate, to obtain reimbursement from the individual for whose benefit the court appointed an attorney.

The legal tests for determination of who is eligible for appointment of counsel under §775.4, 1966 Code of Iowa, and that for aid and support under Chapter 252 of said Code are greatly dissimilar. §252.1 defines the poor persons who may receive support under Chapter 252 and then creates a legal liability on the part of certain relatives of any poor person who is the recipient of support from the county and grants to the county the right to recover from said relatives, any amount expended in support of a poor person as defined in the Chapter.

§775.4 requires the court to assign counsel to any person who is "un-

able to employ any." The determination of what defendants meet this test is left strictly to the court. In the case of *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031 (1906), the court held that where the accused is unable to employ an attorney and desires counsel, the decision of the court that one charged with homicide has no means to employ counsel is final.

Nowhere in chapter 775 or in any other section in the Code, is there any authority for a county to seek and obtain reimbursement for the expense of providing legal counsel to those persons who are unable to employ counsel.

It is also interesting to note that in chapter 336A of the Code, wherein the legislature authorizes the establishment of public defender systems and "indigent" is defined as a "person who would be unable to retain in his behalf, legal counsel without prejudicing his financial ability to provide economic necessities for himself or his family."

I would also call your attention to §336A.2 which reads in part as follows:

"In addition to such funds as may be appropriated from the *court fund* by the county for this purpose, a county may accept money and other contributions. . . ."

For these reasons I feel there is no authority for the payment of fees under chapter 775, out of any other fund other than the court fund.

June 30, 1967

BANKS AND BANKING — Foreign Bank — Chs. 494, 496A. Foreign banks may obtain a certificate to do trust business in this state by complying with Chapter 494. Chapter 496A is not available.

The Hon. Melvin D. Synhorst, Secretary of State: On May 3, 1967, Mr. Frank D. Bianco, Director, Corporation Division, requested by letter an opinion as to whether a corporation organized and regulated under the statutes of Illinois relating to bank and trust companies may be granted a certificate of authority to transact business in Iowa for the purpose of acting or serving in the State of Iowa as Trustee (whether of a personal or corporate trust), Executor, Administrator, Guardian of the Estate, or in any other fiduciary capacity, whether the appointment be by will, deed, agreement, declaration, indenture, court order or decree, or otherwise. The letter then set out the following questions:

"(1) Whether under Chapter 496A of the Iowa Code, the Secretary of State may properly issue a certificate of authority to a Bank or Trust Company, organized under the laws of the State of Illinois, to transact the aforementioned fiduciary business in Iowa?

"(2) If the answer to question (1) is in the negative, whether upon said corporation's application and compliance with the provisions of Chapter 494, the Secretary of State may properly issue to such corporation a permit under that chapter for the transaction of the aforementioned fiduciary business in Iowa?

"(3) If either question numbers (1) or (2) are answered in the affirmative, may the Secretary of State properly issue a certificate or permit to such corporation to transact said fiduciary business in Iowa under the name which includes the words 'Bank' and 'Trust.'"

"(4) If either question numbers (1) or (2) are answered in the affirmative, does the transaction of such business by said corporation subject it to the jurisdiction, supervision and regulation of the Iowa Banking Department or Superintendent of Banking?"

It is my opinion that the first question must be answered in the negative. The provisions of Chapter 496A do not apply to or affect corporations which are subject to the provisions of certain enumerated Chapters of the Code set out in 496A.142. Among the Chapters enumerated is Chapter 528. In §528.52 is the provision that "all corporations . . . whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have a full-paid capital of not less than the amount of capital of savings banks, and shall be subject to exmination, regulation and control by the superintendent of banking, like savings and state banks." If the Harris Trust is applying for authority to do business in this state under such name, §528.52 would apply.

Another Chapter listed in 496A.142 is Chapter 532; §532.13 provides that no corporation hereinafter organized without complying with the terms of this Chapter, and no partnership, individual or unincorporated association shall incorporate or embrace the word "trust" in its name. It is our view that this Chapter and particularly §§532.12 and 532.19 are pertinent and applicable to such foreign corporation.

Inasmuch as the provisions of Chapter 496A appear to be unavailable it is necessary to overrule so much of the Attorney General's Opinion of August 10, 1966, as states that the Iowa law does not prohibit an Illinois State or National Bank from qualifying as a fiduciary under §633.63 of the 1966 Code of Iowa, *provided that such State or National Bank procures a certificate of authority as required by Chapter 496A, 1966 Code of Iowa.* It is our view that this Chapter of the Code is not available to the foreign corporation seeking to do a "Trust" business in this state.

In answer to your second question the Secretary of State may properly issue to such corporation a permit under Chapter 494 for the transaction of the aforementioned fiduciary business in Iowa. Under this Chapter of the Code a foreign corporation may be authorized to do a fiduciary business. §494.1. Further, while this may not be within the scope of authority requested here it is interesting to note that §494.4 contemplates that a foreign corporation may utilize this chapter for "the establishment and conduct of savings banks."

In answer to your third question the certificate issued to a corporation to transact fiduciary business in Iowa under Chapter 494 may be issued under a name which includes the words "Bank" and "Trust." Section 494.14 subjects a foreign corporation doing business in this state to all ". . . liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general law of this state. . . ." One such restriction is the mandatory provision in §532.12 requiring the word "trust" to be incorporated in the name of the corporation.

It is my opinion that the entire name Harris Trust and Savings Bank may be used. While §524.24 makes it unlawful to use the word bank by any "individual, partnership, or unincorporated association, or corpora-

tion . . . not subject to the supervision or examination of the banking department," it is clear that this corporation, when authorized to do business will be subject to such "examination, regulation and control" under §528.52.

The answer to question 4 is included in the above and it may be restated that the transaction of the fiduciary business in Iowa by such corporation is subject to the supervision and regulation of the Superintendent of Banking. See §524.10

June 30, 1967

EMPLOYMENT SECURITY COMMISSION—Chapter 96—§§19.5, 96.12. Commission has exclusive authority to assign space and lease cafeteria space in Employment Security Building, subject to conditions set by Federal Government. Executive Council authority under §19.15 is superceded by §96.12.

Mr. Stephen C. Robinson, Secretary, Executive Council: Under date of June 1, 1967, you had posed the following question:

"I was directed by the Council to obtain from you an opinion as to whether or not the Executive Council has a statutory responsibility for leasing the cafeteria facilities in the Employment Security Building and the assignment of office space in the building."

The authority of the Executive Council with reference to control of facilities in the Capitol Building and Capitol Grounds is set out in Section 19.15, 1966 Code of Iowa:

"The Executive Council shall control the assignment of rooms in the Capitol Building . . . Assignments may be changed at any time . . . The term 'capitol' or 'capitol building' as used in the Code shall be descriptive of all buildings upon the capitol grounds."

There can be no dispute that the Employment Security Commission Building is located on the capitol grounds as set out in §19.15. While I find no express statutory authority for the Executive Council or any other agency of the state government to lease property in the state capitol building or on the state capitol grounds, it can be fairly implied from §19.15 that the control given to the Executive Council over space in the various office buildings on state capitol grounds would include the authority to lease portions of those premises for any purposes incident to the performance of duties by the various state offices and agencies that occupy those buildings. This is true of the cafeteria located both in the state capitol building and the state office building.

With reference to the Employment Security Commission Building, however, inasmuch as the building was constructed primarily with federal funds made available under the Reed Act, it was necessary that a survey of eating establishments in the area of the state capitol be completed in order to assure the United States Department of Labor that inclusion of eating facilities for the benefit of the employees who would occupy the new building was necessary for the efficient operation of the Employment Security Commission.

Section 96.12, 1966 Code of Iowa, contains the following language:

"All duties and powers conferred upon any other department, agency, or officer of this state relating to the establishment, maintenance, and operation of free employment offices shall be vested in the commission."

This section grants to the commission authority far in excess of that given to most state agencies and recognizes the existence of unusual conditions:

(1) It should be noted that the Teletype confirmation authorizing the State of Iowa to construct the present Employment Security Commission Building contains the following condition:

"This approval is contingent upon the assurance of rent free space except for operation and maintenance, costs after the cost of the building has been fully amortized and the continued eligibility of the state for grants for the Employment Security Program and a determination in subsequent fiscal periods that the payments during these periods are necessary and proper for an efficient administration and that such amounts are not in excess of the level of rental of suitable privately owned space."

(2) In addition the Administrative Financing Act of 1954 allows for the use of Reed Act funds for administrative costs of the Employment Security Commission provided that the Employment Security Building is used *only for employment security purposes.*

(3) There is a further complication occasioned by the control and use of special funds as defined under §96.13 of the 1966 Code of Iowa, which requires all such funds to be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of Chapter 96. And your attention is also called to the fact that I.P.E.R.S. has invested some three hundred thousand dollars ($300,000.00) in the construction of the Employment Security Commission Building and is entitled to a prorated portion of any rentals received for any portion of the premises actually leased.

(4) I also call to your attention that the Reed Act funds used in construction of this building are being reimbursed annually to the State of Iowa by the Bureau of Employment Security of the United States Government from funds granted for the administration of the Employment Security Program. A portion of these funds are reimbursing the state for the cost of the cafeteria space located in the Employment Security Commission Building.

Because the State of Iowa has accepted the use of the Reed Act funds for construction of the building subject to conditions which would make it impractical for the Executive Council to assign office space in that building, and because the language in §96.12, 1966 Code of Iowa, set out herein previously, vests in the commission any duties and powers conferred upon any other department, agency, or officer of this state relating to the office space in the building, control of the assignment of office space as well as the leasing of the cafeteria space located in the Employment Security Office Building is within the control of the Iowa Employment Security Commission.

July 7, 1967

LIQUOR, BEER AND CIGARETTES — **Beer Permits.** §124.30, Code of Iowa, 1966, prohibits the state permit board from issuing a permit to a person whose permit has been revoked after July 4, 1965.

Virginia Carpenter, Secretary, State Permit Board: This is in response to your telephone request of June 21, 1967, for an interpretation of Section 124.30, Code of Iowa, 1966. I understand your specific question to be as follows:

"Over one year ago, because of a conviction for keeping liquor where beer is sold, a permittee had his permit revoked pursuant to Sections 124.30 and 124.31, Code of Iowa, 1966. The town council has now issued a class "B" permit to the same person. Must the State Permit Board issue a state permit in view of Section 124.30 which says '. . . the person whose permit is revoked shall not thereafter be allowed to obtain or hold a permit under this chapter.' "

The pertinent parts of Section 124.30, Code of Iowa, 1966, state:

"Mandatory revocation. The permit under this chapter shall automatically be revoked and shall immediately be surrendered by the permit holder, and the bond of the permit holder shall be forfeited, upon any of the following events:

* * *

"2. If the permit holder is convicted of any violation of Section 124.31.

* * *

"If after July 4, 1965, any permit is revoked under the provisions of this section or revoked for cause under any other provision of this section, the person whose permit is revoked shall not thereafter be allowed to obtain or hold a permit under this chapter.

* * *

"If a permit is revoked upon any of the events specified in subsection 1, 2, and 3 shall be issued for the place of business covered by the revoked permit during the period of one year after such revocation."

It would appear that the town council has acted contrary to §124.30 by issuing a new permit to a person whose permit had previously been revoked following a conviction of keeping liquor where beer is sold in violation of §124.31. The one year provision in §124.30 allows a new permit to be issued for the "place of business" but the "person" shall not be allowed to obtain or hold a permit thereafter.

The Supreme Court of Iowa has made clear in a recent decision that while the local authorities have discretionary power to determine the qualifications of beer permit applicants, they may not find the element of good moral character contrary to the statutory definition. *Lehan* vs. *Greigg*, 135 N. W. 2d 80. As defined in §124.2(6)c., one of the requirements for good moral character is that the applicant is not prohibited by the provisions of §124.30 from obtaining a permit. Conviction of any violation of §124.31 is one of the provisions of §124.30 requiring mandatory revocation. Therefore, by definition, the town council may not find good moral character and issue a permit to a person whose permit was revoked after July 4, 1965, resulting from a conviction for a violation of §124.31.

Thus, we arrive squarely to the question of what action must the state permit board take in the above circumstances. Section 124.4, Code of

Iowa, 1966, describes in detail a procedure for reviewing the action of the town council where it appears the permit has not been revoked. I am of the opinion that such procedure ought to be used to determine whether or not the state permit board may exercise its power to revoke.

There also appears to be an alternative course of action for the state permit board. The alternative of not issuing the state permit has been attempted and found improper by the Supreme Court of Iowa. In *Eittreim vs. State Beer Permit Board*, 243 Iowa 1148, 53 N. W. 2d 893, the court could find no authority for the state permit board to refuse to issue the state permit, where the city or town has already issued the local permit.

Substantial change was made in the mandatory revocation section 124.30 since the 1952 *Eittreim* decision. 61 G. A., ch. 150 §5. The court has yet to consider the effect of the part of §124.30 which says that a person whose permit was revoked "shall not thereafter be allowed to obtain or hold a permit" under Chapter 124. That section further states that no permit 'shall be issued' for a business in which such person has certain specified control.

Because both the town council and state permit board issue permits, §124.2(7), it would appear that the state permit board is now faced with one section of the chapter requiring issuance of the permit, §124.5, and a prohibition from doing so in another, §124.30. It is generally recognized that where two statutes conflict the more recent one prevails, *State vs. Blackburn*, 237 Iowa 1019, 22 N. W. 2d 821.

As §124.30 is the more recent of the two sections, and expressly prohibits issuance of a permit in certain circumstances, the logical conclusion is that the state permit board should not issue a permit to a person not allowed to "obtain or hold" a permit, under §124.30.

July 7, 1967

LIQUOR, BEER AND CIGARETTES — Premises. §123.32, Code of Iowa, 1966, the premises where a license or permit was revoked, may not be relicensed for one year following revocation.

Mr. Homer A. Adcock, Chairman, Iowa Liquor Control Commission: During a conversation between us in your office on June 27, 1967, you requested an opinion based on the following fact situation.

"A person operating an establishment under a beer permit and liquor license, has the same revoked as a result of being convicted for selling beer to a minor in violation of Section 124.20(3), Code of Iowa, 1966. About five months after said conviction and revocation, a new permit and a new license are approved for the mother-in-law of the person whose license was revoked. The establishment is located at the same premises where the license and permit were revoked earlier. The city council has been advised by the county attorney that such permit and license may not yet be issued according to the law but the council refuses to revoke the license."

I understand your specific questions to be as follows:

"1. May a mother-in-law of a person whose license was revoked, obtain a license within a year of the revocation, for the same premises?

"2. If a city council has erroneously approved and issued a license, what steps may the liquor control commission take to revoke the license?"

Section 123.32, Code of Iowa, 1966, states in part:

"Any liquor control license issued under this chapter may, after notice in writing to the license holder and reasonable opportunity for hearing, be suspended or canceled by the issuing authority or the commission for any of the following causes:

* * *

"b. Violation of any of the provisions of this chapter as amended or regulations of the commission . . .

* * *

"f. . . . The spouse and business associates of a person whose license has been canceled or revoked for cause shall not be issued a liquor control license, and no liquor control license shall be issued which covers any business in which such person has a financial interest. *In the event a license is revoked for cause the premises covered by a revoked license shall not be relicensed for one year.* (Emphasis added)

Because automatic revocation of a license occurs upon conviction of selling beer to a minor according to Section 123.46(h), that part of the above §123.32(f) relating to premises is clearly applicable to the fact situation presented. The "premises" means all rooms or enclosures where alcoholic beverages are sold or consumed under authority of a liquor control license by the definition of §123.5(24). Therefore, I am of the opinion that the words of the statute are to be taken at their face value, that the premises covered by a revoked license shall not be relicensed for one year.

The relationship of the person obtaining a new license after the expiration of the year in which the premises could not be licensed, has also been considered by the statute. The spouse and business associates, like the person whose license was revoked, may not be permitted to hold or obtain a liquor license. While the general meaning of spouse would not include a mother-in-law, there is no reason why a mother-in-law might not be considered a business associate upon factual determination of such relationship. Thus, I am of the opinion that after the expiration of the year following revocation, the premises may be again licensed, to the mother-in-law, unless she was a business associate of the person whose license was revoked.

In answer to question number two the following Sections of the Iowa Liquor Control Act appear applicable:

Section 123.16, Code of Iowa, 1966, states in pertinent part:

Powers. The commission shall have the following functions, duties, and powers:

* * *

"7. To issue and grant permits, liquor control licenses and other licenses; and *to revoke all such licenses and permits for cause, under this chapter.*

Section 123.32, Code of Iowa, 1966, states in part:

"Any liquor control license issued under this chapter may, after notice

in writing to the license holder and reasonable opportunity for hearing, be suspended or canceled by the issuing authority *or the commission for any of the following causes:* (Emphasis added)

* * *

"d. An event which would have resulted in disqualification from receiving such license when originally issued . . ."

That the commission has the power and authority to revoke a liquor license is clearly enumerated by the words of the statute. As the premises discussed above could not be licensed during the year following revocation, this was "an event which would have resulted in disqualification from receiving such license when originally issued . . ."

Therefore, by following the procedure of §123.32, I am of the opinion that the commission may exercise its power of revocation to enforce the one year prohibition against the "premises."

Your statement of fact included a beer permit as well as a liquor license and it is appropriate to note that the conclusions reached above are also applicable to the permit. A recent decision of the Iowa Supreme Court clearly places the onus upon local authorities where illegal issuance of a beer permit is found. In *Lehan vs. Greigg*, 135 N. W. 2d 80, 84, the court said:

". . . We need not decide whether the violations must occur after the permit has been granted. Mandatory revocation was required here because it was illegally issued in the first place."

Without appropriate action by the local authorities, the State Permit Board has very similar authority regarding the beer permit to that of the Liquor Control Commission with the liquor license.

Section 124.30, Code of Iowa, 1966, also prohibits the "place of business" from having a permit issued for a year after revocation and prohibits the person whose permit was revoked from obtaining or holding one thereafter. It is to be noted that a spouse of the person whose permit was revoked may not hold or obtain a permit thereafter but a business associate is not mentioned.

July 10, 1967

WELFARE: Uniform Support of Dependents Law, Chapter 252A, 1966 Code of Iowa. These proceedings are available when respondent adjudicated in paternity action as father of a child; proceedings may be brought under this chapter although a divorce petition has been filed, or before the commencement of a divorce action, or following a decree of divorce; proceedings under this chapter may be brought when the parties are residents of the same county in Iowa or different counties in Iowa.

Mr. Michael E. Hansen, Assistant County Attorney, Polk County: You have asked for an Attorney General's opinion as to whether or not an action may be brought under the Uniform Support of Dependents Law, Chapter 252A, 1966 Code of Iowa, when the petitioner and respondent are both residents of the State of Iowa.

You ask if it makes a difference whether both parties to the action live in the same county in Iowa or in different counties.

You also ask if it can be used in the case of a paternity action when the father and the mother of said children live in different counties in Iowa.

You also ask if an action under this chapter is barred by the fact that the divorce petition was filed six months prior to the bringing of this action but there were no further proceedings in connection with the divorce matter.

You set forth facts concerning two different cases as follows:

(1) "The plaintiff gave birth to an illegitimate child. They live in Howard County. The father of the child is a resident of Polk County. The plaintiff filed a Uniform Support Action in Howard County and said petition and court certificate were filed according to Chapter 252A with the Clerk of the Howard County District Court. Copies of said petition and court certificate as required by statute were forwarded to the Clerk of the Polk County District Court. (Paternity decree had been entered.)

(2) "The plaintiff and respondent were married on November 26, 1951, and by this marriage five children were born. The plaintiff and respondent are both living in Polk County, Iowa and a divorce was filled six months ago but has laid dormant. The respondent is not supporting the children that were born of this marriage."

Proceedings under the Uniform Support of Dependents Law, Chapter 252A, 1966 Code of Iowa, may be brought when both the petitioner and respondent are residents of the same state by the specific words of the statute:

"252A.5 When proceeding may be maintained. A proceeding to compel support of a dependent may be maintained under this chapter in any of the following cases:

1. Where the petitioner and the respondent are residents of or domiciled or found in the same state. . . ."

Therefore, the initiating state and the responding state can be the same state.

"252A.1 Title and Purpose. This chapter may be cited and referred to as the 'Uniform Support of Dependents Law.'

The purpose of this uniform chapter is to secure support in civil proceedings for dependent wives, children and poor relatives from persons legally responsible for their support.

"252A.2 Definitions. As used in this chapter, unless the context shall require otherwise, the following terms shall have the meanings ascribed to them by this section:

1. 'State' shall mean and include any state, territory or possession of the United States and the District of Columbia. . . .

3. 'Child' includes . . . and means a child actually or apparently under seventeen years of age, . . .

4. 'Dependent' shall mean and include a wife, child, . . . who is in need of and entitled to support from a person who is declared to be legally liable for such support by the laws of the state or states where the petitioner and the respondent reside."

Therefore, a child born out of wedlock but determined to be the child of the respondent in a paternity action would be entitled to support in a proceeding brought under this chapter, Uniform Support of Dependents Law.

"252A.8 Additional Remedies. This chapter shall be construed to furnish an additional or alternative civil remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute and available to the petitioner in relation to the same subject matter."

Therefore, this action can be commenced by a petitioner whether or not the parties are divorced or whether or not a divorce matter is pending.

"252A.6 How commenced — Trial.

1. A proceeding under this chapter shall be commenced by a petitioner, or a petitioner's representative, by filing a verified petition in the court in equity in the county of the state wherein he resides or is domiciled, showing the name, age, residence and circumstances of the petitioner, alleging that he is in need of and is entitled to support from the respondent giving his name, age, residence and circumstances, and praying that the respondent be compelled to furnish such support. The petitioner may include in or attach to the petition any information which may help in locating or identifying the respondent including, but without limitation by enumeration, a photograph of the respondent, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, or social security number.

2. If the respondent be a resident of or domiciled in such state and the court has or can acquire jurisdiction of the person of the respondent under existing laws in effect in such state, such laws shall govern and control the procedure to be followed in such proceeding. . . ."

Paragraph 2 of the foregoing quoted section, 252A.6, was construed by the Supreme Court of Iowa in the case *Davis vs. Davis*, 246 Iowa 262, 67 N. W. 2d 566, as pertaining solely to the manner in which notice is to be given to bring the respondent into court. At page 271, the Supreme Court of Iowa, speaking through Justice Garfield, said:

"Much of respondent's argument rests on the language of Section 252A.6(2) 'such laws shall govern and control the procedure to be followed in such proceeding.' It is contended this can be interpreted as providing that existing laws of the state as found in Chapter 252 shall govern the entire proceeding. Respondent claims too much for the language just quoted.

"Obviously the last two words of 252A.6(2), 'such proceeding,' mean a proceeding commenced under this chapter by petitioner in court. . . . The words 'existing laws in effect in such state' refer to laws under which the court 'can acquire jurisdiction of the person of the respondent.' And the words 'such laws' refer back to 'existing laws.'

"Further, the interpretation of Section 252A.6(2) respondent urges upon us requires the nullification of several other provisions of Chapter 252A herein quoted which clearly indicate a legislative intent contrary thereto. However, the construction we place upon 252A.6(2) is reasonable and also give effect to such other provisions of the Act."

The Attorney General's opinion, dated March 5, 1965, is hereby withdrawn as it bases its conclusion upon a different construction of Section 252A.6 than placed upon said section by the Supreme Court of Iowa.

Since the Attorney General's opinion, dated March 5, 1965, the Supreme Court has had another occasion to review Chapter 252A of the Code of Iowa. In that case, *Keefe v. Keefe*, 143 N. W. 2d 335, decided June 14, 1966, the Court said:

"In *Davis v. Davis*, 246 Iowa 262, 67 N. W. 2d 566, we considered the law extensively and held that Chapter 252A is generally applicable and available to compel support."

Justice Garfield, in the Davis case, cited various sections in Chapter 252A which show the legislature intended this proceeding to be used when both parties reside in the State of Iowa. The legislature did not require that the parties had to be residents of the same county and, therefore, it is not limited to such fact situations.

As Justice Garfield stated in the Davis case, the title of the Act known as Chapter 252A reads:

"AN ACT authorizing and prescribing the procedure for civil proceedings to compel the support of dependent wives, children and poor relatives *within and without the state.*"

Also, in the Davis case, Justice Garfield said:

"[10] There are other fundamental rules of statutory construction here applicable. We will mention only two. In seeking the meaning of a law the entire Act and other related statutes (such as Chapter 252) should be considered. . . . ('All parts of the act should be considered, compared, and construed together. It is not permissible to rest the construction upon any one part alone . . . or to give undue effect thereto.').
* * *

"The second elementary rule, closely related to the one just stated, is that, if fairly possible, it is our duty to give effect to every part and word of an Act. (Citations)"

The construction of Chapter 252A in the Attorney General's opinion, dated March 5, 1965, not only contradicts the interpretation of the Supreme Court, but it reads into the law a restrictive use of the proceedings under said chapter obviously not contemplated by the legislature.

Therefore, it is the opinion of the undersigned that proceedings may be brought under Chapter 252A regardless of the fact that the petitioner mal live in one county in Iowa and the respondent in another county in Iowa.

July 11, 1967

SANITARY DISTRICTS: FILLING VACANCIES IN OFFICE — Where all offices of trustees of the Sanitary District established under Chapter 358, Code of 1966, are vacant and no provision for filling such vacancies is provided either in the Constitution or statute, authority to fill such vacancies is vested in the governor pursuant to the provisions of Article IV, Section 10, Constitution of Iowa.

Mr. William G. Faches, Linn County Attorney: Reference is herein made to your letter of the 16th inst. in which you submitted the following:

"A vacancy exists in each of the offices of trustees in a Sanitary District established pursuant to Chapter 358, Code of Iowa, 1966, in Linn County, Iowa. The question arises as to who should appoint the trustees to fill a vacancy when all of the offices are vacant?

"Section 358.9 and Section 69.8 of the 1966 Code of Iowa do not cover the situation. Your opinion is requested with respect to the above question."

In reply thereto I advise the following:

Your request shows that neither by constitution nor statute is there provision for the filling of vacancies in the office of Sanitary Trustees established under the provisions of Chapter 358, Code of 1966. In that situation resort is had to the following constitutional provision, to-wit: Article IV, Section 10, of the Constitution of Iowa provides:

"When any office shall, from any cause, become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the General Assembly, or at the next election by the people."

Note that the power bestowed in the Governor is limited to appointment to fill the vacancies first by appointment for a period expiring at the end of the next session of the General Assembly or second at the next election by the people. Such appointment authorized and limited by the session of the next legislature obviously concerns vacancies in offices of the state. On the other hand, the other period of appointment limited to the next election of the people concerns county, city and township officers and offices and their subdivisions or agencies. The power in the governor is further limited to be exercised in the filling of *offices*. McKinley vs. Clarke County, 228 Iowa 1185, 293 N. W. 449, defines an office in the following language:

". . . a position created by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case, by the legislature, is a public office, that to constitute one a public officer his duties must either be prescribed by the constitution or the statutes, or necessarily inhere in and pertain to the administration of the office itself, that the duties of the position must embrace the exercise of public powers or trusts; that is there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; and that among other requirements the following are usually, though not necessarily, attached to a public office. a. an oath of office; b. salary or fees; c. a fixed term of duration or continuance."

One holding the office of Sanitary Trustee under Chapter 358, Code of 1966, is a public officer.

In the light of the foregoing the Supreme Court of Iowa in the case of City of Nevada vs. Slemmons, 244 Iowa 1068, 59 N. W. 2d 793, where filling a vacancy in the city council was in question the Supreme Court in denying applicability of the foregoing numbered Article of the Constitution stated:

"Section 10, Article IV, of the Iowa Constitution provides that the Governor shall have the power to fill vacancies only in case no mode is provided by the Constitution and laws for filling such vacancies. We believe, however, this constitutional provision is not applicable for the legislature has provided a mode by chapter 147, Acts of the Fifty-fourth General Assembly. It is inconceivable, we think, to place such a burden on the Governor in matters of this kind unless clearly required, and we cannot so construe here that legislative intent. Many occasions such as group resignations, an accident or other disaster could reduce the members of a council in a given city whereby no quorum would be possible. Local members of the council, it must be conceded, are better able to know and select replacements in their community than the Governor of the state far removed from the concerned community."

The Constitution of the State of California contains a provision in the exact terms of Article IV, Section 10, of the Iowa Constitution and the Supreme Court of that State in People vs. Sischo, 23 Cal. 2d 478, 144 P. 2d 785 stated:

"We think that the broad language of this section should properly be construed to give the Governor power to fill a temporary vacancy in a term, caused by the absence of a state officer while on military leave, as well as to fill a permanent vacancy in an office as to which 'no mode is provided by the Constitution and law for filling such vacancy.'"

The Constitutions of Arkansas, Florida, Georgia and Missouri contain provisions to fill vacancies in the same terms expressed in Article IV, Section 10, of the Iowa Constitution.

The use of that constitutional provision was considered by 42 Am. Jur., Title Public Officers, Section 141:

"It would seem, therefore, that whenever possible, the statutory and constitutional provisions should be so construed as to diminish rather than increase the possibility of official vacancies. This is illustrated by the provisions of a Constitution declaring that when any office becomes vacant, and no mode is provided by the Constitution for filling the vacancy, the governor shall have the power to fill the same by granting a commission which shall expire when the person elected to fill the office at the next general election shall qualify, and that the governor shall, in case a vacancy occurs in any state, district, county, or township office, by death, resignation, or otherwise, fill the same by appointment to be in force until the next general election. Such provisions have been construed as relating solely to elective offices, the incumbents of which are selected at regular intervals, and as not authorizing the governor to appoint officers created by laws which provide for their selection by the legislature. Where authority is conferred by law on the governor to fill vacancies in office by appointment, this does not confer on him the power of ultimately determining whether the vacancies actually exist, and a claimant may have such question determined in the courts."

I am of the opinion by reason of the foregoing that in the situation described Article IV, Section 10, of the Iowa Constitution is applicable and the governor is directed to fill the vacancies in the office of Sanitary Trustees in Linn County to serve until the next election of such Trustees as provided by §358.9, Code of 1966.

July 14, 1967

LIQUOR, BEER AND CIGARETTES — Discounts on sales to liquor licensees — Senate File 50, 62nd G. A., §123.18, Code of Iowa, 1966. The 10% discount presently granted by the Liquor Control Commission on sales of $100.00 or more to liquor licensees may be withdrawn by the commission at any time with or without notice. Every licensee must, prior to the effective date of S.F. 50, either lawfully sell on the premises, his existing liquor inventory or pay the 15% tax provided for by S.F. 50 on the full retail price on each bottle of liquor comprising his inventory and have the appropriate identification marker affixed to each such bottle.

Mr. Walter E. Edelen, Commissioner, Iowa Liquor Control Commission:
By your letter of July 12, 1967, you have requested my opinion relating to Senate File 50 as passed by the 62nd General Assembly, to become effective on publication. Specifically, you ask:

"(1) Under Senate File 50 must the Iowa Liquor Control Commission make a demand upon all liquor licensees for the 15% tax on all their liquor inventory on hand on the effective date of Senate File 50?

"(2) The Commission has the power to remove the present discount on liquor sales to licensees under Section 123.18 of the Code. If that power is exercised and this discount is removed, is the Commission required to notify the licensees of the removal of the discount and if so, how many days notice must we give the licensees of this discount removal and in what manner must the notice be given?"

Senate File 50 is "an act to repeal the 10% occupational tax on gross receipts of liquor licensees on sales on alcoholic beverages and replace the lost revenues by adding a mark-up on liquor sold to licensees at time of purchase in conjunction with placing per drink sales under the retail sales tax and establishing identification means and procedures therefor and to increase the share received by cities and towns of proceeds from the sale of liquor."

The bill, except for the publication clause which is section 5, provides:

"Section 1. Sections one hundred twenty-three point ninety-seven (123.97), one hundred twenty-three point ninety-eight (123.98), one hundred twenty-three point ninety-nine (123.99), one hundred twenty-three point one hundred (123.100), Code 1966, are hereby repealed and the following enacted in lieu thereof.

1. 'There is hereby imposed on every individual, partnership, corporation, association or club licensed to sell alcoholic beverages for consumption on the premises where sold, a special tax equivalent to fifteen (15) percent of the price established by the commission on all alcoholic beverages for general sale to the public. Such tax shall be paid by all licensees at the point of purchase from the state on all alcoholic beverages intended or used for resale for consumption on the premises of retail establishments. Such tax shall be in lieu of any other sales tax applied at the state store and shall be shown as a separate item on special sales slips provided by the commission for purchases by licensees.

2. 'Except as allowed under section one hundred twenty-three point ninety-six (123.96), Code 1966, no licensee shall knowingly keep on the licensed premises nor use for resale purposes any alcoholic liquor on which the special tax has not been paid to the state. The conviction of a violation of this section shall cause the license held to automatically be revoked and the license shall immediately be surrendered by the holder, and the bond of the license holder shall be forfeited to the commission.

3. 'Each bottle of alcoholic beverage purchased by a licensee shall bear an identification marker applied at the place of purchase.'

"Sec. 2. Section one hundred twenty-three point eighteen (123.18), Code 1966, is hereby amended by striking all after the period (.) in line twelve (12).

"Sec. 3. Section one hundred twenty-three point fifty (123.50), Code 1966, is hereby amended by striking from line two (2) of subsection three (3) the word 'five' and by inserting in lieu thereof the word 'ten (10).'

"Sec. 4. Section four hundred twenty-two point forty-six (422.46), Code 1966, is hereby amended by adding after the word 'beer' in line ten (10) the following: ,' alcoholic beverages.' "

The last three lines of §123.18, Code of Iowa, 1966, provides:

"The commission may allow a discount from the sale price as established by the commission for quantity purchases of liquor by the holders of a liquor control license only."

This clause was repealed by §2 of the foregoing act, but will remain

in effect until the repeal becomes effective on publication of the act. Thereafter, the commission may no longer allow discounts on the sale price for quantity purchases of liquor by licensees.

As I understand it, the commission has, by authority of that part of §123.18 quoted above, been allowing liquor licensees a ten percent discount on purchases of $100 or more. You have correctly assumed that the commission has the power to remove the present discount under §123.18 even before the new law becomes effective. It may be implied from the power to allow the discount that the commission has the power to take it away. Your second question is, however, whether the commission is required to notify licensees before "removal" of the discount and, if so, how many days notice must be given them.

In absence of any statutory requirement of such notice, the commission has authority to rescind all discounts without notice. The discount was a privilege or a matter of grace granted by the commission in the exercise of its discretion and may be taken away at any time while the quoted portion of §123.18 is in force.

On the other hand, there is nothing in the law to prohibit the giving of such notice of rescinding the discount if the commission deems such notice to be proper.

In answer to your first question as to whether the Liquor Control Commission must make a demand upon all liquor licensees for the 15% tax on all their liquor inventory on hand on the effective date of Senate File 50, the answer is no. Subsection 1 of §1 of Senate File 50 provides that the new 15% tax be paid by licensees "at the point of purchase from the state" which means the state liquor store where purchased. Subsection 2, however, provides that "no licensee shall knowingly, *keep* on the licensed premises *nor use for resale purposes* any alcoholic liquor on which the special tax has not been paid to the state." Subsection 3 provides that "Each bottle of alcoholic beverage purchased by a licensee shall bear an identification marker applied at the place of purchase." Presumably, none of the licensee's existing inventory will bear the identification marker prior to the effective date of the bill. Consequently, *before Senate File 50 becomes effective*, every licensee must either:

1) Lawfully sell his existing inventory on the premises (§123.27, Code of Iowa, 1966) or

2) Pay the 15% tax on the full retail price of his existing inventory and have the identification marker affixed to each bottle thereof.

Perhaps one or more rules or regulations should be adopted establishing the mechanics for collecting the tax on existing inventories.

July 15, 1967

COUNTIES AND COUNTY OFFICERS—§§368.15, 337, 356.5 and 368.15, Code of Iowa, 1966. Cities and towns have the right to use county jails for confinement of ordinance violators. Counties are not limited by the provisions of §337.11 and may charge cities and towns actual cost of confinement. Cost of keeping prisoners of cities and towns shall include cost of emergency medical treatment rendered.

Mr. William L. Wegman, Chickasaw County Attorney: You have requested an opinion of this office on the following questions:

1. Must Chickasaw County accept the prisoners of the City of New Hampton when the city has no jail of its own, and if so, can the county charge the city an amount in excess of fifteen cents (15¢) per night for the lodging of the city's prisoners?

2. Although the prisoner is primarily responsible, as between the city and the county, who is obligated to pay the cost of emergency medical treatment for a prisoner lodged at the county jail for violation of a city ordinance when the prisoner is indigent?

Your attention is invited to Chapter 368.15, 1966 Code of Iowa, which states in part:

". . . Any city or town shall have the right to use the jail of the county for the confinement of such persons as may be subject to imprisonment under the ordinances of such city or town, but it shall pay the county the cost of keeping such prisoners."

In view of the foregoing language, it is our opinion that the county must accept prisoners of the city or town who have violated ordinances of the particular city or town. (see also Chapter 602, 1966 Code of Iowa)

However, cities and towns are obligated to pay the costs of such confinement. Your question as to whether the county may charge more than fifteen cents (15¢) per night for lodging is apparently a reference to Chapter 337.11, 1966 Code of Iowa, which provides for fees that may be charged by the sheriff for lodging of prisoners. It is our opinion that Chapter 337.11 and sub-sections analogous thereto, establish a limit upon the fees the sheriff may retain in addition to his salary but has no reference to the actual costs of lodging a prisoner. (1940 O.A.G. 92) Therefore, we must conclude that the county may charge cities and towns the actual cost of lodging prisoners notwithstanding the fact that said cost may exceed the amounts stated in Chapter 337, 1966 Code of Iowa.

In answer to your second inquiry, please be advised that in Chapter 356.5, 1966 Code of Iowa, the duties of a keeper of a jail are described. It states in part:

"The keeper of each jail shall:

"1. See that the jail is kept in a clean and healthful condition.

"2. Furnish each prisoner with necessary bedding, clothing, towels, food and *medical aid.* (emphasis added)

"3. Serve each prisoner three times each day with an ample quantity of wholesome food.

"4. Furnish each prisoner sufficient clean, fresh water for drinking purposes and personal use.

"5. Keep an accurate account of the items furnished each prisoner."

* * *

Each of the items above mentioned constitute an expense that is a result of lodging a prisoner. Thus, Chapter 368.15, 1966 Code of Iowa, allowing cities and towns to lodge ordinance violators in county jails also provides that cities and towns pay the costs of such confinement. It is

our opinion that emergency medical aid, such as described in your letter, is included as a cost of confinement and is an obligation of the city or town as are other costs of confinement. (1930 O.A.G. 327)

July 15, 1967

CRIMINAL LAW: Double Jeopardy — §§698.1, 725.2, 1966 Code of Iowa. A defendant who has previously been tried and convicted for a crime of rape may subsequently be tried for the crime of lewd and lascivious acts with a child stemming from the same transaction without the second prosecution constituting double jeopardy.

Mr. William L. Wegman, Chickasaw County Attorney: This is in reference to your recent letter of June 2, 1967, in which you ask substantially the following question:

"Can a defendant who has previously been tried and acquitted for the crime of rape subsequently be tried for the crime of lewd and lascivious acts with a child stemming from the same transaction without the second prosecution constituting double jeopardy?"

A quite similar problem was considered in *State vs. Jacobson,* 197 Iowa 547, 197 N. W. 638 (1924). There, defendant, after having been indicted for the offense of assault with intent to commit rape, was convicted of the included offense of assault and battery. Subsequently, he was indicted for committing lewd lascivious acts with a child stemming from the same transaction for which he had been indicted for the assault with intent to commit rape offense. He was convicted and appealed, arguing that the second prosecution constituted double jeopardy.

The Iowa Supreme Court, in rejecting defendant's contention, first stated that the proper test for determining whether the defense of former jeopardy is available is that it must appear that the two offenses are in substance the same, so that the evidence which proves one would prove the other. Unless one crime is included in and forms a necessary part of the other, and is in fact but a different degree of the same offense (i.e. unless one is a lesser included offense of the other), then a conviction or acquittal of the higher offense will bar a prosecution of the lower offense.

The Court then examined the offenses involved and stated its conclusion on page 552 of 197 Iowa:

"The two crimes are entirely distinct in their character. By the language of the statute, the offense of assault with intent to commit rape can only be committed upon 'a female,' while the offense of committing lewd, immoral, and lascivious acts may be committed upon 'any child.' The latter section also provides that a person shall be guilty who commits any lewd, immoral, and lascivious act upon a child of thirteen years or under, with the intent of arrousing, appealing to, or gratifying lust or passions or sexual desires of such person, *or of such child.* It is perfectly obvious from the reading of the statute that this offense may be committed without any assault with intent to commit rape. . . . (Emphasis the Court's)

"We hold that the offense of assault with intent to commit lewd, immoral, and lascivious acts, under Section 725.2 of the 1966 Code of Iowa, is not an included offense in the crime of assault upon a female with intent to commit rape, under Section 698.4 of the Code and that an acquittal or conviction under an indictment charging [the latter] does not

necessarily bar a prosecution for [the former], even though the two indictments refer to the same transaction, and even though the evidence in the two cases be identical."

It must be noted that the *Jacobson* decision is cited in 22 C.J.S., Crim. Law, §292 with *People vs. Jameson*, 136 Cal. App. 10, 27 P. 2d 935 (1933) as authority for the proposition that a conviction or an acquittal for rape does not bar a prosecution for lewd and lascivious conduct. **It is therefore my opinion based on all of the above that a defendant who has previously been tried and convicted for the crime of rape may subsequently be tried for the crime of lewd and lascivious acts with a child stemming from the same transaction without the second prosecution constituting double jeopardy.**

July 15, 1967

SCHOOLS: Religion — Constitution of Iowa, Art. I, §3. Religious or sectarian instruction cannot be given in the public schools of this state.

The Hon. Vincent B. Steffen, State Representative: You have requested an opinion on the following:

"A proposal has been made within my legislative district to add to the curriculum within the New Hampton Community School District an elective course in religion.

"The proposal would establish a religion course modeled after the course at the State University of Iowa. The classes would be held on the premises of the Community High School. The courses would be entirely elective, and the teachers would be furnished at the expense of the various churches in New Hampton. The entire emphasis would center on a study of religion, rather than a study of any particular faith. The courses offered and the subject matter of each course would be subject to the approval of the Board of Education.

"I would like your opinion as to whether this proposal, if implemented, would be in conflict with laws of the state of Iowa."

The proposal outlined in your letter is not sufficiently developed for us to be able to determine how the course offered at the university would serve as a model for the teaching of a study of religion by teachers furnished at the expense of the various churches. Without indulging in any comment about the study of religious attitudes, beliefs and practices or a comparative philosophy as a subject appropriate for high school students, it is not entirely clear to us how such courses could be offered by the teachers who might be available without such courses being tinged with a sectarian character which would be prohibited by the Constitution of the State of Iowa.

The law of this state clearly prohibits any religious or sectarian instruction of any kind to be provided or given in the public school. *Knowlton v. Baumhover*, 182 Iowa 691, 166 N. W. 202 (1918).

In McCollum v. Board of Education, 333 U. S. 203, the Supreme Court of the United States held that the constitutional principle of separation of church and state was violated when a school board in Illinois authorized the teaching of religion by members of various denominations during the regular school hours when children in the public schools were obliged to attend the compulsory school laws of the state. In that case the teachers were furnished at no cost to the taxing district by the vari-

ous churches of the locality and the children who attended the classes in religion, did so with the written permission of their parents. It would appear that that situation would be similar to what is proposed, and if so, the addition of such elective courses would not be permissible.

I am enclosing a copy of an opinion from 1954 O.A.G. 73, which advises that the board of directors of an Iowa school district may make provision to excuse pupils on the written request of their parents so that such pupils may attend religious instruction given by non-school personnel at places not a part of the school premises. I hope that this will be an aid in clarifying the limitations of the proposed plan.

July 15, 1967

MAYOR'S COURTS: It is not per se a violation of the law for a mayor to monitor police radio reports while serving as magistrate in mayor's court.

CRIMINAL LAW: Minors — §§367.5, 232.61, 321.42, Code of Iowa, 1966. Minors under age 18 must be transferred to juvenile court and mayor's court has no jurisdiction to prosecute juveniles with certain exceptions.

JUVENILE RECORDS: §232.54, Code of Iowa, 1966 — Legal records of juvenile proceedings are a public record.

NOTE — Supplemental letter attached, dated July 19, 1967.

Hon. Lester M. Freeman, State Representative: This will acknowledge your correspondence of June 8, 1967, wherein you submitted the following.

"1. I want to know if it is legal for a mayor, who also serves as a judge in a mayor's court, to monitor police radio reports.

"2. Is it legal for a person under 18 to appear before a mayor's court if it isn't a motor vehicle offense? Code 232.61. Also, can a juvenile record be made public, and is it an official record that can be use against them?"

In reference to your first inquiry, there appears to be no specific statutes that prohibit an individual serving as judge in a mayor's court to monitor police radio reports. A review of the annotations pertaining to mayor's courts and courts in general reveal no cases which would condemn the practice you have questioned. However, the Supreme Court in *In Re: Judges of Cedar Rapid's Municipal Court*, 256 Iowa 1135, 130 N. W. 2d 553 (1964) has said:

"Courts are not omnipotent; they have considerable power, but it must be exercised fairly and without oppressive use or threats of use. Judges should likewise be meticulous in observing the Canons of Judicial Ethics, and should be most careful to avoid becoming involved in public controversies.

"It has been well said. 'A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.' Lord Howard, C. J. in *Rex v Sussex Justices*, 1 K.B. 256, 259."

It is our opinion, that in the absence of a specific showing that justice is not or cannot be fairly dispensed, the monitoring of police radio calls by the mayor is not per se a violation of the laws of Iowa.

Further responding to your inquiry as to whether it is legal for a person under 18 to appear before a mayor's court if it is not a motor vehicle offense, the following is submitted for your consideration:

Chapter 367.5, 1966 Code of Iowa states as follows:

"367.5. *Jurisdiction of Mayor.* In other cities and towns, the mayor, or mayor pro tempore when authorized to hold mayor's court, shall have exclusive jurisdiction of all actions or prosecutions for violations of city or town ordinances, and the mayor shall have, in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county, and in civil cases, the jurisdiction within the city or town that a justice of the peace has within the township."

Chapter 232.61, 1966 Code of Iowa provides:

"Any child taken before any justice of the peace or police court charged with a public offense shall, together with the case, be at once transferred by said court to the juvenile court."

Although Chapter 232.61, 1966 Code of Iowa, does not make reference to mayor's court, but only to justice of the peace and police courts, it must be presumed that it also includes mayor's courts since mayor's courts have the same jurisdiction in criminal matters as the justice of the peace courts.

It has been previously ruled by this office that unless it is stated specifically otherwise by law, a justice of the peace or a police court lacks jurisdiction to try a child under 18-years of age who has been charged with a public offense over which the justice of the peace ordinarily has jurisdiction, and if such child is brought before a justice of the peace or police court, he must be immediately transferred to the juvenile court. Op. Atty. Gen. September 16, 1965.

It is our opinion that the same rule is equally applicable to mayor's courts. See 1940 O.A.G. 156.

However, an exception to the above rule does exist in the event the juvenile is charged with a motor vehicle offense which is declared a misdemeanor by Chapter 321.482, 1966 Code of Iowa, which states in part:

* * *

"Chapter 232 (Neglected, Dependent and Delinquent Children) shall have no application in the prosecution of offenses committed in violation of this Chapter which are punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days."

Furthermore, this office has previously ruled that the mayor's court must transfer to juvenile court, cases in which a minor under 18-years of age is charged with a violation of a city ordinance. See 1940 O.A.G. 156.

Therefore, it is our opinion that, except in the cases of motor vehicle violations as prescribed in Chapter 321.482, a mayor's court has no jurisdiction to hear cases involving juveniles under the age of 18.

In response to your third question as to whether a juvenile record can be made public and is it an official record that can be used against them, the following is submitted for your consideration:

Chapter 232.54, 1966 Code of Iowa states as follows:

"The legal record of the juvenile court shall be a public record, and shall include the petition, information or indictment, notices, orders, decrees and judgments."

Chapter 232.55, 1966 Code of Iowa states:

"The proceedings concerning delinquency petitions filed by parents and petitions concerning neglected or dependent children; the reports of juvenile court probation officers; and the reports on juvenile homes shall not be public records, but the court may make them public in its discretion."

Chapter 232.56, 1966 Code of Iowa states:

"Peace officer's records of children except for offenses exempted from this Chapter by law shall be kept separate from the record of persons 18-years or older. These records shall be public records."

Chapter 232.57, 1966 Code of Iowa states:

"All information obtained and social records prepared in the discharge of official duties by an employee of the Court shall not be disclosed directly or indirectly to any one other than the judge or others entitled under this Chapter to receive such information unless otherwise ordered by the judge."

Therefore, in view of the above quoted statutes, it is our opinion that those portions of a juvenile record constituting the legal record as defined in Chapter 232.54, 1966 Code of Iowa, are of a public nature; other portions of a juvenile record which constitutes reports and investigations in the main, are within the judge's discretion as to whether they will be made public.

Since the legal record of a juvenile action is a matter of public record, the question of whether such record may be used against the juvenile is, of course, left up to the person who sees the record.

July 19, 1967

Hon. Lester M. Freeman, State Representative: This is to supplement our opinion of July 15, 1967, wherein said opinion cited Chapter 232.61, 1966 Code of Iowa, which provided:

"Any child taken before any justice of the peace or police court charged with a public offense shall, together with the case, be at once transferred by said court to the juvenile court."

Our office interpreted said statute to include mayor's courts because of the provisions of Chapter 367.5, 1966 Code of Iowa, which provides that mayor's courts have jurisdiction concurrent with the justice of the peace.

Senate File 200 which was enacted by the 62nd General Assembly and became law July 1, 1967, repealed the above quoted Chapter 232.61, 1966 Code of Iowa. In lieu thereof, Chapter 232, 1966 Code of Iowa, was amended and the following provisions were added:

"Section 15. All juveniles appearing in any court other than the juvenile court and charged with a public offense not exempted by law and who are under eighteen (18) years of age or who were under eighteen (18) years of age at the time of the commission of the alleged offense shall immediately be transferred to the juvenile court of the county."

Section 24 of Senate File 200 provides:

"A child referred to juvenile court pursuant to Section fifteen (15) of this Act, may also be transferred to criminal court and tried as an adult by the filing of a county attorney's information or grand jury indictment charging the child with an indictable offense. No such county attorney's information, grand jury indictment or information shall be filed or be valid to affect such a transfer after there has been an adjudication of delinquency in juvenile court."

The above quoted provisions of Senate File 200 now clarifies the position of the police, justices of the peace and mayor's courts in regard to children under the age of eighteen (18) years. Except in cases otherwise provided for, which would be motor vehicle violations as prescribed in Chapter 321.482, 1966 Code of Iowa, these courts have no jurisdiction over children under the age of eighteen (18) years. Any cases brought before these courts involving children under the age of eighteen (18) years must be transferred to the juvenile court for processing.

Our original opinion to you held this to be true. However, in view of the latest amendments to the 1966 Code of Iowa, which specifically states this to be the law, we felt it to be imperative that we quote this additional authority to you.

July 15, 1967

TAXATION: Real Property Tax: Exemptions — Summer Theater owned and operated by College. Section 427.1(9), Code of Iowa, 1966. A Summer Theater which is owned and operated by a non-profit private college, which is used for educating the college's students in the field of dramatic arts, and which is not a profit-making venture, is exempt from taxation under Section 427.1(9), Code of Iowa, 1966.

Mr. Jack H. Bedell, Dickinson County Attorney: This is to acknowledge receipt of your letter of July 6, 1967, in which you posed the following question:

"Does the Okoboji Summer Theater, which is owned and operated by Stevens College of the State of Missouri, qualify for tax exemption under Section 427.1(9) of the 1966 Code of Iowa?"

You also posed a factual situation which is paraphrased as follows: The Summer Theater, which is operated during the summer months in Dickinson County, presents plays for which admission is charged to the public for nightly appearances during six (6) days of the week. The cast and producers of the plays are Stevens College students who receive dramatic arts credits, certain paid professional actors and actresses and certain paid staff members of the college. Stevens College is a Missouri non-profit corporation.

Apparently, the Theater's local management consists of volunteers who serve without compensation. The Summer Theater is not self-supporting and requires some financial assistance from the college. Tuition is charged to those students receiving dramatic arts credits from the college.

Funds received from the sale of tickets to the public are remitted to the college to be placed in its general fund. No separate account is kept respecting the college's theater operation except an informative account for the purpose of determining the cost of the Summer Theater's operations.

Enclosed please find an opinion rendered by a former Special Assistant Attorney General, dated September 24, 1965. As you will note, a private college is considered to be a charitable organization. Also, the Attorney General has ruled that property owned by a college, and used solely for educational purposes with no part thereof leased or otherwise used with a view to pecuniary profit is exempt from taxation. 1909 O.A.G. 253.

In a sales tax case, the Iowa Supreme Court has held that a community theater which charged admission to its presentations but which provided instructions on drama to non-professionals was engaged in educational activities. *Community Drama Ass'n. of Des Moines vs. Iowa State Tax Commission*, 252 Iowa 854, 109 N. W. 2d 23 (1961).

It appears that the Okoboji Summer Theater is operated for the purpose of educating Stevens College students in the field of dramatic arts. This type of education is an "appropriate object" of the college pursuant to Section 427.1(9). It also appears that the Summer Theater is not a profit-making venture since financial assistance is needed from the college in order to sustain this operation, notwithstanding the fact that the Summer Theater charges admission to the public.

It is the opinion of this office that a Summer Theater, which is owned and operated by a non-profit private college, which is used for educating the college's students in the field of dramatic arts, and which is not a profit-making venture, is exempt from taxation under Section 427.1(9), Code of Iowa, 1966.

July 17, 1967

CITIES AND TOWNS: **Councilmen** — House File 280, 62nd General Assembly. Where there is a change from a five member council to the ward system pursuant to H.F. 280 councilmen whose terms have not expired should be recognized as the elected representatives of the wards in which they reside and if two reside in the same ward, one be designated the ward councilman and the other the councilman-at-large.

The Hon. John Tapscott, State Representative: In your letter of June 27, 1967, you requested an opinion relating to House File 280, which provides an alternative for municipalities operating under the council-manager form of government by also authorizing election of a portion of the council from wards and to increase the council to seven members. Specifically, your questions were as follows:

"In the event there is a change of government from a five member council to the ward system, what would be the position of any holdover councilmen? Also, if they would be retained, would they serve within a ward or at large?"

There is no doubt of the power of the Legislature which creates an office to abolish it or to change it, and the Legislature may shorten or lengthen the term of the office itself, in the absence of constitutional inhibition. 43 Am. Jur. Public Officers §151. However, it is well settled

that statutes will not be construed to change the terms of incumbent officers unless the intent is plainly and clearly expressed. 67 C.J.S. 201.

In answer to your first question, it appears that under §7 of House File 280, there is a possibility that where there is a change of government from a five-member council to the ward system, there may be councilmen in office whose four-year terms have several years to run when the ordinance is passed to provide for the division of the city into four wards and to provide for the election of the mayor and the council thereunder at the next regular municipal election.

It is my view that in such case the councilmen who are holdovers should wherever possible be recognized as the elected representatives of the wards in which they reside and if it should happen that both reside in the same area which is one of the four wards that one be designated the ward councilman and the other designated the councilman elected at large. I believe this is possible since both councilmen were originally elected at large.

The answer to your second question is contained in my answer to the first. Whether any holdover councilman who is retained would serve as the representative of a ward or as a councilman at large is dependent upon the factual situation concerning his residence and that of any other holdover councilman.

July 17, 1967

SCHOOLS — **Conflict of Interest** — §§553.23, 739.10. The fact that a member of a school board is related to officers of a construction firm does not constitute a conflict of interest so as to prohibit such member from serving in planning stages prior to request for bids on school construction projects.

Mr. Edward F. Samore, Woodbury County Attorney: This is in reply to your letter of July 5, 1967, requesting advice on the following situation:

"A member of the Sioux City Board of Education is the wife of the executive vice president of a construction company, and the daughter of the president of the same company. This company is a local construction firm which would be interested in major school construction projects.

"Does a conflict of interest exist because of her membership on the Board of Education, and if she should serve in the planning stages and the public election prior to the request for bids?"

We see no conflict of interest in this lady's membership on the board of education. The Code of Iowa is specific in prohibiting pecuniary or personal interests in contracts as set out in §§15.3, 18.4, 86.7, 252.29, 262.10, 314.2, 347.15, 368A.22, 372.16, 403.16, 403A.22, 553.23, 741.8, and 741.11. However, while these sections relate to and specify nearly every state, county, or municipal official and employee, there is no specific reference to members of school boards. Likewise, in §297.7 which gives the school board authority to construct and repair school buildings, there is no provision precluding any member in the situation described from participating in the planning stages and public election prior to the award for major school construction projects.

We wish to call your attention, however, to §553.23 of the Code of Iowa, which requires that the party to whom the contract has been awarded guarantees that he has not directly or indirectly entered into any agreement or arrangement with any other bidder or with any public officer, or entered into any agreement which tends to or does lessen or destroy free competition in the letting of the contract.

In addition, we wish to call your attention to §739.10, which makes it a crime to accept any reward for public duty. In 1928 O.A.G. 75 an opinion was rendered stating that a contract for the transportation of school children to and from school should not be made with the wife of one of the members of the board as ". . . it is against public policy for any official, state, county, or school to be directly or indirectly interested in any contract or employment wherein the board or department of which he is a member, is required to act for the public."

In view of the above, there appears to be no conflict of interest at the present time and whether or not such might occur at some time in the future upon the submission of bids for a school construction project is now only a matter of speculation.

July 17, 1967

USE OF STATE INSTITUTION FUNDS — §444.12, Code of 1966 — The State Institution Fund by its terms shall not be diverted to any other purpose than named therein and, therefore, payment for the care of an Iowa patient in an Illinois school is unauthorized.

Mr. Pat Myers, Marion County Attorney: Reference is herein made to yours of the 21st ult. in which you submitted the following:

"Section 444.12 of the 1966 Code of Iowa permits boards of supervisors to establish an institutional fund to maintain county patients at certain enumerated institutions in Iowa. Can a board of supervisors authorize payment from this fund to a mental health school located in Illinois for the care of an Iowa county patient?"

In reply thereto I advise the state institution fund §444.12, Code of 1966, so far as applicable provides the following:

"The board of supervisors for each county shall establish a state institution fund and shall at the time of levying other taxes, estimate the amount necessary to meet the expense in the coming year of maintaining county patients, including cost of commitment and transportation of patients at the Mount Pleasant Mental Health Institute, Independence Mental Health Institute, Cherokee Mental Health Institute, Clarinda Mental Health Institute, the state sanatorium for the treatment of tuberculosis at Oakdale or any similar tuberculosis institution established and maintained by any county under the provisions of chapter 254, the Glenwood state hospital-school, the woodward state hospital-school, the Iowa juvenile home at Toledo, the Iowa Annie Wittenmyer Home at Davenport, the Iowa braille and sight-saving school at Vinton, the school for the deaf at Council Bluffs, the state psychopathic hospital at Iowa City, and for the establishment of a community mental health center as provided in section 230.24, and for the support of such mentally ill or mentally retarded persons as are cared for and supported by the county in the county home or elsewhere outside of any state hospital for the mentally ill or mentally retarded, shall levy a tax therefor. Cost of outpatient care of tuberculosis patients administered under the supervision of a tuberculosis sanatorium may be paid from the state institution fund. Said fund shall not be diverted to any other purpose except that if any

patients are returned to a county from any of the four mental health institutes under the provisions of section 226.32 or from any state hospital-school for the mentally retarded as provided by law, the cost of care for such patient may be paid from the state institution fund of the county of legal settlement in an amount commensurate with the cost of patients in the county hospital, county home, or other institution located in the county; if inmates of Toledo state juvenile home and Iowa Annie Wittenmyer home are transferred or placed in foster homes in a county, the cost of care of such inmate's foster homes may be paid from the state institution fund of the county of legal settlement of such inmate in an amount not to exceed the cost per inmate in the respective state institution."

This fund is established for the purpose of maintaining county patients in the state institutions and fixing the cost of such maintenance. The board of supervisors in performing the duty imposed by §444.12 is provided with the list of institutions in order to make the board aware of the relative scope of their duty. In addition, they are directed to levy taxes sufficient in amount necessary to meet the expenses in the coming year of maintaining the county patients including the cost of commitment and transportation of such patients to the named institutions. By this statute the state institution fund is directed to be used for the maintenance of county patients and the cost of their transportation and commitment in the institutions named in the statute and specifically provides that the fund shall not be diverted to any other purpose than that named except that if any such patients are returned to a county, the cost and care thereof shall be paid from the state institution fund. This statutory prohibition of the use of this fund is an affirmation of this principle to wit:

"Funds derived from taxes levied and collected for particular purposes cannot be legally utilized for, or diverted to any other purpose." 85 C.J.S. §1057(b), cases cited in support thereof. According to 85 C.J.S. page 647 "it is a sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation."

In my opinion the use of this fund for the purpose of paying for the care of an Iowa patient in a mental school in Illinois violates both the provisions of §444.12 and the principles of law recited.

July 17, 1967

HOMESTEAD TAX CREDIT — **Ten percent down payment requirement in cases involving assumption of a mortgage in a land contract** — Chapter 425.11. The words "purchase price" in Iowa Code Chapter 425.11 (2) denotes an amount which includes the unpaid balance on a mortgage which the buyer assumes.

Mr. Robert K. Richardson, Esq., Greene County Attorney: I have your letter of June 20, 1967, in which you request an opinion of this office as follows:

"Would you please give me an Attorney General's Opinion as to the requirements of the 10% down payment on a real estate contract before the Homestead Exemption will be allowable.

"The problem arises through a contract for the purchase of property for a price of some $17,000.00, with a down payment of $1,500.00 and the assumption of a $4,000.00 mortgage.

"Does this meet the requirements of a 10% down payment or what is the basis for determining the 10% down payment?"

This opinion assumes your question relates to the interpretation of the Homestead Tax Credit Law and not to exemption of the homestead from execution. We further assume that the $17,000 purchase price includes the $4,000 mortgage.

Iowa Code, Chapter 425.11(1)(a) defines the word "homestead" as follows:

"The Iowa homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed . . ."

You will note that the statute requires one to be an "owner" to qualify for the exemption.

Iowa Code, Chapter 425.11(2) defines the word "owner" as follows:

"The word, 'owner,' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, . . ."

In the instant case, land bought under contract, an owner is one who shall have actually paid "one-tenth of the purchase price named in the contract."

While the words "purchase price" do not appear to have been the subject of judicial interpretation in this state, other state courts have addressed themselves to a determination of this issue.

The Louisiana court in *Byrd v. Babin*, 200 F. O. 294, 300, 196 La. 902, stated that the "purchase price" is the price agreed upon by the parties as a consideration for which the property is sold and purchased. The Missouri court in *National Dairy Products Corp. v. Carpenter*, 326 S. W. 2d 87, 90 (Mo.), stated that the word "purchase price" means the consideration paid for an object involved in a sale.

Webster's Seventh New Collegiate Dictionary defines price as "worth" or "value" or "the quantity of one thing that is exchanged or demanded in barder or sale for another."

In the instant case the vendee has agreed not only to pay a principal amount to his vendor but also has agreed to assume personal liability for payment of the vendor's mortgage. This appears to be the vendor's consideration.

In light of the above, it is our opinion that the words "purchase price" denote an amount which includes the unpaid balance on a mortgage which the buyer assumes. In the case you refer to us the vendee would not qualify for a homestead tax credit as he has not paid the required 10% which in this case would be $1,700.

July 17, 1967

AREA HOSPITALS — H.F. 435, 62nd G. A. — Additional legislation needed to change boundaries of area hospital should be patterned after school reorganization in Chapter 274.

Hon. J. Henry Lucken, State Senator: This is in response to your letter of June 26, 1967, in which you pose the following question:

"I would appreciate an opinion on whether or not the territory included in a present hospital organized area could be changed by going through a reorganization process; or whether this could be done under the bill as passed in this session of the legislature. In other words, what we are interested in is the simplest way of making any justified changes in the area to be served by a particular merged area hospital."

You indicate that you have in your possession a copy of my opinion to Representative James T. Klein dated June 16, 1967. That opinion was directed to S.F. 447 which was passed by the senate on March 7, 1967. I have now determined that this bill was dropped by the house and H.F. 435 was substituted for the senate file bill and has been passed by both houses of the general assembly and signed by the governor on June 8, 1967. This opinion is therefore directed to the bill known as H.F. 435 which for all purposes of the question posed by you is identical to S.F. 447.

You will recall that in my letter of June 16, 1967, to Representative Klein I concluded:

"It is therefore my opinion that once an area hospital has been established under S.F. 447, absent further legislation authorizing a change in the size of the area, there is no authority to increase the size by adding additional townships nor is there any authority for any township to remove itself from the approved area."

In reviewing H.F. 435 which has now been enacted into law my opinion as expressed above has not changed and further legislation is still necessary in order to enable a merged area hospital to change its boundaries. In this regard I pointed out in my letter of June 16, 1967, the authority granted to cities and towns to increase or decrease the corporate limits of such a municipal corporation and also pointed out the appropriate code section with reference to the power of school districts to change their boundaries.

It is my opinion that a merged area hospital structurally resembles a school district more than a municipal corporation and it would be my opinion that a procedure patterned after §274.13 through §274.15 inclusive and §274.37 of the 1966 Code of Iowa would be the most practical method of changing the boundaries of the merged area hospital.

In this regard we would be more than willing to aid you in drafting the necessary legislation.

July 18, 1967

EXECUTIVE COUNCIL AND INDUSTRIAL COMMISSIONER — CONTRACTUAL POWERS. While the Executive Council is without power to engage services of a physician in an infirmary operating in the Capitol Building, such engagement with a physician by the Council may be ratified by the Legislature and the engagement of the same physi-

cian by the Industrial Commissioner as a consultant likewise may be ratified by the Legislature and his status as an independent contractor as well as compensation therefor may be the subject of an agreement between the Executive Council and the Industrial Commissioner.

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of May 29, 1967, in which you submitted the following:

"The Executive Council has directed me to obtain from you an opinion as to the fee proposal for Daniel W. Coughlan, M.D., in the operation of the First Aid Room of the Capitol Building.

"Dr. Coughlan was retained by the Executive Council the latter part of 1966 at a base fee of $300.00 per month with an additional per patient charge if the doctor saw patients here at the Capitol Building.

"The proposal now is to pay Dr. Coughlan a $7,500.00 per year fee, with the Industrial Commission being charged for $125.00 per month and the Executive Council bearing the rest of the cost.

"The present practice is that an employee cannot be on the state payroll on a salary basis for two different departments at the same time. May a professional person be retained on a fee arrangement with two different departments of the state bearing the cost of same? Since the doctor will be on a fee, it is assumed that he will not be eligible for 'fringe benefits' affecting salaried personnel.

"I am including the proposals for operating the First Aid Room which were adopted by the Executive Council in their meeting on February 14, 1967."

Attached thereto is a copy of a letter addressed to the Council by H. W. Dahl, Industrial Commissioner, concerning this matter, a copy of which letter is exhibited in this opinion. Also attached to your letter is a copy of a letter to the Commissioner for Dr. Coughlan addressed to the Council, likewise exhibited in this opinion and made a part thereof. It appears from these documents that Dr. Coughlan is a practicing physician of long duration in the city of Des Moines. He has for a long period, in connection with his own practice, been a medical consultant for the Industrial Commissioner and for such services, compensation has been paid to him.

In addition, it appears that by act of the Executive Council in October, 1966, an infirmary designed to provide first aid to members of the legislature, state officials and state employees was established in the capitol building. Dr. Coughlan was retained to perform medical service at the infirmary and for the services was to be paid, by agreement with the Council, a base fee of $300 per month. It appears further that thee infirmary has performed services for members of the legislature, public officials and employees, and that a nurse has been employed and been in attendance at the infirmary and has been paid a salary as an employee. The current governor's budget included the payment of the nurse's salary and compensation of Dr. Coughlan in connection with the operation of the infirmary.

In the foregoing situation some fundamental rules are pertinent. The state has the power to contract with an individual or with any other state; its officers and agents, likewise, may bind the state under like

power when delegated to them; and authorized contracts made by state officials may be ratified. (81 C.J.S. §§112 and 113) Insofar as ratification is concerned, §123 of the above named title provides the following:

"The legislature may ratify an unauthorized contract made by a state officer, unless it is in contravention of the constitution, and a portion of a contract may be so ratified without ratifying it all. It has been held that the ratification can be only by the legislature, and only by a law duly passed by both branches of the legislature; and the act of ratification or adoption must be so explicit and definite as to show an intention to recognize and adopt the unauthorized contract. It is not necessary, however, that the ratification should be in direct terms; it may be effected by legislation recognizing the contract as valid. Thus, bringing suit on the contract may amount to a ratification, but bringing a suit authorized merely to ascertain whether the state is liable on the contract does not. An appropriation of money for the payment of a claim arising under the contract may be so made as to constitute a ratification, but an appropriation for such purpose does not necessarily do so."

In addition to the foregoing general rule, there are rules of law pertinent to performing service for the state. According to *Norton vs. Day Coal Co.*, 192 Iowa 160; 120 N. W. 905 (1920):

* * *

"A contract for service creates the relation of contractor and employer, and not the relation of employee and employer, when in its essential features, the employer retains no control over the methods and details of the work, but only over the results. . . ."

Hassebrach vs. Weaver Construction Co., 1954, 246 Iowa 622; 67 N. W 2d 549:

"The principal test of determining whether one is an independent contractor, is his freedom to determine for himself the manner in which a specified result shall be accomplished, and other tests are existence of a contract for a certain piece of work, at a fixed price, independent of his calling, his right to hire and supervise assistants, his obligation to furnish necessary tools and equipment, time for which he is employed, method of payment, whether by job or time and whether his work is part of his employee's regular business."

Pertinent to the status of a physician "a physician is an independent contractor for there is no more distinct calling than that of a doctor, and none in which the employee is more distinctly free from the control or direction of his employer." *Pearl vs. West End St. Ry. W.*, 1900, 176 Mass. 177; 57 N. E. 339. See also, *Dowling vs. Mutual Life Insurance Co. of New York*, 1964, 168 So. 2d 107.

Thus, as far as the relationship of Dr. Coughlan to the infirmary is concerned, he is an independent contractor and not an employee and the rule stated in your letter that an employee cannot be on the state payroll on the salary basis for two different departments at the same time is not applicable. (See O.A.G. 1921, p. 286.)

While the contract with Dr. Coughlan appears not to be expressly authorized by statute insofar as the doctor's status is concerned, the Governor's budget for the Executive Council for the 62nd General Assembly contained a proposed expenditure for a physician of $150 per month, and an expenditure for a nurse operating under the Executive Council was

also provided. These budget requests resulted in appropriating by the 62nd General Assembly for such purpose and as far as the personnel department is concerned the departmental appropriation of the Executive Council is evidence thereof.

Such physician by common knowledge has performed his duties in the infirmary. The physician's contract appears therefore to have been ratified by action of the legislature in appropriating for the payment of the physician's services. The power of ratification by actions of the administrative officials by the legislature is confirmed by the following opinion appearing in the Report of Attorney General of 1956 on page 87:

" 'The legislature is presumed to know the construction of its statutes by the executive departments of the state, and if the legislature of this state was dissatisfied with the construction which has been placed upon them by the duly elected officials in the past years, the legislature could very easily remedy this situation, as it has the power to pass such legislation, and the only conclusion we can come to is that the legislature must have been satisfied with the construction placed upon the action by the secretary of the State.'

"As was also said in this case:

" 'A settled practice under which the state has collected and the companies have paid such important amounts for so long a time ought not to be disturbed without compelling reasons therefore.

* * *

" 'Courts have always given great weight to the construction of statutes of this kind by the executive department of the state. . . .

" 'Thus, it will be seen that our Courts have always given weight to the construction of statutes by an executive department of the State. Since it has been for settled practice for so many long years for the Board of Supervisors to make such payments as proper items of poor relief, unless there are compelling reasons therefor, it should not be disturbed.

* * *

" 'It is, therefore, our holding that hospitalization, medical services, medical supplies and nursing are included within the term 'medical attendance,' as used in §3828.099, Code 1939, that the same constitutes proper items of poor relief. It naturally follows that the county of legal settlement of the soldier and his family are liable for such expenditure.' " (*State vs. Ind. Foresters*, 226 Iowa 1339, 1345.)

Insofar as the proposal now is to pay Dr. Coughlan $7,500 per year with the Industrial Commission being charged for $125 per month and the Executive Council bearing the rest of the cost, I am of the opinion that according to the following rule:

"Generally, state agencies have authority to contract with each other insofar as necessary to administer duties within scope of their authority." *State vs. Fla., et al*, 30 So. 2d 97, 158 Fla. 743; *Mulkey vs. Quillian*, 100 S. E. 2d 268, 213 Ga. 507; *Electrical Contractors Association v. Ill., et al*, 213 N. E. 2d 761, 33 Ill. 2d 587, *Jenkins vs. State*, 108 N. W. 2d 924, 13 Wisc. 2d 503.

such agreement may be effected by and between the Industrial Commissioner and Executive Council.

July 19, 1967

CITIES AND TOWNS: Sewer rentals fund, §§24.22 and 393.8, Code of Iowa, 1966 — The state appeal board may not legally approve under §24.22 a transfer to another functional fund of a municipality any part of the sewer rentals fund established as a part of the sanitation fund because of the prohibition contained in §393.8 against the disbursement of such sewer rental funds for purposes other than those set forth in Ch. 393.

Mr. Marvin R. Selden, Jr., C.P.A., Comptroller: By your letter of July 5, 1967, a copy of which is annexed hereto as Exhibit A, you have requested an opinion of this office with respect to the authority of the state appeal board to permit the City of Ames to transfer to another functional fund a portion of funds from the sewer rentals fund established as a part of the sanitation fund.

In our opinion the state board may not legally approve a transfer of funds from the sewer rentals fund to another functional fund of the City of Ames.

The statutory prohibition against such a transfer is contained in §393.8, Code of Iowa, 1966, which provides:

"393.8 Sewer rental fund — accounting. Any and all funds, rentals, charges or rates collected under the provisions of this chapter shall be remitted or turned over to the city treasurer, at regularly established intervals by the officer charged with their collection and all such collections shall be kept in a separate and distinct part of the Sanitation Fund, to be known as the 'Sewer Rentals Fund' and disbursed only for the purposes set forth, either expressly or by reference, in this chapter, as such purposes may be further limited by the town or city council pursuant to ordinance duly adopted thereby."

Moreover, it is clear that the legislature which enacted Chapter 393, Code of Iowa, 1966 (Acts 1931, 44th G. A., Ch. 157) intended that the rentals authorized by such chapter were to be used only to pay for sanitary sewer systems and not as a general revenue producing vehicle. Thus the purpose of the act is stated as follows:

"An Act to provide for the financing in any city or town of the management, construction, maintenance, and operation of main sanitary sewers, intercepting sanitary sewers, outfall or outlet sanitary sewers, sanitary pumping stations, and sanitary sewage treatment of purifying works by a system of sewer rentals."

Other provisions of Chapter 393 make it clear that the rentals collected pursuant thereto are to be geared as nearly as possible to the volume of use made of the sanitary sewer facilities. §§393.1, 393.2.

It does seem probable that, but for the limitation imposed by §393.8, the appeal board could approve the transfer of funds from the sanitation fund to another functional fund. However, it is an axiomatic rule of statutory construction that where a general provision of statute and a special one conflict, the latter will prevail and the former must give way. *State v. Flack*, 251 Iowa 529, 101 N. W. 2d 535 (1960), and cases and authorities cited therein. The following extracts from *American Jurisprudence* and *Corpus Juris Secundum* expand upon this doctrine and were quoted with approval by the court in the *Flack* case:

"It is an old and familiar principle, * * *, that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision. Additional words of qualification needed to harmonize a general and a prior special provision in the same statute should be added to the general provision, rather than to the special one. Under these rules, where there is, in the same statute, a general prohibition of a thing and a special permissive recognition of the existence of the same thing under regulation, the particular specified intent on the part of the legislature overrules the general intent incompatible with the specific one." 50 Am. Jur., Statutes, §367.

"Where, however, general provisions, terms, or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions must govern or control, as a clearer and more definite expression of the legislative will, unless the statute as a whole clearly shows a legislative intention to the contrary, or some other canon of statutory construction compels a contrary conclusion. This is true whether the special provisions precede or follow the general ones, and regardless of the otherwise proper construction of the general provisions." 82 C.J.S., Statutes §347b.

Here the statute of general applicability §24.22 must, to the extent a conflict exists, yield to the special provision, §393.8; and any ambiguities must be resolved in favor of the latter section.

We feel that the argument which has been advanced to the effect that §393.8 prohibits only the *disbursement* of sewer rental funds but not their *transfer* if such transfer is otherwise authorized under §24.22 is a proposition wholly lacking in merit. This nice dichotomy is, in our view, an exercise in sophistry which, if carried to its logical conclusion could be utilized to completely frustrate the limitations placed on the use of sewer rental funds by the legislature which enacted §393.8. If there were a valid distinction to be drawn between the terms "transfer" and "disburse" a city could transfer funds out of the sewer rental fund to another functional fund and having thus removed the funds from the limitations of §393.8 spend or "disburse" the same. Indeed, there is no reason to suppose that such funds could not even be thereafter again transferred, under §24.22, back to the sanitation fund and there disbursed for purposes which would clearly have been prohibited had such funds remained a part of the sewer rental fund. We do not think that the plain language of §393.8 can be circumvented by recourse to so facile a semantic device.

We do not agree that there is any room for uncertainty or doubt as to the proposition that insofar as sewer rental funds are concerned §393.8 effectively limits the application of the transfer provisions of §24.22.

However, if any uncertainty did exist on the question of the power of the city to transfer funds out of the sewer rental funds, such doubts would have to be resolved against the municipality. As stated in *Mason City v. Zerble*, 250 Iowa 748, 93 N. W. 2d 94 (1958):

"Grants of power to municipalities are strictly construed against the authority claimed, and where there is uncertainty or reasonable doubt as to its existence it must be denied."

July 20, 1967

LIQUOR, BEER AND CIGARETTES: Reports Required, Constitutional Law — Senate File 111, 62nd G. A. §8 of S.F. 111, an act "relating to the disclosure of payments by companies selling alcoholic liquor or beer to the Iowa Liquor Control Commission and to aid in the prevention of illegal payments" which requires detailed reports of virtually all payments by persons receiving payments totaling $1,000.00 or more from liquor companies or from persons employed by or under the control of such companies even though the persons of whom such reports are required are only remotely connected with any liquor company is unreasonable, oppressive, wholly unenforceable and constitutionally void. §2(7) which permits the liquor control commission, the attorney general, or the state tax commission to require the reporting of such additional information as they, or any of them, deem necessary or appropriate is clearly unconstitutional as a delegation of legislative authority without limitations or guidelines. The balance of the bill, while likely to cause much litigation regarding its construction, application and enforceability, is found to be a liquor control act and not clearly unconstitutional as an abuse of police power inasmuch as the policy of the state is that liquor and beer traffic is inherently illegal.

The Hon. Howard C. Reppert, State Senator, The Hon. Dan Johnston, State Representative: You have each separately requested my opinion as to the constitutionality of Senate File 111, a bill for an act "relating to disclosure of payments by companies selling alcoholic liquor or beer to the Iowa Liquor Control Commission and to aid in the prevention of illegal payments," enacted by the 62nd General Assembly, and a copy of which is submitted herewith.

It appears that the main purpose of the bill is to require, as a liquor control provision, that all companies selling alcoholic liquor or beer to the Iowa Liquor Control Commission report "payments" made to various public officials and other individuals in Iowa, regardless of the amount of the payments, and to require the individuals *receiving* payments totaling $1,000.00 or more to also report such. Section 4 indicates these reports are to "ensure compliance with the applicable laws of this state" and, although the laws applicable are not specified and it may be open to question, I assume the liquor, beer and taxation laws are included.

A payment is defined in the bill as follows:

" 'Payment' includes any direct or indirect transfer of money or property to or for the benefit of a person, or any credit to the account of a person. Without limiting the generality of the foregoing, 'payment' includes any commission, fee, salary, bonus, gift, contribution, or donation."

Section 2 of the bill requires the reporting, to the Liquor Control Commission, of "each payment made directly or indirectly by the company, or by any person on behalf of the company, or by any person controlling, *controlled by*, or under common control with the company" of certain information thereinafter enumerated. This quoted clause requires the company to report payments made by its employees, who are certainly "controlled by" the company.

It would appear from §2 that a liquor company would be required to report, among other things, any payments for "*any services* rendered wholly or partly in Iowa" made by any and all of its employees. It is a commonly accepted rule of statutory construction, requiring no citation

of authority, that the words of a statute be given their plain, ordinary meaning. In so construing this statute, it is clear that the company would be required to report all payments made by its employees for any services, regardless of whether they had anything to do with the business of the company or not, and including the employees' payments for such things as attorney fees, shoe shines, haircuts and bank service charges. To comply with these provisions the company would have to ascertain the nature of almost every expenditure made by each of its employees within the state, obviously a considerable and difficult undertaking.

The company would also be required to ascertain and report each payment by its employees "for the benefit of any individual resident of Iowa or any person having his or *its* principal office or principal place of business in Iowa." A "person" is defined in §1(2) to include, among other things, a corporation. Thus, the liquor company would have to report each purchase of food or merchandise made by each of its employees whether or not the purchase had anything to do with the business of the liquor company. Presumably, for example, the company would have to report the purchases by its employees of such items as groceries, cigarettes and clothing. The bill requires that the "purpose of each payment" be stated. For example, the company may be required thereby to state the nature and reason for the payment of attorney fees by an employee, whether such relate to the business of the company or the private affairs of the employee.

The company is also required to ascertain and report whether each employee made the foregoing payments "by check, in currency, or in some other manner" and to show the consideration of each and combine all payments made to the same person in total amount unless made for "two or more purposes."

Under subsection 7 of §2, the company would also be required to supply such "additional information as the Iowa liquor control commission, the attorney general, or the state tax commission may deem necessary or appropriate." This latter provision is clearly unconstitutional as a delegation of legislative authority without limitation or guidelines. See *State ex rel Klise v. Town of Riverdale*, 1953, 244 Ia. 423, 57 N. W. 2d 63 and *Lewis Consolidated School District v. Johnston*, 1964, 256 Ia. 236, 127 N. W. 2d 118.

Subsection 8 of §2 requires that the companies show "whether or not the reporting company retains an attorney or a firm of attorneys that any elected or appointed public official is presently associated or had been associated, in the practice of law." It may be possible to read in the words "with whom" the public official is presently associated as necessary, in order to make sense of this clause and require the reporting company to ascertain and report whether its attorney had a partner or a former partner, who is a public official. Many lawyers have partners, former partners and secretaries who are or have been public officials, but if such is the case all this clause requires is that the company answer "yes" without identifying the public official.

Under subsection 9 of §2, the company is required to report the attorneys representing it and the amount of legal fees paid to them regard-

less of the nature of the services performed. If the amount of the fee is in excess of $1,000.00, the attorney would also have to file a separate report under §8.

Subsection 10 of §2 requires such companies who have deposited money in a bank to ascertain and report the names of "all elected or appointed state officials employed by" the bank or "upon whose board of directors such official serves or in which such official, his spouse, or immediate family, jointly or severally, own stock equal to one (1) percent of the outstanding stock of such bank." This information may be difficult to obtain in the required detail. The last sentence of this subsection says, "The reporting company shall also state the name of the bank and *its* average monthly deposit for the reporting period." While it is not entirely clear, I conclude that this means the *company's* average monthly deposit in the bank rather than the amount of the *bank's* average monthly deposits.

Section 7 provides that the state officials enumerated "shall have the right to examine all books and records of any company relating to any payment or suspected payment" and that "this section applies to books, records, and companies located within or without the state of Iowa." Such state officials could not, however, seize these books and records without observing constitutional requirements. But the sale of alcoholic liquor and beer in this state is not in the nature of a right. It is a privilege. And it is not unconstitutional to provide, as the bill does, that if the company does not permit such examination of its books and records the Liquor Control Commission shall not purchase any alcoholic liquor or beer from that company. Such a requirement can be supported on the same general principles which are the basis of the so-called "implied consent law" or the "non-resident motor vehicle service law."

In addition to the reports by the company, §8 provides that every person *receiving* payments of $1,000.00 or more is required to file a report with the liquor commission. Apparently, a grocer selling groceries in excess of that amount to an employee of the liquor company would be required to report "in triplicate" to the liquor commission as would an automobile dealer selling a car to such an employee.

"There is no natural or inherent right to manufacture, sell, transport, or in any manner use, possess, or deal in intoxicants, in any such sense as to remove the liquor traffic from the legitimate sphere of legislative control. The sale of intoxicating liquors is in a class by itself, since it is affected with a public interest; and it has been held that it is not a lawful business except as authorized by express legislation of the state. The right to engage in the liquor traffic is a mere franchise which the state may grant or withhold at will." *48 C.J.S. 154*, Intoxicating Liquors §20.

Section 123.1, Code of Iowa, 1966, provides:

"This chapter shall be cited as the 'Iowa Liquor Control Act,' and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose, and it is declared to be the public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter provided for in this chapter."

It is within the power of the Iowa Legislature to *prohibit* the sale of intoxicating liquor *absolutely. Ziffrin vs. Reeves*, 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. Ed. 128. And the power to prohibit includes the power to regulate its traffic. *30 Am. Jur. 539*, Intoxicating Liquors §22. This being so, it would seem as a matter of logic that the power to absolutely prohibit would necessarily include *any* lessor regulatory power no matter how restrictive. But this is not entirely true. Under its police power, a state has the right to prohibit, regulate or restrain the use, manufacture, and sale of intoxicants, and to deprive intoxicating liquors of their character as property. But in the exercise of this power a state is nevertheless subject to the limitations and restrictions imposed by the federal and state constitutions. *48 C.J.S. 164*, Intoxicating Liquors §33. *30 Am. Jur. 545*, Intoxicating Liquors §30.

"Although there is no natural or inherent right to engage in the liquor business, which may be prohibited or subjected to more stringent regulation than other enterprises, and although licenses therein are privileges rather than either contracts or property, a state cannot impose unconstitutional regulations as a condition for engaging in such business, and consequently even a person who has accepted a liquor license conditional upon conforming to such regulations has standing in court to question their constitutionality, such a requirement constituting an abuse of the police power." *14 A.L.R. 2d 680, 702*

The Iowa Legislature has power to enact such laws as it desires with regard to the regulation of alcoholic liquor, unless such powers are limited by the Iowa Constitution or the Federal Constitution. *State v. Arluno*, 1936, 222 Ia. 1, 268 N. W. 179.

Generally, the state's police power permits licensing and regulation of *legitimate* businesses where necessary for the public good, but such regulation must not be capricious, arbitrary, or unreasonable; it must have some relation to the general welfare and may not go to the extent of entire prohibition of operation of the business. *Central States Theatre Corporation v. Sar*, 1954, 245 Iowa, 1254, 66 N. W. 2d 450. But the *Sar* case referred to a legitimate business: that of operating an outdoor theatre, and distinguished the liquor business as inherently illegal. A permit to operate a liquor business may be granted or refused at the will of the licensing body, is a privilege rather than a property right, and may be revoked without notice or hearing. *Walker v. City of Clinton*, 1953, 244 Ia. 1099, 59, N. W. 2d 785. As between the selling of liquor and other callings less harmful to the public, the former may be discriminated against. *30 Am. Jur. 546*, Intoxicating Liquors §31; *14 A.L.R. 2d 701.*

While this Act may be difficult in its application and work such an extreme hardship upon companies which sell alcoholic liquor and beer to the Iowa Liquor Commission as to restrict their doing of business in Iowa, that fact alone does not render this bill unconstitutional. *16A C.J.S. 1062*, Constitutional Law §668. But, to the extent that this law may impose unreasonable and oppressive burdens upon other individuals than the liquor companies, and to the extent that it is unintelligible, uncertain, and unworkable, such portions must be held void. *82 C.J.S. 108*, Statutes §68, *Tolerton and Warfield Co. v. Iowa State Board of Assessment and Review*, 1936, 222 Ia. 908, 270 N. W. 427; *Davidson Building Co. v. Mullock*, 1931, 212 Ia. 730, 235 N. W. 45. Section 8 of the bill,

which requires a person *receiving* payments totaling $1,000.00 or more to file reports, although such persons are not directly connected with the liquor company, falls in this latter category and is void as unreasonable, oppressive and wholly unenforceable.

In *State ex rel Mitchell v. Thomas Thompson's School of Beauty Culture*, 1939, 226 Ia. 556, 285 N. W. 133, the Iowa Supreme Court said:

"The limitations upon the legislature, in the exercise of the police power, appear to be well stated in the case of *Baker v. Daly*, D. C., 15 F. 2d 881, 882, which held that the Oregon statute, regulating cosmetology, was unconstitutional. In the court's opinion, the court refers to certain rights guaranteed by the constitution, and the police power of the state to interfere with such rights, by the following language: 'The right thus granted is, of course, subject to the police power of the state to enact laws essential to the public safety, health, or morals; but, to justify a state in exercising such authority, it must appear that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive to individuals. 'The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose undue and unnecessary restrictions upon lawful occupations.' *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385.' "

As we have noted earlier, §8 would apparently require a grocer or an automobile dealer to report in triplicate for groceries or automobiles sold to an employee of a liquor company for prices totaling in excess of $1,000.00. There is no reasonable basis for any such requirement in the exercise in the state's police power and such requirement is wholly unrelated to the purpose of liquor control or regulating the liquor industry.

The primary purpose of police power is to protect the public welfare and permit the enactment of laws essential to the public safety, health, and morals. To justify the exercise of such power, it must appear that the interests of the public so require and that the means are reasonably necessary for the accomplishment of such purpose. *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; *State v. Thompson's School*, 226 Ia. 556, 285 N. W. 133. I am not disposed to say that under these principles there is an abuse of the police power by §2 of the act or that the legislature cannot require the liquor companies to report payments as defined, even including the personal expenditures of their employees in Iowa. The fact that the requirement will be burdensome or prohibitive is not controlling. Nor is the wisdom of the bill for me to decide. But §8, relating to the reporting by *others* who merely receive such payments does not meet the foregoing Constitutional standards.

Moreover, there is a question as to whether §8 violates the self-incrimination clause of the Fifth Amendment, or the right to privacy guaranteed by the Fourth Amendment, of the Constitution of the United States, in requiring reports by "persons." Corporations have no right against self-incrimination. *U. S. v. White*, 137 F. 2d 24, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1943). But individuals do have this right and §8 may require an individual to report information which could possibly incriminate him. Yet §10 provides the coercion, through a fine, which compels a report without provision or other regard for this right and without guaranty of immunity from prosecution. It is well settled that the Fourth and Fifth Amendments to the federal constitution are applicable to the states. I do not rest my opinion upon these grounds,

and therefor find it unnecessary to answer this issue, but see: *U. S. v. Molasky*, 118 F. 2d 128 (7th Cir. 1941); *Isaacs v. U. S.*, 256 F. 2d 654 (8th Cir. 1958); *U. S. v. Jaffe*, 98 F. Supp. 191, (D.D.C. 1951); *Malloy v. Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Murphy v. Waterfront Commission*, 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964); *Ullman v. U. S.*, 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956); *U. S. v. Ragen*, 314 U. S. 513, 62 S. Ct. 374, 86 L. Ed. 383 (1942), rehearing denied 315 U. S. 826, 62 S. Ct. 620, 86 L. Ed. 1222.

The remaining portions of the bill do not appear to offend against the constitution. While §2 and what is left of the bill as a whole are likely to cause much litigation regarding construction, application and enforceability, it is clearly unconstitutional only with respect to subsection 7 of §2 and all of §8, and is otherwise enforceable.

Caveat

The constitutionality of §2 of this bill is upheld upon my conclusion that this bill is a liquor control act. If it is not a liquor control act, as some members of my staff insist that it is not, §2 is unconstitutional for all of the reasons that §8 is unconstitutional. Furthermore, if this is not a liquor control bill, §2 may violate the equal protection clause of the 14th Amendment of the Constitution of the United States; and §9, which requires that all reports and statements required by the Act shall be public records, may be discriminatory. The reason I conclude the bill is a liquor control act is that it is my duty to uphold the constitutionality of the bill, if possible, and that is the only possible way I can do so. As I said in an opinion dated June 10, 1967:

"Declaring an act of the legislature unconstitutional is a 'delicate function.' Miller v. Schuster, 1940, 277 Iowa 1005, 289 N. W. 702. It is well settled that a statute is presumed to be constitutional. The presumption is strong and the courts will not declare an act of the legislature unconstitutional unless the conclusion is unavoidable. They will do so then only when the violation is clear, plain, palpable and free from doubt. The Iowa court has even gone so far as to say that a person challenging the constitutionality has the burden of negativing every conceivable basis which might support it. Dickinson v. Porter, 1948, 240 Iowa 393, 35 N. W. 2d 66. Where a statute is fairly open to two constructions, one of which will render it constitutional, and the other doubtful, or unconstitutional, the construction upon which it may be upheld will be adopted. Eysink vs. Board of Supervisors of Jasper Co., 1941, 229 Iowa 1240, 296 N. W. 376. If any reasonable state of facts can be conceived which will support constitutionality, it will be sustained. An attacker must negative every possible hypothesis of constitutionality. Lewis Consolidated School District v. Johnston, 1964, 256 Iowa 236, 127 N. W. 2d 118." *OAG 6/10/67*

It should also be noted that this bill was passed by the 62nd General Assembly on July 1, 1967, and contains no publication clause. As a consequence, even if it is approved by the Governor subsequent hereto, it will not become effective before July 1, 1968, and the first reports (for the calendar year 1968) will not be required to be filed before April 1, 1969.

July 20, 1967

CITIES AND TOWNS. Powers of Cities and Towns. Art. 1, §6, Art. 3, §30, Constitution of Iowa; §§395.27, 368.47, 395.28, 395.29, 565.6, 368.37, 368.38, 395.2, 396.6, 472.25, 472.26, 472.27, 395.25 specifically authorize a city or town to cooperate in federal flood control projects and sign assurances relating thereto, take possession of lands needed therefor prior to final conclusion of condemnation proceedings including appeals, and to issue bonds to finance local cooperation, and any law purporting to empower a particular city or town to participate in federal flood control projects as local in character and void.

Mr. Othie R. McMurry, Director, Iowa Natural Resources Council: Reference is made to your letter of March 31, 1967, requesting an opinion of this office with regard to the legality of legislation specifically authorizing a particular Iowa city or town to cooperate in a federal flood control project and sign assurances relating thereto, to take possession of lands needed therefore prior to final conclusion of condemnation proceedings including appeals, and to issue bonds to finance local cooperation. Congressional authorization for these projects normally requires the local community to undertake specific items of cooperation as follows:

"(a) Provide all lands, easements and right-of-way necessary for the construction of the project;

(b) Hold and save the United States free from damages due to the construction works;

(c) Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army;

(d) Make any necessary alterations to utilities, culverts for interior drainage, roads and highways, including necessary widening of levees to provide for roadways where required, and provision of the necessary freeboard on streets and alley portions if and when needed; and

(e) Obtain appropriate legal control of pondage areas and prevent encroachment in such areas until substitute areas or equivalent pump or outlet capacity have been provided."

The opinion of this office with respect to cooperation by Iowa cities and towns in federal flood control projects is hereby rendered as follows:

SPECIFIC LEGISLATION

The Iowa Constitution requires that all laws that can be made so must be of a general nature and have uniform operation.

Iowa Constitution, Art. 1, Sec. 6, "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

Iowa Constitution, Art. 3, Sec. 30. "The General Assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for State, County, or road purposes;

For laying out, opening and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, case for and against it."

Involved in *State ex rel West v. City of Des Moines*, 96 Iowa 521, 65 N. W. 818, was an act of the General Assembly purporting to extend the boundaries of all cities in the state which had a population of 30,000 or more by a particular completed federal census. Finding that Des Moines was the only city in the state with a population of 30,000 by the Census specified in the act, the court held that the act was local in character and void. At page 525 of the Iowa Reports, the court stated that "If the act had specified the City of Des Moines as the one whose boundaries were to be extended, there would be no question that the law is local in its applications." See also *Chicago & N. W. Ry. Co. v. Fachman*, 255 Iowa 989, 125 N. W. 2d 210; *Sperry and Hutchinson Co. v. Hoegh*, 246 Iowa 9, 65 N. W. 2d 410; *Iowa Electric Light and Power Co. v. Town of Grand Junction*, 221 Iowa 441, 264 N. W. 84; *City of Des Moines v. Bolton*, 128 Iowa 108, 102 N. W. 1045; *Cedar Rapids Water Co. v. City of Cedar Rapids*, 118 Iowa 234, 91 N. W. 1081; *Morris v. Stout*, 110 Iowa 659, 78 N. W. 843; *Iowa R. R. Land Co. v. Soper*, 39 Iowa 112; *McAunich v. Mississippi etc. R. Co.*; 20 Iowa 338; Ex parte Samuel Pritz, 9 Iowa 30.

Since authority to cooperate in federal flood control projects clearly can be delegated to municipalities by laws of general and uniform application, we are of the opinion that any law purporting to empower a particular city or town to provide such cooperation would be local in character and void.

EXISTING GENERAL AUTHORITY

Sections 395.26-395.29 and 368.47, Iowa Code 1966, (quoted in full hereinafter) confer general authority upon cities and towns to accept federal aid in connection with flood control projects and improvements. The above quoted items of local cooperation and the signing of "assurances" relating thereto, are conditions imposed by Congress which must be met to qualify for the federal aid the General Assembly has authorized cities and towns to accept.

The rule of construction amendment (Acts 1963, 60 G. A., ch. 235) to the municipal powers statute (§368.2, second paragraph), does not confer any power on cities and towns without reference to another statute but is a rule of construction directing that a statute granting a specific power over local and internal affairs shall not be construed as pertaining to the specific power only but shall be liberally construed to confer broad and implied powers. See *Richardson v. City of Jefferson*, 257 Iowa 709, 134 N. W. 2d 528; *Slapnicka v. City of Cedar Rapids*, 139 N. W. 2d 179.

Prior to enactment of the liberal rule of construction, the case of *Iowa Electric Co. v. Town of Cascade*, 227 Iowa 480, 288 N. W. 633, involved a question whether the Town of Cascade had authority to establish minimum rates of wages for persons engaged in the construction of a municipal light plant, in order for the town to qualify for certain federal aid which the General Assembly had authorized the town to accept. The statute authorizing acceptance of the funds also stated:

". . . conditions attached to such gifts or bequests become binding upon the corporation . . . upon acceptance thereof."

The Court held that this language authorize compliance with the requirements of the grant.

We are of the opinion that the statutes cited above confer general authority upon cities and towns to provide the items of local cooperation required by the Congress in the construction of federal flood control projects and to sign "assurances" relating thereto.

SPECIFIC AUTHORITY

1. Specific authority to provide the cooperation required by paragraph "a" of the assurances is furnished by §395.27, Code of Iowa, which provides as follows:

"*Right of Way.* The cost of all right of way acquired by purchase or condemnation may be borne by the city or town together with any other property rights which may be required in furtherance of such projects and the work of actual construction and the cost thereof may be borne by the federal government."

2. Specific authority to provide the cooperation required by paragraph "b" of the assurances is furnished by §368.47, Code of Iowa, which provides as follows:

"Agreement with federal government. Whenever the government of the United States, acting through its proper agencies or instrumentalities, will undertake, in whole or in part, the original construction or planning of improvements within or adjacent to the corporate boundaries of any municipal corporation or the repair or alteration of existing improvements within or adjacent to the corporate boundaries of any municipal corporation and which improvements will benefit said municipal corporation, or which could be constructed, repaired, or altered by said municipal corporation acting by itself, said municipal corporation, when authorized by a resolution passed by a two-thirds vote of the city council or by a majority vote of the electors thereof at a general, regular or special election call for that purpose as provided in §368.48, acting through its dock board in the case of improvements referred to in chapter 384 or acting through its council in the case of all other improvements, shall have the power to enter into and to perform such agreements with the United States as may be necessary to meet federal requirements, including the payment to the United States of all or any part of the cost to the United States of the said undertakings as such apportionment of said cost may be determined by such agreements with the United States, the giving of indemnifying agreements to the United States holding and saving the United States free from damages due to the construction and subsequent maintenance of the improvements including the granting of easements or other interests in real estate, and including the taking over, repair, and maintenance of the improvements. Any agreement or agreements with the United States contemplated herein may be entered into by the municipal corporation as herein provided in advance of the adoption of a final plan for such improvements, such agreement to be effective if the plan of improvement is finally adopted. Payments to the

United States in furtherance of said agreements may be made to the United States in whole or in part advance of the letting of contracts by the United States for such undertakings to secure the United States in the letting of said contracts subject to the provision that any such payments be made on condition that any excess of such payments over and above the actual cost as so apportioned shall be refunded."

3. Specific authority to provide the cooperation required by paragraph "c" of the assurances is furnished by §368.47, Code of Iowa, quoted above, and by the following sections of the Code of Iowa:

"395.28 Division of Expense. §§395.26 to 395.30, inclusive, contemplate that the actual direction of the project and the doing of the work in connection therewith is assumed by the federal government and that the city or town provides and assumes the cost of necessary right of way over and above such contributions in that regard as the federal government may choose to make. Cities and towns may pay to the United States all or any part of the cost to the United States of the improvements contemplated by this chapter as such apportionment of said cost may be determined by agreement with the United States. Payments to the United States in furtherance of said agreement may be made to the United States in whole or in part in advance of the letting of contracts by the United States for such improvements to secure the United States in the letting of said contracts subject to the provision that any such payment be made on condition that any excess of such payment over and above the actual cost as so apportioned shall be refunded to the city or town. Funds for such payments to the United States may be provided by contracting indebtedness and issuing bonds to the extent and in the manner authorized by §395.25. Under such limitation all appropriate portions of this chapter shall apply."

"395.29 Contributions — maintenance assumed. Cities and towns in furtherance of such flood control projects may accept contributions to enable them to pay for necessary right of way. They may also enter into agreement with the federal government to maintain levees, dikes or other construction and to do all other acts required by the federal government in maintaining the work of construction when completed."

Further specific authority for providing cooperation required by paragraph "c" of the assurances is conferred by §565.6, Code of Iowa, which provides as follows:

"Gifts to municipal corporations. Counties, cities, towns, the park board of any city or town, and civil townships wholly outside of any city or town, and school corporations, are authorized to take and hold property, real and personal, by gift and bequest; and to administer the same through the proper officer in pursuance of the terms of the gift or bequest. No title shall pass unless accepted by the governing board of the corporation, township, or park board. Conditions attached to such gifts or bequests become binding upon the corporation, township, or park board upon acceptance thereof."

4. Authority to provide the cooperation required by paragraph "d" of the assurances, insofar as the same relates to facilities owned by the city or town, exists by virtue of the same statutes under which said facilities were originally constructed and, with regard to all other facilities listed, by authority of the Cascade case, supra, and §368.47, Code of Iowa, quoted above.

5. Authority to provide the cooperation required by paragraph "e" of the assurances is furnished by §§368.47, 395.27, 395.28, 395.29, and 395.47, Code of Iowa, quoted above, and the Cascade case.

EMINENT DOMAIN AND RIGHT TO POSSESSION

The power to purchase or to condemn property rights that may be required in providing the items of local cooperation required in the construction federal flood control projects is conferred upon cities and towns by the following sections of the Code of Iowa:

"368.37 Condemnation — power. Municipal corporations shall have power to purchase or provide for the condemnation of, pay out of the general fund or the specific fund, as may be provided, enter upon and take any lands within or without the territorial limits of the corporation for such public purposes and as an incident to such other powers and duties conferred upon such corporations as make necessary or reasonable the acquisition of such land by said municipal corporations."

"368.38 Condemnation — procedure. The procedure for the condemnation of land by municipal corporations shall be that provided by chapter 472."

"395.2 Condemnation. Cities and towns may acquire by gift, purchase or condemn, and appropriate, private property, within or without the limits of such cities and towns, including right to cross railroad right of way and property, so as not to impair the previous public use, as may be necessary to carry into effect the provisions of this chapter, and to provide an outlet for the watercourses, either natural or artificial, which may be deepened, widened, straightened, altered, changed, diverted, or otherwise improved under the provisions of this chapter, and the cost of such property shall be included in the cost of the improvement. All provisions of the law relating to the condemnation of lands for public purposes shall apply to the provisions hereof in and so far as applicable."

"396.26 Federal aid. Cities and towns may in accordance with the provisions of this chapter accept federal aid in the doing of the acts provided in §395.1, and may assume such portion of the cost thereof not discharged by such federal aid. They shall have power of condemnation as provided in section 395.2."

The procedure for the condemnation of private property for works of internal improvement and for other public uses and purposes is set forth in detail in Chapter 472, Code of Iowa.

The right of the condemnor to take possession of the land condemned is conferred by §472.25, Code of Iowa, which provides as follows:

"472.25 Right to take possession of lands. Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided. Upon appeal from the commissioners' award of damages the district court, wherein said appeal is pending, may direct that such part of the amount of damages deposited with the sheriff, as it finds just and proper, be paid to persons entitled thereto. If upon trial of said appeal a lesser amount is awarded the difference between the amount so awarded and the amount paid as above provided shall be repaid by the person or persons to whom the same was paid and upon failure to make such repayment the party entitled thereto shall have judgment entered against the person or persons who received such excess payment."

This right to take possession is somewhat limited by following sections of the Code of Iowa which provides as follows:

"472.26 Dispossession of owner. A landowner shall not be dispos-

sessed, under condemnation proceedings, of his residence, dwelling house, outhouse, orchard, or garden, until the damages thereto have been finally determined and paid. This section shall not apply to condemnation proceedings for drainage or levee improvements, or for public school purposes."

"472.27 Erection of dam — limitation. If it appears from the finding of the commissioners that the dwelling house, outhouse, orchard or garden of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed as authorized by this chapter, such dam shall not be erected until the question of such overflowing or other injury has been determined in favor of the corporation upon appeal."

We are of the opinion that the above quoted statutes provide ample authority to cities and towns to condemn property rights needed to provide the items of required local cooperation in connection with a federal flood control project and that the condemnor may take possession of the land condemned and proceed with the improvement upon deposit with the sheriff of the amount of assessed damages (unless the dwelling house, outhouse, orchard, or garden of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir). In the latter event, the dam or reservoir may not be erected until all appeals have been determined.

BOND ISSUES

We are of the opinion that specific authority to contract indebtedness and to issue general obligation bonds to provide funds for payment of the local costs of cooperation in federal flood control projects is conferred upon cities and towns by §395.28, Code of Iowa, supra, and by §395.25, Code of Iowa, which provides as follows:

"395.25 General obligation bonds — indebtedness — taxes. Cities and towns are hereby authorized to contract indebtedness and to issue general obligation bonds to provide funds for the payment of the cost of improvements contemplated by this chapter by following either of the following procedures:

"Proceedings for the issuance of said bonds may be initiated by the governing body of the municipality without an election pursuant to notice and hearing as prescribed by §23.12 or the governing body of the municipality may call a special election to vote upon the proposition of issuing said bonds or may submit the proposition as a special question at a regular municipal election. Notice of such election shall be given in the manner prescribed in §37.4 and if the vote at said election in favor of the issuance of such bonds is equal to at least sixty percent of the total vote cast for and against the proposition at said election, the governing body of the municipality shall issue the bonds and make provisions for the payment thereof as hereinafter provided.

"Taxes for the payment of said bonds shall be levied in accordance with chapter 76 and said bonds shall be payable through the debt service fund in not more than twenty years, and bear interest at a rate not exceeding five percent per annum, and shall be of such form as the city or town council shall by resolution provide, but no city or town shall become so indebted in an amount which, together with all other indebtedness of said municipality, shall exceed five percent of the actual value of the taxable property within said city or town as shown by the last state and county tax lists previous to incurring such indebtedness. The indebtedness incurred for the purpose herein provided shall not be considered an indebtedness incurred for general or ordinary purposes within the meaning and application of §407.1 and shall not be charged against or counted

as part of the one and one-fourth percent available for general or ordinary purposes until the other three and three-fourths percent of the five percent of indebtedness permitted by statute has been exhausted.

"This section shall be construed as granting additional power without limiting the power already existing in cities and towns.

"The provisions of this section shall be applicable to all municipal corporations regardless of form of government or manner of incorporation."

In summary, we are of the opinion that any law purporting to empower a particular city or town to cooperate in federal flood control projects is local in character and void and that cities and towns presently have authority under existing statutes to cooperate in such projects, to condemn property rights needed therefor, to take possession thereof upon appropriate deposit of the condemnation award (unless the project is with the limitations set forth in §472.26, Code of Iowa), and to issue general obligation bonds to provide funds for payment of local costs of cooperation therein. This authority, of course, can be exercised only on compliance with the procedural steps and subject to limitations provided therein.

July 21, 1967

GAMBLING DEVICES — §726.5, 1966 Code of Iowa. Pin-ball machine issuing additional balls at a reduced cost upon achieving a certain score constitutes a gambling device.

Mr. D. E. Skiver, Osceola County Attorney: This will acknowledge your letter of July 15, 1967, in which you request an opinion of this office. The issue you present is as follows:

"A 'flipper type' pin-ball machine as described in *State vs. Doe*, 123 N. W. 2d, 400, has been installed in this county. However, it varies from the machine described in the above case in the following manner. When a player makes a certain score he is granted the right to purchase an additional ball for .01¢. If he wishes to continue playing, he may insert a penny and the machine then furnishes him with an additional ball to play.

"The initial game consists of five (5) balls, costing the participant ten cents (.10¢).

"I will appreciate your opinion at your earliest convenience, as to whether or not, in your opinion the granting of the option to purchase an additional ball for one penny is in violation of Section 726.5 of the Iowa Code."

The code section in question is 726.5, 1966 Code of Iowa, which states as follows:

"Possession of gambling devices prohibited. No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep, or hold in possession or control any roulette wheel, klondyke table, poker table, punchboard, faro, or keno layouts or any other machines used for gambling, or any slot machine or device with an element of chance attending such operation."

The case to which you refer, *State v. Doe*, 255 Iowa 814, 123 N. W. 2d 400 (1963), dealt with a "flipper-type" pin-ball machine which gave the player a *free* ball if he attained a certain score or hit a certain bumper or gate. In a five to four decision, the court held that such a machine was a gambling device. The court stated:

"The legislature under the inherent police power of the state has seen fit to legislate upon the problem of gambling by enacting the statute here involved. There can be no question but that the machines in the instant case are devices with an element of chance. This the legislature says constitutes such device as a gambling device."

The majority further states:

"In *State ex rel. Manchester vs. Marvin,* 211 Iowa 462, 233 N. W. 486, we held a machine that at times awarded tokens, good only for a replay of the machine, constituted the machine as a gambling device. In *State vs. Wiley,* 232 Iowa 443, 3 N. W. 2d 620, we held an amusement machine which at times gave the player an additional free game is prohibited by the statute. Here these machines give player one or more additional balls to shoot as part of a game in which at least five balls are assured. Free tokens of no intrinsic value, free games, or free balls as part of a game—differ only in matter of degree and have been condemned by the legislature. We see no reason or basis for changing the rule announced in the Wiley case. If a change is desirable, it is for the legislature to make, not the courts."

The above seems to summarize the present Iowa law concerning pinball machines which constitutes gambling devices. The question you present poses a factual setting of first impression in respect to the Iowa law on this exact point. The determination must be made as to whether the "pin-ball" machine described in your request is one that fits within the principles announced in *State v. Doe, supra,* and must be condemned.

The machine in question is a device that offers to the player an element of chance, this can not be denied. However, the argument in favor of the machine is that since the player pays value for his additional shot(s) he is not taking a chance, not gambling. This argument, although not without merit, is ineffective in view of the statute and case law in existance. An apparatus is a "gambling device" where there is anything of value to be won or lost as the result of chance, no matter how small the intrinsic value. *Commonwealth v. King,* 13 A. 2d 104, 105 (1940). Therefore, receiving a ball for half price is actually no different than receiving a free ball. The majority in *State v. Doe, supra,* stated:

"Free tokens of no intrinsic value, free games, or free balls as part of the game—differ only in matters of degree and have been condemned by the legislature."

To be consistent with the line of decisions, it must be concluded that where a machine may issue to the player balls at reduced cost if the player achieves a certain score, the principles enunciated in the majority opinion of *State v. Doe, supra,* are applicable.

It is, therefore, our opinion, in view of the statute and the case law interpreting the statute, that the machine described in your letter is such a machine that constitutes a gambling device under Iowa law.

July 21, 1967

SCHOOLS: Appeal — §290.1. Not only teachers but also other employees or residents of the school district may appeal to the County Superintendent if they are a "person aggrieved" by an order or decision of the board of directors.

Mr. Walter L. Saur, Fayette County Attorney: In your letter of July 17, 1967, you ask for the opinion of this office on the construction of §290.1 of the Code of Iowa, which provides as follows:

"Any person aggrieved by any decision or order of the board of directors of any school corporation in a matter of law or fact may, within thirty days after the rendition of such decision or the making of such order, appeal therefrom to the county superintendent of the proper county; the basis of the proceedings shall be an affidavit filed with the county superintendent by the party aggrieved within the time for taking the appeal, which affidavit shall set forth any error complained of in a plain and concise manner."

We agree with the position which you have taken that quoted section means what it says in terms that any person aggrieved may bring such an appeal and that this is not limited to teachers, but might include any employee of the school district. In 28 O.A.G. at page 249 a former Attorney General ruled that an individual cannot borrow complaints for purpose of appeal and, therefore, such appeal may be made only by an aggrieved party or his attorney. It has further been held that such appeal is available only in matters where discretion granted by statute to the board of directors can be reviewed by the county superintendent and that relief from a void act of a school board may be had by direct appeal to the courts. See 1924 O.A.G. 347.

There are also cases where appeals under this section of the Code have been brought by the residents of the school district whose children attended the school, *Sanderson v. Board of School Directors of Lincoln Township,* 211 Iowa 768, 234 N. W. 216, 1931, and by a person aggrieved by a contract executed by a school board to provide supply of gasoline for school buses, 1960 O.A.G. 178.

July 21, 1967

STATE OFFICERS AND DEPARTMENTS: State Sinking Fund—§454.5, Code of Iowa, requires that the investment of all funds above a necessary working balance be in United States government bonds. Treasury "year bills," other instruments or obligations which are not technically bonds should not be purchased for investment purposes under this section of the code.

Mr. Stephen C. Robinson, Secretary, Executive Council: Your letter dated July 18, 1967, enclosed a copy of a letter from Jon P. Sexton, Deputy Treasurer, asking for council approval to purchase as many U. S. Treasury Bills maturing July 31, 1968, as available funds from the State Sinking Fund will permit. You then requested an opinion on such procedure.

It appears that there have been investments made in U. S. Treasury "Year Bills" which are non-interest bearing and are purchased at discount by noncompetitive bid at auction. Funds available from bills which mature on July 31, 1967, if approval is given to such purchase, would be transferred to the purchase account for new bills maturing July 31, 1968. It is our opinion that the Executive Council should not approve such a purchase.

Section 454.5, Code of Iowa, applicable to the State Sinking Fund provides:

"All above a necessary working balance shall be kept invested in United States government bonds under the direction of the executive council."

Officials having public funds in their control are without power to depart from the literal statutory requirements as to loans and *investments* of such funds. 42 Am. Jur. Public Funds §10. Inasmuch as the statute set out above has specified a class of securities we cannot construe the language of this statute to include other instruments or obligations of the United States Government which are not technically bonds.

July 21, 1967

COUNTY AND TOWNSHIP GOVERNMENT: Board of Supervisors: §331.21, Unliquidated Claims, 1966 Code of Iowa. Claims for services rendered by the North Iowa Mental Health Center pursuant to §230.24, 1966 Code of Iowa, are claims against the county and required to be made under provisions of §331.21, 1966 Code of Iowa.

Mr. Keith A. McKinley, Mitchell County Attorney: This is in response to your recent letter wherein you posit the following problem:

"Mitchell County several years ago, along with a number of other counties in North Central Iowa, joined in establishing the North Iowa Mental Health Center at Mason City. Mitchell County has supported the North Iowa Mental Health Center in accordance with the provisions of Section 230.24 since its inception. The North Iowa Mental Health Center has billed the county quarterly for payment of the budget amount allegated to Mitchell County. The county has requested in the past that the North Iowa Mental Health Center follow the procedure set forth in Section 331.21 for the filing of claims, asking that the Mental Health Center itemize by patient name the cost of the services rendered to each patient rather than merely submitting lump sum bill which could or could not reflect the actual cost of the services rendered during that quarter. The Mental Health Center has and is refusing to submit an itemized verified statement quarterly despite the request. They are, on the other hand, demanding that the county merely pay each quarter one-fourth of that amount which they estimate to cover the cost of the use of the Mental Health Center by Mitchell County. It is the county's position that the refusal of the Mental Health Center to provide an itemized statement precludes the county from maintaining the required lien index for those persons who are using the Mental Health Center at the expense of Mitchell County. The county also takes the position that without an itemized statement, we may be paying more in a given year for such treatment than represents the actual cost for the services rendered to the residents of Mitchell County. The situation resolves itself generally into a question of whether or not the North Iowa Mental Health Center should submit to Mitchell County an itemized and verified statement of the services rendered during each preceding quarter in accordance with the provisions of Section 331.21?"

The problem therefore is whether Mitchell County can require the North Iowa Mental Health Center to file an itemized claim for services rendered in accordance with §331.21, 1966 Code of Iowa.

In reply thereto, enclosed herewith are copies of three opinions pertaining to the same subject. In accordance therewith I am of the opinion that Mitchell County can require the North Iowa Mental Health Center to submit an itemized and verified statement of the services rendered in accordance with §331.21, 1966 Code of Iowa.

I am sorry that the opinion to William Pappas dated September 25, 1956, mentioned in opinion dated June 30, 1960, is not available.

July 24, 1967

TAXATION: Tax Deeds — H.F. 547, Acts 62nd G. A. (1967), §§446.38, 447.9, Code of Iowa, 1966. The total period before the county, the tax sale certificate holder, can obtain a tax deed is twelve months for old-age assistance property where the provisions of Section 446.38, Code of Iowa, 1966, are applicable.

Mr. Robert W. Burdette, Decatur County Attorney: This is to acknowledge receipt of your letter of July 13, 1967, in which you posed the following question which in substance is:

"By virtue of House File 547, Acts 62nd G. A. (1967) how long after the County has been given a tax sale certificate, is required before the County can get a tax deed to property of a deceased Old-Age Assistance recipient?"

Enclosed please find a copy of H.F. 547. The explanation of H.F. 547 is: "This bill will permit an early sale of property of a deceased old-age assistance recipient."

You will note that Section 447.9, Code of Iowa, 1966, is amended by inserting "or section four hundred forty-six point thirty-eight (446.38)" after "446.18." With this insertion, Section 447.9 will read in pertinent part:

"After two years and nine months from the date of sale, *or after nine months from the date of a sale made under the provisions of section 446.18 or section four hundred forty-six point thirty-eight (446.38), the holder* of the certificate of purchase may cause to be served upon the person in possession . . . that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof . . . Service of such notice shall also be made by certified mail on . . . the state of Iowa in case of an old-age assistance lien by service upon the State Board of Social Welfare."

Section 2 of H.F. 547 provides:

"Sec. 2. Section four hundred forty-six point thirty-eight (446.38), Code 1966, is hereby amended by adding at the end thereof the following: 'In such cases the requirements of section four hundred forty-six point eighteen (446.18) to the effect that the real estate shall have been advertised and offered for sale two years or more, shall not be applicable."

It would appear that the legislature intended to and did provide that the normal advertising and sale offer period of two years or more would be inapplicable where the provisions of Sections 446.38, Code of Iowa, 1966, are applicable. However, Section 447.9, as amended by H.F. 547, in providing for the notice of expiration of the right of redemption, does provide that the holder of the tax sale certificate must wait nine months before causing the said notice to be served on the interested parties and the notice must state that "the right of redemption will expire and the deed for the land be made unless redemption is made *within ninety days* from the completed service thereof." Therefore, the total period before the county, the tax sale certificate holder, can obtain a tax deed is twelve months for old-age assistance property where the provisions of Section 446.38, Code of Iowa, 1966, are applicable.

July 26, 1967

STATE OFFICERS AND DEPARTMENTS: Salaries and longevity distinguished — Senate File 853. Longevity pay is not salary within the meaning of §66 of S.F. 853 which provides that no employee of any state department, bureau, commission or agency shall receive a salary in excess of that fixed for the chief administration officer of such department, bureau, commission or agency.

The Hon. Edwin A. Hicklin, State Representative: By your letter of July 14, 1967, you have requested our opinion as to whether longevity increases are to be included or excluded in computing the limitations on the salaries of state employees under §66 of Senate File 853. The full text of your letter is hereinafter set forth as follows:

"During my term as State Representative for Louisa-Muscatine Counties, Senate File 853 came before the House for consideration, and section 66 thereof stated as follows in its original form:

" 'Unless otherwise provided, no employee of any state department, bureau, commission, or agency shall receive salary (or remuneration) in excess of the salary fixed for the chief administrative officer of such department, bureau, commission, or agency.'

"The last line of page 2509 and the first three lines of page 2510, Iowa State House Journal, July 1, 1967, show that an amendment by Representative Charles Glenn was adopted in which the words, 'or remuneration,' were removed from section 66. In floor debate Mr. Glenn expressed the opinion that inclusion of the words, 'or remuneration,' would encompass longevity increases to state employees, whereas the word, 'salary,' would not be so construed. It was my intent, and I am sure the intent of the House of Representatives, that longevity increases were not to be considered in the salaray limitation imposed under section 66 of Senate File 853, and the House of Representatives expressed this legislative intent by removing the words, 'or remuneration,' from section 66. The Senate concurred in the House amendment, and I now request an opinion from your office as to whether longevity increases are to be included or excluded in computing the salary limitation of state employees under section 66 of Senate File 853.

"As you are undoubtedly aware, the state classification and compensation plan appears generally on pages 380 and 381, Iowa Departmental Rules, 1966, and salaries are dependent upon the classification and compensation allotted to the position. Longevity increases appear on pages 382 and 383, Iowa Departmental Rules, 1966, and the statutory purpose of longevity pay is, 'to provide reward for long and satisfactory service to the State of Iowa.'

"Your early reply to this request for an opinion would be appreciated in view of the large number of state employees who will be affected by your opinion."

In our opinion longevity increases are not to be included in computing the limitations imposed by §66 of Senate File 853 on the salaries of state employees.

Your account of the floor debate surrounding the adoption of Representative Glenn's amendment to delete the words "or remuneration" would certainly appear to be persuasive evidence of a legislative intention that the amendment was calculated to allay any doubt on the question of whether or not longevity increases were to be excluded in computing the

salary of a state employee for purposes of the limitation imposed by §66 of S.F. 853. However compelling this evidence may be we are, unfortunately, not permitted to consider it as an aid to the construction of the statute before us. As stated by the Supreme Court of Iowa in *Tennant v. Kuhlemeir*, 142 Iowa 241, 120 N. W. 689, 690 (1909):

"It is a well-known rule that the so-called legislative intent in the passage of any given act is a very uncertain guide whereby to interpret a statute, and so it is held that the opinions of individual legislators, remarks on the passage of an act or the debates accompanying it, or the motives or purposes of individual legislators, or the intention of the draughtsman are too uncertain to be considered in the construction of statutes."

In any event there is ample authority to support the conclusion we have reached without recourse to the floor debate on S.F. 853.

The case reports are replete with numerous instances in which the term "salary" has been judicially defined. As stated by the court in *Ekblad v. Williams County*, 69 N. D. 576, 577; 289 N. W. 90, 91 (1939), salary is:

"the recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services, especially to holders of official, executive, or clerical positions . . ."

Numerous other cases emphasize that an essential element of the expression "*salary*" is the concept that it is a reward or recompense for services rendered or performed. *Maes v. City of New Orleans*, 97 So. 2d 856 (1957), *Savannah Bank and Trust Co. v. Mason*, 209 Ga. 364; 72 S. E. 2d 720 (1952); *Treu v. Kirkwood*, 42 C. 2d 602; 268 P. 2d 482 (1954). Longevity pay on the other hand, as generally understood and applied, is given not so much as compensation for services currently being rendered but as a reward for continuity of employment and faithful attendance to one's duties over a protracted period of time. Thus situations could, and probably do, exist where a newly hired and a veteran employee perform the same duties and with equal competence. Yet the latter will receive somewhat greater remuneration than the former. The differential, or longevity pay, is unrelated to the *services* being performed since these are the same. Such longevity pay cannot, therefore, be properly characterized as "salary" since it is given as a reward for prior service rather than as consideration for the value of services currently being performed.

As stated by the court in *Reynolds v. Reynolds*, 14 Cal. App. 2d 481; 58 P. 2d 660, 661 (1936):

"The word 'salary' signifies the periodical compensation due to men in official and other situations; the word is derived from 'salarium,' which is from the word 'sal' (salt), that being an article in which the Roman soldiers were paid. While the term 'salary' in its original and strict sense signifies a fixed compensation, it is frequently used in our constitution and laws as the equivalent of 'compensation.'"

The Iowa Supreme Court has concurred in this conclusion that "salary" and "compensation" are synonomous and interchangeable. *Kellogg v. Story County, et al*, 219 Ia. 399; 257 N. W. 778 (1934); see also *Hreu v. Kirkwood*, supra.

§8.5(6), Code of Iowa, 1966, establishes the division of personnel within the office of the state comptroller and gives to the director of personnel broad discretion to establish plans of compensation, prescribe salary schedules, and make rules and regulations necessary to efficient personnel administration. Pursuant to the authority thus granted, the director of personnel has adopted rules to govern the administration of the personnel department. Iowa Departmental Rules 1966, pp. 380-383. The rules so adopted are broken down into the following subdivisions or headings:

Definition
Statement of policy
Organization
State classification and compensation plan
Application and examination
Appointment
Hours of service, holidays, vacations, sick leave, etc.
Longevity

It is to be observed that "compensation" (or "salary") and "longevity" are dealt with in completely separate divisions of the rules. The section entitled "state classification and compensation plan" speaks in terms of "salary range," "maximum and minimum compensation," "starting salaries" and (merit) "salary increase." The wholly separate division dealing with longevity states in §1 that, "The aim of longevity pay is to provide reward for long and satisfactory service to the State of Iowa" thereby emphasizing that it is given as a reward for past service rather than as compensation for work currently being performed. §§3 and 4 of the longevity division make it clear that longevity pay is to be given automatically without regard to merit and determined only by reference to years of employment. Nowhere in the subdivision on longevity are the words "salary" or "compensation" used except in §5 which states:

"5. Promotion or Demotion: When an employee has earned longevity pay prior to promotion or demotion to another wage classification range, he shall have added to his base *salary* in the promoted class the same number of longevity steps as previously earned." (Emphasis added)

The above quoted language emphasizes the fact that in the rules a distinction is drawn between "salary" and "longevity."

That portion of the rules devoted to a statement of policy reads:

"The purpose of these rules and regulations is to establish uniformity among all departments under the division of personnel in matters relating to *compensation*, vacations, sick leave, *longevity*, promotion and demotion in keeping with section 8.5 of the Code of Iowa." (Emphasis added)

Here again "longevity" is treated as apart and distinct from "compensation" (salary). These rules of the personnel department promulgated by the director pursuant to the statutory mandate of §8.5, both in the manner in which such rules are organized and in the language and terminology employed therein, manifest a plain intent that "salary" (or "compensation") and "longevity" are two separate and distinct concepts and that the latter is not a part of the former.

July 27, 1967

STATE COMPTROLLER—§298.2, Code of Iowa, 1966, and the provisions of §§33 and 34 of House File 686, 62nd General Assembly, are an irreconcilable repugnancy. House File 686 being the later enactment; §298.2, Code of 1966 is impliedly repealed.

Mr. Marvin R. Selden, Jr., Comptroller: Reference is herein made to yours of the 19th inst. in which you stated your belief that the Legislature neglected to repeal §298.2, Code of Iowa, 1966. In your opinion, the provisions of §§33 and 34 of House File 686, Act of the 62nd General Assembly, make §298.2 inoperative and any increases in budget askings must be approved thereby by the School Budget Review Committee.

In view of the fact that if §§33 and 34 of House File 686, Act of the 62nd General Assembly, make §298.2, Code of 1966, inoperative they become so only by reason of implied repeal of §298.2 by §§33 and 34 of House File 686 and, therefore, these statutes are exhibited as follows. §298.2 provides:

"In all school districts where the maximum statutory allowances provided in section 298.1 are not sufficient to meet the budget requirements, upon proper showing by any such school district the state comptroller may authorize such district to levy an additional amount above the said maximum statutory allowance for each person of school age in the district, up to but not in excess of thirty-five percent; provided that the comptroller may, upon recommendation of the county board of education, or the county board of supervisors of the county in which the school is located, authorize such district to levy an amount in excess of thirty-five percent. However, for the school fiscal year beginning July 1, 1966 and each year thereafter, no school district shall levy an amount for the general fund which is more than twice the average amount per person of school age raised by taxation for the school general fund throughout the state during the preceding school fiscal year, unless the proposition to do so is submitted to and approved by a majority of the voters at any regular or special election. If approved, the amount of the levy in excess of said limitation shall be certified to the levying board prior to the first day of October."

Section 33 of House File 686 provides:

"There is hereby created a committee to be known as the school budget review committee which shall consist of the superintendent of public instruction, the state comptroller and three members appointed by the governor to represent the public and to serve three year staggered terms. Legislators shall be notified of hearings concerning school districts in their constituencies. The school budget review committee shall meet and hold hearings each year in Des Moines in September and shall continue in session until it has acted on all requests from school districts for tax increase approval submitted to the committee for budgetary review and examination pursuant to section thirty-four (34) of this Act. The committee may recommend to the state board of public instruction the revision of any rules, regulations, directives, or forms relating to school district budgeting and accounting, confer with local school boards or their representatives and make recommendations thereto in regard to any budgeting or accounting matters, and may direct the superintendent of public instruction or the state comptroller to make studies and investigations of school costs in any school district whose budget has been submitted to the committee pursuant to section thirty-four (34) of this Act. The committee shall report to each session of the legislature which report shall include any recommended changes in laws relating to school districts, set out the number of hearings held pursuant to section thirty-

four (34) of this Act, the reasons for any authorized increases in school costs beyond the state average as provided in section thirty-four of this Act, and such other information as the committee may deem advisable. The committee shall adopt its own rules of procedure and the superintendent of public instruction shall serve as chairman. The state comptroller shall act as secretary. The committee members representing the public shall receive a per diem equal to the per diem of members of the board of public instruction and their necessary travel and expense while engaged in their official duties. Such payments shall be made from appropriations to the department of public instruction."

Section 34 of House File 686 provides:

"The state comptroller shall compute the sum of tax askings plus state aids excluding special education, driver education, and vocational education aids for each local school district for each of the preceeding three (3) years. The three (3) sums for the preceding years shall be divided by the average daily membership for each year respectively. The percentage change in tax askings plus state aids for two (2) years prior and the percentage change in tax askings plus state aids for one (1) year prior divided by two (2) shall constitute the average percentage of change.

"Each local school district shall certify to the state comptroller the amount currently budgeted for tax askings plus state aids divided by the projected average daily membership for the current year. Projected average daily membership shall be determined as follows:

"The percentage change in average daily membership two (2) years prior plus the percentage change in average daily membership one (1) year prior divided by two (2). This percentage shall be used to determine the average percentage of change in projected average daily membership. The average percent of change in projected average daily membership multiplied times the prior years average daily membership added to this same prior years average daily membership shall constitute the projected average daily membership. In those prior years for which average daily membership data are not available 'beginning of the year' enrollment figures as reported to the state department of public instruction shall be substituted.

"The state comptroller shall compute the proposed change between the three (3) year average and the current year as certified by each local school district. Any school district whose proposed growth exceeds the adjusted state average reimbursable expenditures per pupil in average daily membership for the preceding year shall have its budget submitted to the school budget review committee for review and examination. If after review and examination the committee recommends against the proposed growth increase and if the school district nevertheless maintains its proposed budget beyond the percent of allowable change, the payment of state funds to the district in the following year shall be limited to the reimbursable expenditures per pupil in average daily membership as allowed by the school budget review committee."

As far as implied repeal is concerned, rules of law pertaining thereto are well settled. Statutes or provisions thereof may be repealed by implication as effectively as by expressed repeal. A repeal of statute by implication is not favored. Repeal of an earlier statute by a later one by implication results where provisions which are inconsistent and irreconcilable with each other and where two legislative acts are repugnant to, or in conflict with, each other the last one enacted will govern, control, or prevail, and supersede and impliedly repeal the earlier act although it contains no repealing clause. However, conflict or repugnancy between the earlier and the later acts will not result in the implied repeal unless the repugnancy or conflict is plain, unavoidable, and irreconcilable. A

provision or a portion of a statute may be repealed by implication. See 82 C.J.S., "Statutes," §§286, 288, 290, 291; 50 Am. Jur., "Statutes" §538; *Bennett v. Greenwalt*, 226 Iowa 1113, 286 N. W. 722 (1939); *Schoenwetter v. Oxley*, 213 Iowa 528, 239 N. W. 118 (1931); *DeShaw v. South Fork Twp. Sch. Dist.*, 231 Iowa 27, 300 N. W. 650 (1941); *Ryan v. Wilson*, 231 Iowa 33, 300 N. W. 707 (1941); *Hahn v. Clayton Co.*, 218 Iowa 543, 552, 255 N. W. 695, 699 (1934); *McGraw v. Siegel*, 221 Iowa 127, 263 N. W. 553, 106 A.L.R. 1035 (1936); *State ex rel Shaver v. Iowa Telephone Co.*, 175 Iowa 607, 154 N. W. 678 (1916).

The repugnancy herein arises out of the duties and authority bestowed upon the comptroller by both House File 686 and §298.2, Code of 1966. Such duties bestowed upon him by House File 686 include the membership in a proposed School Budget Review Committee required by such Act to act upon all school requests for tax increases. Under §34 of House File 686 requiring the comptroller to compute the tax askings of school districts and by the formula there prescribed after each school district is required to certify to him in the amount currently budgeted for the tax askings plus state aid divided by the projected daily membership for the current year. The comptroller then has the duty under House File 686 of computing the proposed change between the three year average and the current year as certified by each local school district. Any such school district whose askings exceed the adjusted state average reimbursable expenditures per pupil in average daily membership for the preceding year will have its budget submitted to the School Budget Review Committee for review and examination.

On the other hand, under the provisions of §298.2 it is the comptroller who sits in judgment upon additional amounts above the maximum of statutory allowances. In that respect §298 specifically provides the following:

"In all school districts where the maximum statutory allowances provided in section 298.1 are not sufficient to meet the budget requirements, upon proper showing by any such school district the state comptroller may authorize such district to levy an additional amount above the said maximum statutory allowance for each person of school age in the district, up to but not in excess of thirty-five percent; provided that the comptroller may, upon recommendation of the county board of education, or the county board of supervisors of the county in which the school is located, authorize such district to levy an amount in excess of thirty-five percent."

Thus there is a conflict between §298.2 and the provisions of House File 686 and the repugnancy which cannot be reconciled. In that view, House File 686 being the later statute, this repugnancy results in implied repeal of §298.2, Code of 1966.

July 28, 1967

INSTITUTIONS — Rehabilitation of alcoholics, expense thereof, §§226.35, 230. Provisions of Chapter 230 apply for the payment of costs for voluntary treatment of alcoholism. Those seeking admission for treatment of alcoholism need not submit to examination by court commission of hospitalization.

Mr. David A. Opheim, Webster County Attorney: This is to acknowledge your letter wherein you request of this office an opinion on the following matters:

"1) Does the following language in Section 226.35 of the Iowa Code: 'Chapter 230 shall apply so far as applicable in connection with the payment of the costs, expenses and maintenance of the applicant in any of said institutions,' require Webster County to pay for the care of such alcoholics in the same way that Chapter 230 requires the county to pay for the care of mentally ill persons?

"2) Can alcoholics seeking admission to the mental health institute under §226.35, Iowa Code be required to submit for examination by the hospitalization commission under §229.2 of the Iowa Code?"

Chapter 226.35, 1966 Code of Iowa refers to patients afflicted with an alcoholic problem who wish to *voluntarily* admit themselves for treatment at the various mental institutions in the State of Iowa that are under control of the Iowa Board of Control. It is our opinion that the provisions of Chapter 226.35, 1966 Code of Iowa which states:

* * *

"Chapter 230 shall apply so far as applicable in connection with the payment of the costs, expenses and maintenance of the applicant in any of said institutions."

is clear and unambiguous and, therefore, all of the relevant provisions of Chapter 230, 1966 Code of Iowa, are incorporated by reference.

In answer to your second inquiry, it must first be understood that the method of admission for treatment to a mental institution for alcoholism depends whether the admission is voluntary or involuntary

Chapter 226.35, 1966 Code of Iowa, applys to voluntary admissions. It states in part:

"This application shall be made on forms provided by the board of control and under such regulations as the board may prescribe. If the superintendent shall be satisfied after examination of the applicant by the staff, that he is in need of hospital treatment and will be benefited thereby, the superintendent may receive and care for the applicant in the state hospital for such a period of time as he shall deem necessary for the treatment, improvement or recovery of said patient."

Since Chapter 226.35, 1966 Code of Iowa, pertains to voluntary admissions, we find no provisions requiring the individual to submit for examination by the hospitalization commission under Chapter 229.2, 1966 Code of Iowa. Therefore, it is our opinion that admissions under the provisions of Chapter 226.35, 1966 Code of Iowa are subject to the board of control and not the hospitalization commission under Chapter 229.2.

July 28, 1967

COUNTIES AND COUNTY OFFICERS: Payment of costs for care at Oakdale Sanatorium, §§271.17(1), 271.17(2), 271.17(3). Treatment for patients other than those affiliated with tuberculosis is an expense to be collected from institution or agency referring patient to Oakdale or from patient and lien provisions of §230.25 are not applicable unless patient is a referral from a mental health institution.

Mr. William G. Faches, Linn County Attorney: This will acknowledge receipt of your letter wherein you request of this office an opinion on the following questions:

"1. Is Oakdale to bill the state and the state bill each county for the care of patients under the provisions of Section 271.17(2) and Section 271.17(3) or is Oakdale to collect directly from the county or is Oakdale to collect directly from the patient?

"2. Do the responsible relative provisions under Section 230.15, Code of Iowa, 1966, apply to patients receiving care and treatment under the provisions of Section 271.17, Code of Iowa, 1966.

"3. Do the lien provisions of Section 230.25, Code of Iowa, 1966, apply to patients being treated under Section 271.17, Code of Iowa, 1966."

The provisions of Chapter 271.17, 1966 Code of Iowa, were added by Chapter 238 of the Acts of the 61st General Assembly. These provisions were added as a result of the legislature integrating Oakdale as part of the university hospital system and administration. (Chapter 271.1, 1966 Code of Iowa) Prior to the amendment by the 61st General Assembly, the sanatorium was devoted to the care and treatment of patients afflicted with tuberculosis. However, the legislature provided in Chapter 238 §2 Acts of the 61st General Assembly, additional responsibilities by allowing chronic patients and patients for rehabilitation to be hospitalized at the institution.

Chapter 271.17, 1966 Code of Iowa, groups the additional patients into three classes. The first class is described as follows:

"271.17(1) Selected chronic patients and patients for rehabilitation referred from university hospitals who shall retain the same status, classification, and authorization for care which they had at university hospitals. . . ."

The second class of patients is as follows:

"271.17(2) Selected chronic patients and patients for rehabilitation referred from other state hospitals or institutions, the state department of vocational rehabilitation, or federal hospitals or agencies. . . ."

The third class of patients is as follows:

"271.17(3) Such other patients as the sanitorium authorities may at their discretion deem advisable and for which facilities are available. . . ."

In addition to classifying patients other than those afflicted with tuberculosis, the legislature prescribed a different procedure of payment for treatment and hospitalization of each of the three classes.

The first class, i.e. referrals from the university hospitals, is to have its cost for care paid for in the same method as patients at the university hospitals for Chapter 271.17(1) goes on to say:

". . . County quotas and costs for the care of indigent patients from funds appropriated to the sanatorium shall be established by the sanatorium authorities by the same procedure as provided for the university hospitals by §255.16. The provisions of §§255.20, 255.21, 255.22, 255.24, 255.25 and 255.26 shall apply to said patients and to the sanatorium the same as the provisions apply to the university hospitals."

We believe the statutes incorporated in Chapter 271.17(1) are self-explanatory.

The second class of patients, i.e. chronic and patients for rehabilitation referred from locations other than the university hospitals, is to have its cost paid for by the institution, department or agency that referred the patient to the sanatorium. The cost is determined by the sanatorium officials and based upon the cost of hospital care, medical treatment and training necessary. The sanatorium negotiates this cost with the referral agency, institution or department.

Therefore, as to patients of the second class, it is our opinion that the referral agency, institution or department has the primary duty of paying the costs attendant with being a patient at the sanatorium.

The third class of patients referred to in Chapter 271.17, 1966 Code of Iowa, can be referred to as the voluntary or private patients. The expense attendant to hospitalization of these patients is borne by the patient or by those liable for his support for Chapter 271.17(3) states in part:

". . . The sanatorium shall collect from said patients or the person or persons liable for their support, such reasonable charges for hospital care, service, and treatment as fixed by the sanatorium authorities. . "

Furthermore, the income derived from the patients of the third class are paid directly to the treasurer of the State University for Chapter 271.17(3) goes on to say:

". . . Earnings from such patients shall be deposited with the treasurer of the State University of Iowa for the use and benefit of the sanatorium and to supplement its legislative appropriations, collections and other sources of income."

In addition, it is the duty of the superintendent of the sanatorium with the aid of the Attorney General of Iowa to collect the accounts of persons in the third class. (Chapter 271.19, 1966 Code of Iowa)

Therefore in answer to the first question, our opinion is that Oakdale is to collect from the state hospitals (other than the university hospitals) or institutions, state department of vocational rehabilitation, federal hospitals or agencies depending upon the organization referring the patient to the sanatorium.

If the patient comes to the sanatorium under the provisions of Chapter 271.17(3), 1966 Code of Iowa, it is our opinion that the sanatorium collects the cost of hospital care, treatment and service directly from the individuals or persons liable for their support.

In answer to your second question, it is our opinion that the responsible relative provisions of Chapter 230.15, 1966 Code of Iowa, do not apply to Chapters 271.17(1) and 271.17(3), 1966 Code of Iowa.

Chapter 230.15, 1966 Code of Iowa, refers to the payment of costs for treatment of mentally ill persons. However, it is our opinion that if the patient is referred to Oakdale under the provisions of Chapter 271.17(2)

from an institution for treatment of mentally ill, then the mental institution referring the patient would be responsible for the cost of treatment and hospitalization at Oakdale. The mental institution referring the patient, in our opinion, may then cause the cost and expense of such patient to be borne by the patient or persons liable for his support under the provisions of Chapter 230.15, 1966 Code of Iowa.

In answer to your third question, it is our opinion that the lien provisions of Chapter 230.25, 1966 Code of Iowa, do not apply to patients being treated under the provisions of Chapters 271.17(1) and 271.17(3), Code of Iowa (1966). However, if a patient is referred to Oakdale from a state mental institution under the provisions of 271.17(2), 1966 Code of Iowa, the institution must bear the cost, but the cost may be considered as assistance under Chapter 230, 1966 Code of Iowa, and therefore, Chapter 230.25, 1966 Code of Iowa would apply.

July 31, 1967

CHAPTER 229 & 230, CODE OF 1966, ACTS OF THE 62ND G. A. The Mental Health Hearing in connection with commitment of the mentally ill is not confidential record. Collection of accounts for mental care in Mental Health Institute of the County, Welfare Department is unauthorized.

Mr. Lloyd Smith, Auditor of State: This will acknowledge your oral request for opinion; first, as to whether proceedings on a mental health hearing are confidential; and second, whether the board of supervisors has authority to turn the collection of the accounts for the patients' care at the mental health institute over to the county welfare director and to pay him additional compensation for such service. In reply thereto I advise the following: I assume you are referring to the duties, powers, and responsibilities of the Commission of Hospitalization as set forth in the Iowa Code (1966) Chapters 228 and 229.

"§228.1 In each county there shall be a commission of hospitalization which shall be composed of three members."

The clerk of the district court is a member (§228.2), and acts as clerk of the commission (§228.4). The duties of the clerk are set out in the Code:

"§228.6 The clerk of said commission shall: (1) issue all processes required to be given by the commission, and affix thereto his seal as clerk of the court. (2) File and preserve in his office all papers and records connected with any inquest by the commission. (3) Keep separate books of the proceedings of the commission with entries sufficiently full to show, with papers filed, a complete record of its findings, orders, and proceedings."

These duties seem clear and no explanation here is necessary.

The "mental hearing" you were referring to is the one immediately preceding commitment to the screening center. The above mentioned commission has the duty to hold this "mental hearing." Chapter 229 of the Iowa Code (1966) deals with the commitment of the mentally ill and the commission's responsibility in this regard is set out in detail. Once an information is filed (§229.1), the commission then hears evidence in

respect to the individual in question (§§229.2-229.8). A finding is made and the procedure outlined in §229.9 is followed if the individual is found to be other than sane.

"§229.9 If the commission finds from the evidence that said person is mentally ill and a fit subject for custody and treatment in the state hospital, it shall order first his observation and treatment at the screening center located at the hospital in the district nearest to the county in which the hearing is conducted and no order of commitment shall issue until the superintendent of the hospital at which said screening center is located shall find and recommend that such order should be issued and, in the event that such recommendation of commitment is made, the commission shall order his commitment to the hospital in the district in which the county is situated and in connection with such finding and order shall determine and enter of record the county which is the legal settlement of such person. If such settlement is unknown the record shall show such fact.

"No person shall be ordered committed or delivered to a state hospital until the commission has first communicated with the superintendent of said hospital, and has been advised that adequate facilities are available. A person ordered to screening center for observation and treatment shall have the same right to appeal from the order as from the order of commitment finding him mentally ill as provided in sections 229.17 to 229.19, inclusive."

No where in this process does the Code provide for the proceedings in the mental health hearings to be kept confidential. It is the commission's duty to hold the hearings, and it is the clerk's duty to keep proper records (see §228.6, supra). Whether these records are open to the public, when the statute is silent on the point, has been a matter of controversy. However, this problem is now moot, the right of the citizens of Iowa to examine public records is established now by Senate File 537, 62nd General Assembly, §2 of which provides:

"Every citizen of Iowa shall have the right to examine all public records and to copy such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section six hundred twenty-two point forty-six (622.46) of the Code."

The following public records by Senate File 537, §7, are deemed confidential:

"1. Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records.

"2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.

"3. Trade secrets which are recognized and protected as such by law.

"4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.

"5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.

"6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

"7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

"8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.

"9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

"10. Personal information in confidential personnel records of the military department of the state.

"11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts."

The mental health hearing described in your request is not a confidential hearing under the terms of the above numbered bill and is, therefore, subject to examination by citizens of Iowa.

Your second point of inquiry deals with whether the county board of supervisors have the authority to turn the collection of the accounts for the patient's care at the mental health institute over to the county welfare director, and, if so, do they have the authority to grant additional compensation for such service. I would advise that neither is authorized. The correct procedure is set forth in Chapter 230 of the Code of Iowa (1966). The county board of supervisors work with the county auditor and the county attorney in processing these collections. The correct procedure is indicated in the following Code sections:

"§230.15. Personal liability. Mentally ill persons and persons legally liable for their support shall remain liable for the support of such mentally ill. Persons legally liable for the support of a mentally ill person shall include the spouse, father, mother, and adult children of such mentally ill person, and any person, firm, or corporation bound by contract hereafter made for support. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

"§230.26. Auditor to keep record. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons admitted or committed from such county and the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of such lien. The name of the husband or the wife of such person designating such party as the spouse of the person admitted or committed shall also be indexed in the same manner as the names of the persons admitted or committed are indexed."

"§230.27. Board and county attorney to collect. It shall be the duty of the board of supervisors to collect said claims and direct the county attorney to proceed with the collection of said claims as a part of the duties of his office."

Since it is clear that the county welfare director is not the proper person for this task, it is equally clear that no compensation for same can be allowed.

July 31, 1967

TAXATION: Personal Property Tax — Filing of Notice of Tax Liens. §§445.6, 445.8, 445.9, 445.29, Code of Iowa, 1966. Notice of personal

property tax liens, where personal property taxes are not delinquent, should be filed with the County Recorder pursuant to Section 445.6. Where personal property taxes are delinquent, the County Treasurer should enter the same on the delinquent personal tax list and file the published notice of said list with the County Auditor. Personal property tax liens should be indexed on the delinquent personal tax list pursuant to Section 445.9.

Mr. Lee B. Blum, Franklin County Attorney: This is to acknowledge receipt of your letter of July 22, 1967, in which you requested an opinion as follows:

"Your opinion is requested as to where the County Treasurer should file personal property tax liens under Section 445.29 Iowa Code (1966) and how the same should be indexed in order to constitute due notice."

Section 445.29, Code of Iowa, 1966, provides

"445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall for a period of one year following December 31 of the year of levy be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed. Such a lien shall not be effective or applicable, however, as against the rights of purchasers or mortgagees who acquired an interest in or lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien."

Enclosed please find an opinion which is dated March 17, 1965, and written by a former Special Assistant Attorney General which partially answers the first part of your question. Section 445.6, Code of Iowa, 1966, expressly provides that the notice of such lien is to be filed with the County Recorder where the taxpayer is about to remove himself from the County or to dispose of his personal property prior to the time when the personal property taxes would become delinquent.

Where the personal property taxes are delinquent, Section 445.8 provides for the creation and compilation by the County Treasurer of the "delinquent personal tax list." Section 445.8(1) and (2) provide

"445.8 Delinquent personal tax list - distress warrant.

"(1) The treasurer shall, after October 1, and before December 31, of each year, enter in a book or other record to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes and delinquent poll taxes of any preceding year which do not appear thereon; if the tax list maintained by said treasurer is such that all delinquent personal taxes and delinquent taxes of any preceding year are at all times therein recorded, then he shall not be required to keep in his office, as a part of the records thereof, a separate delinquent personal tax list.

"(2) The treasurer shall cause to be compiled a list of all delinquent personal property taxes for the current assessment year, as shown by the delinquent personal property tax list. Such list shall show the amount of the taxes delinquent when the amount of the tax is more than five dollars and the amount of penalty, interest and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, and shall be published in some newspaper in the county once each week for two consecutive weeks, the last of which shall be not more than two weeks before the first Monday in December, and by immediately posting a copy of the first publication thereof at the door of the courthouse, if there be one, if not, at the door of the place where the last term of district court was held. The provisions of sections 446.10 and 446.11 shall prevail in connection with the publication of such notice. The treasurer shall obtain a copy of the notice as published, and a certificate of the publication thereof from the printer or publisher, and file it in the office of the auditor."

There is no statutory provision which expressly directs the County Treasurer to file a notice of lien for delinquent personal property taxes with the County Recorder, but Section 445.8(2) does provide for the filing of the published notice of the delinquent tax list with the County Auditor. Thus, where the taxes are delinquent, the County Treasurer should enter the same on the delinquent personal tax list and proceed under Section 445.8, Code of Iowa, 1966. Since the lien is a statutory one, the notice, as filed with the County Auditor, should constitute the filing of notice of such lien pursuant to Section 445.29.

Finally, Section 445.9, Code of Iowa, 1966, provides that the entries on the delinquent personal tax list should alphabetically list the names of the taxpayers, the amounts of tax, the delinquent years, and the location of the property when assessed. Section 445.8 and Section 445.9 would appear to be the statutory procedure for indexing in order to constitute due notice of the tax lien.

August 1, 1967

LABOR: Employment agencies, limitation on fees, §§95.1 and 94.6, Code of Iowa, 1966. A baby-sitting agency is an employment agency within the meaning of §95.1 and must be licensed before doing business in the state. Each procurement of a baby-sitting assignment is a separate employment for which the maximum permissible fee is 5%.

Mr. Dale Parkins, Labor Commissioner: By your letter of June 29, 1967, you have requested our opinion with respect to the following questions:

"1. Does a baby sitting agency come within the provisions of Chapter 94 and 95 of the Code of Iowa, i.e. must it be licensed as an employment agency before doing business in the state of Iowa?

"2. Would the fee charged the babysitting employee by the babysitting agency be subject to both the 5% and 25% limitations in 94.6 or would only the 25% limitation apply? The babysitting agency would argue that the 5% limitation of Section 94.6 does not apply, but the 25% figure is applicable because each procurement of employment by the agency is a separate service for which a separate fee should be paid.

"3. Attached you will find the description of the operations of a specific babysitting agency, which wishes to be licensed. The operation which they describe provides more services than the ordinary agency. To date we have refused to license this agency since we feel they cannot operate without following the 5% limitation provision. What is your opinion?"

A copy of your description of the contemplated method of operation of the baby-sitting agency mentioned in paragraph number 3 above is attached hereto as "Exhibit A."

In our opinion a baby-sitting agency of the type you describe would have to be licensed as an employment agency before doing business in the state of Iowa. The fee which could be charged the baby-sitting employee would be subject to both the 5% and 25% limitations contained in §94.6. Each baby-sitting assignment is a separate procurement of employment so that, as a practical matter, the maximum permissible fee would be 5%.

Section 95.1, Code of Iowa, 1966, provides:

"License. Every person, firm, or corporation who shall keep or carry on an employment agency for the purpose of procuring or offering to procure help or employment, or the giving of information as to where help or employment may be procured either directly or through some other person or agency, and where a fee, privilege, or other thing of value is exacted . . shall before transacting any such business whatsoever procure a license. . . ."

The type of agency intended to be regulated by the legislature is one that holds out to the applicant that the agency can provide help or employment by virtue of contacts which the agency has with various employers and employees. In 1963 AGO page 243. The activities of the baby-sitting agency therefore appear to be embraced by this section.

Section 94.6 provides:

"Limitation of fee. No such person, firm, or corporation shall charge a fee for the furnishing or procurement of any situation or employment paying less than two hundred fifty dollars per month which shall exceed twenty-five per cent of the wages paid for the first month of any such employment or situation furnished or procured, *but in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five per cent of the annual gross earnings.* The provisions of this section shall not apply to the furnishing or procurement of vaudeville acts, circus acts, theatrical, stage or platform attractions or amusement enterprises." (Emphasis added)

This section applies to all agencies except those specifically mentioned. 1928 AGO, page 439. As the section applies to all employment agencies other than those specifically excluded, the baby-sitting agency is necessarily included within the provisions of the section, and is subject to each provision within such section. §94.6 is explicit in providing that: "in no event shall the charge for the furnishing or procurement of any situation or employment be in excess of five per cent of the accrued gross earnings." Therefore, in order for the baby-sitting agency to conduct business without being in violation of the prescribed statute, it must not only limit its fee to twenty-five per cent of the wages paid during the first month, but it also must limit its fee to five per cent of the accrued gross earnings of each individual for whom the agency procures employment.

August 2, 1967

427.10 The power vested in the Board of Supervisors to cancel and remit suspended taxes to an old age recipient, includes the power to compromise such taxes when in the best interest of the public and the recipient. Strauss to Hughes, Ringgold County Attorney. 8/2/67 #67/8/2

Mr. Arlen F. Hughes, Ringgold County Attorney: Reference herein is made to yours of the 8th inst., in which you submitted the following:

"We have a number of aged persons in Ringgold County who hold title to real estate and are receiving assistance as aged persons. As you know the collection of tax on this property has been suspended. A number of these persons now reside in nursing homes or with members of their families and desire to sell their real estate. Ordinarily the accumulated suspended taxes exceed the value of the property and it has been the position of the attorney in this area in the examination of titles that the Board of Supervisors does not have authority to compromise or cancel the accumulated suspended taxes when the owner of the property is still living.

"Section 427.10 of the Code of Iowa does authorize the Board of Supervisors to cancel and remit taxes if they think it is for the best interest of the public *and* the petitioner. Surely it is the best interest of the public to compromise or cancel these taxes so that the property might be sold rather than left vacant to deteriorate in condition and value in it's unoccupied state. However, the question arises as to whether it is in the interest of the petitioner who in this type of case would be an old age recipient in as much as they are not compelled to pay taxes and the property will not be sold at tax sale during their life time.

"In view of the above and foregoing, I would appreciate your opinion as to whether or not the Ringgold County Board of Supervisors may compromise or cancel suspended taxes against property owned by an old age recipient when the said recipient desires and wishes to sell the property and the accumulated suspended taxes exceed the value of the property.

"If the Board of Supervisors does have this authority a number of property owned by persons such as I have described could be sold and returned to taxation, and thus not continue to deteriorate in value while unoccupied."

In reply thereto I advise that under Section 427.10, Code of 1966, authority is vested in the Board of Supervisors to cancel and remit suspended taxes. Previously appearing as Section 6951, Code of 1939, it has been interpreted by Opinion of this Department to enable the Board of Supervisors in their discretion to cancel the suspended taxes described in the foregoing Section 427.10. This Opinion, appearing in the Report for 1942, at page 158, after exhibiting the Section:

"Additional order. The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in section 6950, or the public and the aged person referred to in section 6950.1, cancel and remit the taxes assessed against the petitioner referred to in section 6950, or the aged person referred to in section 6950.1, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 6950 and 6950.1."

then stated:

"From the wording of section 6951, it is our opinion that it is within the sound discretion of the County Board of Supervisors to cancel and remit the taxes assessed against a property for any year or for any number of years when such taxes have been previously suspended, either under the provisions of section 6950 or section 6950.1, 1939 Code of Iowa."

The power to cancel vested in the Board of Supervisors would include the power to compromise. You are so advised.

August 7, 1967

MOTOR VEHICLES: Implements of husbandry, steel forage box. §§321.1 (16), 321.453, 1966 Code of Iowa. Truck, mounted with steel forage box is not "implement of husbandry" and is required to be registered. Zeller to Craig Rolfs, Butler County Attorney 8/7/67 #67-8-5.

Mr. Craig Rolfs, Butler County Attorney: This is in reply to your recent request for an opinion in which you state:

"A question has arisen in our county as to whether or not a motor truck which has been mounted with a specially designed forage box and used exclusively for agricultural purposes can be classified as an implement of husbandry as defined in Section 321.1(16) 1966 Code of Iowa and the exemption provisions of Section 321.453 as to maximum gross weight.

"The trucks in question are used only during the summer months and are used exclusively for transportating chopped hay from field to farm for processing. Steel mesh forage boxes are mounted on the truck frames thereby limiting the use of these trucks so that they cannot be used for the transportation of merchandise or freight without the removal of these boxes. The opinion of the Attorney General dated July 6, 1965 would not appear to be controlling since there is in the instant case a modification of the motor truck."

§321.1(16), 1966 Code of Iowa, provides as follows:

" 'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations and shall include portable livestock loading chutes without regard to whether such chutes are used by the owner in the conduct of his agricultural operation, provided however, that such chutes are not used as a vehicle on the highway for the purpose of transporting property."

§321.1(1) defines the "vehicle" as follows:

" 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

It is clear from the above definition that a motor truck would be included in the definition of "vehicle." The first sentence of the definition of "implement of husbandry" states that the "vehicle" is designed for agricultural purposes, and it is necessary to determine what this means.

The word "designed" has been defined in the case of *State vs. Lasswell*, 311 S. W. 2d 356, 358 (Mo., 1958) as follows:

" 'Designed' has been defined as 'appropriate, fit, prepared, or suitable,' and also as 'adopted, designated, or intended,' . . . When applied to property, 'designed' ordinarily refers to the purpose for which it has been constructed (26A C. J. S. 863) and the purpose contemplated and intended by the *manufacturer, not the purchaser*, usually becomes the controlling factor."

This definition provides a basis for this opinion.

The fact that the farmer, in this case has mounted a steel forage box

on the truck does not permanently change the design of the truck, or its original purpose of transporting freight. The forage box may be dismounted, or the truck may still be used for transporting other freight. The burden is on the farmer to show that he comes fairly within the exception set forth in the statute in order to escape the registration fee, and he has not established it. The manufacturer did not intend that this truck should be used exclusively for agricultural purposes, or for hauling hay on the farm.

Accordingly, it is our opinion that even though the truck is now used for agricultural purposes, it does not qualify as an instrument of husbandry, as defined in §321.1(16) and should be registered. The former opinion of the Attorney General, dated July 6, 1965, is enclosed, and is still controlling.

August 7, 1967

LABOR: Inspection of state, county or municipal workshops. §§91.9, 91.11, 1966 Code of Iowa. State inspectors have authority to inspect state-operated facilities. Zeller to Dale Parkins, Commissioner of Labor, 8/7/67. #67-8-6

Mr. Dale Parkins, Commissioner, Bureau of Labor: Reference is herein made to your letter of the 27th inst. in which you submitted the following:

"We request an informal opinion on the authority of our inspectors to inspect State operated facilities, which facilities if privately owned would be subject to inspection.

"If you determine that we do not have the authority to inspect state facilities, would this apply to County operated facilities and also to City operated facilities?

"In the event that any of the above facilities are subject to safety inspections, upon whom is the notice of violation served?"

The inspection of factories, work shops, and other places of work is controlled by §91.9, Code of Iowa, 1966, which provides as follows:

"The labor commissioner and the inspectors shall have the power to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employees . . ."

§91.15 also applies and reads as follows:

"The expressions 'factory,' 'mill,' 'workshop,' 'mine,' 'store,' 'business house,' and 'public or private work,' as used in this chapter, shall be construed to mean any factory, mill, workshop, mine, store, business house, public or private work, where wage earners are employed for a compensation."

Accordingly, it is our opinion that your inspectors have authority to inspect state-operated facilities, county-operated facilities, and city-operated facilities. The above expressions and definitions cover public workshops whether state owned or not.

It is our opinion that the Notice of Violation, if any, should be served upon the owner, operator, superintendent, or person in charge as provided in §91.11.

The statute is designed to protect all wage earners without regard to whether the employers are public or private agencies.

August 7, 1967

CITIES AND TOWNS. Authority to charge for ambulance service §§368.2, 368.74 cities not authorized to charge for ambulance service. Zeller to Crotty, Pocahontas County Attorney, 8/7/67 #67-8-10

Mr. J. D. Crotty, Pocahontas County Attorney: This is in reply to your recent letter in which you submitted the following request:

"Can a city in providing ambulance service pursuant to Section 368.74 of the 1966 Code of Iowa exact a charge from the user of such ambulance service provided by the city?"

§368.74, Code of Iowa, 1966, provides as follows:

"Cities and towns may purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service or to contract for such vehicles, equipment, maintenance or service."

§368.2, Code of Iowa, 1966, provides in part as follows:

"Notwithstanding any of the provisions of this section, cities and towns shall not have power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute."

Since the assessment of the charge of fee is expressly forbidden by the above section, it is my opinion that the city cannot exact a charge for ambulance service until a charge is expressly authorized by statute.

August 7, 1967

TAXATION — Real Property Tax: Exemptions. §§427.1(9), 427.1(24), Code of Iowa, 1966. That portion of a Farm Bureau's building which is used for storage and distribution of items commercially sold is not exempt from property taxation. If the remaining portion of the building cannot be physically separated from that portion used for commercial purposes, the exemption from real property taxation should be totally disallowed.

Mr. Edgar E. Cook, Mills County Attorney: This is to acknowledge receipt of your letter of July 17, 1967, in which our opinion was requested as follows:

"The Mills County Farm Bureau has purchased a building in Malvern, Iowa, for its headquarters.

"In addition to the Farm Bureau's ordinary service to farmers, they also carry a large inventory of items that they sell and they pay personal property taxes on such inventory. These items are stored and distributed from this building.

"The County Assessor of Mills County has asked me for your opinion, under the facts above stated, as to whether or not all of this real estate is exempt from taxation and, if not, what part in your opinion would be exempt."

Section 427.1(9), Code of Iowa, 1966, provides in part for a property tax exemption as follows:

"All grounds and buildings used or under construction by . . . agricultural . . . institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit . . ."

Section 427.1(24), Code of Iowa, 1966, provides in pertinent part:

". . . In any case where a portion of the property is used regularly for commercial purposes no exemption shall be allowed upon property so used and the exemption granted shall be in the proportion of the value of the property used solely for the appropriate objects of the organization, to the entire value of the property "

Farm Bureau Associations are agricultural institutions within the meaning of Section 427.1(9). 1940 O.A.G. 498.

However, whether property is entitled to a tax exemption is to be determined from the use made of the property rather than the declared objects and purposes made by the institution seeking the exemption. *Readlyn Hospital vs. Hoth*, 223 Iowa 341, 272 N. W. 90 (1937).

If the exempt and non-exempt portions of the property are physically separable, the part used for exempt purposes should be held non-taxable and the other part should be taxed. *Oklahoma County vs. Queen City Lodge No. 197, I.O.O.F.*, 195 Okla. 131, 156 P. 2d 340 (1945). Enclosed, please find a copy of an opinion dated September 9, 1965, rendered by a former Special Assistant Attorney General which, basically, reaches this same conclusion under the Iowa statutes, to-wit, Section 427.1(9) and Section 427.1(24).

It is the opinion of this office that the portion of the Farm Bureau's Building which is used for storage and distribution of items commercially sold is not exempt from real property taxation. If the remaining portion of the building cannot be physically separated from that portion used for commercial purposes, the exemption from real property taxation should be totally disallowed.

August 7, 1967

EXECUTIVE COUNCIL: Furnishing of uniforms. §19.25 Code of Iowa, 1966, The Executive Council in fulfilling its obligation under the foregoing numbered section to provide supplies to the Superintendent of Buildings and Grounds does not include therein the furnishing of uniforms for the Capitol Police. Strauss to Stephen C. Robinson, Secretary, Executive Council, 8/7/67. #67-8-7

Mr. Stephen C. Robinson, Secretary, Executive Council: Reference herein is made to yours of the 27th ult., in which you advise that the Council directed you to request an opinion as to the legality of purchasing uniforms for the members of the Capitol Security Police Patrol.

As far as furnishing uniforms for peace officers generally is concerned the obligation of the administrative body to furnish supplies to enable public officers to perform their duties does not include the furnishing of uniforms for such officers. The obligation of the board of supervisors to furnish supplies to the Sheriff, §§332.9 and 332.10, Code of 1966, required the following legislative directive:

332.10 Supplies. . . . "The board of supervisors of each county may furnish suitable uniforms for the sheriff and his deputies and such uniforms shall at all times remain the property of the county."

As far as the Highway Patrol is concerned such duty to furnish supplies included an express provision for furnishing uniforms. §80.18 states:

"It shall be the duty of the commissioner of public safety to provide for the members of the department when on duty, suitable uniforms, subsistence, arms, equipment, quarters, and other necessary supplies, and also the expense and means of travel and boarding the members of the department, according to rules and regulations made by the commissioner, as may be provided by appropriation."

As far as the Superintendent of Buildings and Grounds is concerned, while the Executive Council is required to furnish articles and supplies for the public use and necessary to enable public officers to perform the duties imposed upon them by law, §19.25, Code of 1966, does not include an express provision for furnishing uniforms for the Capitol Police. The duty of the Superintendent of Buildings and Grounds as far as Police are concerned is described by §18.2(4) as follows:

"Have at all times, charge of and supervision over the police, janitors, and other employees of his department in and about the capitol and other state buildings at the seat of government. The police when serving in and about the capitol and other state buildings at the seat of government are hereby designated as peace officers."

From the foregoing I am of the opinion that the legislature, as far as supplies for peace officers are concerned, did not include therein the furnishing of uniforms. The answer to your question is therefore that the Executive Council has no authority to provide the Capitol Police with uniforms.

August 7, 1967

WAR ORPHANS' EDUCATIONAL AID. Chapter 35 §§9 and 10, Code of Iowa, 1966. War Orphans' Educational Aid is available only to the child of a veteran who died while in active service while serving in the military or naval services of the United States, or as a result of such service. A child whose parent was killed while a member of the National Guard active service training duty is not eligible for such aid. Strauss to Major General Junior F. Miller, Adjutant General of Iowa, 8/7/67. #67-8-8

Major General Junior F. Miller, Adjutant General of Iowa: Reference is herein made to yours of the first inst., in which you submitted the following:

"Ray J. Kauffman, Executive Secretary of the Soldiers Bonus Board, has forwarded a request for guidance as to applicability of Chapter 35, Code of Iowa 1966, in regard to members of Reserve Components of the Armed Forces of the United States, while performing training or duty authorized and directed by Federal law. A copy of the letter request is attached.

"Section 35.9, Code of Iowa 1966, as amended, provides in part as follows:

'"said Bonus Board is authorized to expend not to exceed $300.00 per year for any one child * * * who is the child of a man or woman who died * * * while serving in the military or naval forces of the United States, or as a result of such service * * *."'

"Title 10 of the United States Code, entitled "Armed Forces," encompasses the basic and permanent military law of the United States. Section 1 of Act, Aug. 10, 1956, c.1041, 70A Stat. 1 enacted Title 10. Section 2 of the Act enacted Title 32, United States Code, entitled "National Guard."

"Section 101 of Title 10 defines "Armed Forces."

"Chapter 11, Sections 261 through 280, Title 10, sets forth the basic law with reference to Reserve Components, to include the Army National Guard of the United States and the Air National Guard of the United States.

"Title 32, United States Code, entitled "National Guard" provides the basic law with reference to the organization, administration and training of the Army and Air National Guard of the United States, as the organized militia of the several States, and as the Reserve Components of the Army and Air Force, during such time as such components are not in the active service of the United States.

"Chapter 5, Sections 501 through 505, Title 32 United States Code, provides the basic law with reference to required drills, field exercises, service schools, and discipline and training of the Army National Guard and the Air National Guard of the United States, as Reserve Components of the Army and Air Force respectively, during such time as such components are not in the active military service of the United States. Such duty and training includes unit training assemblies, additional inactive duty flying training periods, field training, service schools and related training. Section 672(d), Title 10 United States Code, provides active duty for training status for members of the Army National Guard and Air National Guard of the United States in addition to and supplementary to that training or duty authorized and required in Sections 502 through 505, Title 32 United States Code, for improvement of unit or individual operational readiness or accomplishment of special projects or missions. Training and duty authorized under Section 672 Title 10 and Sections 503-505 Title 32, United States Code, is performed in an active duty for training status as Reserve Components for the Army and the Air Force.

"Section 318 through 321, Title 32, provides authority for compensation for disablement, hospitalization, and death gratituties for members of the Army and Air National Guard of the United States, as Reserve Components, for performance of such duty

"An Opinion is respectfully requested as to whether or not the words "while serving in the military or naval force of the United States" may be interpreted to include members of the Reserve Components of the Armed Forces as provided and authorized by the above referenced Federal statutes."

Accompanying your letter is a copy of a letter from Ray J. Kauffman, Executive Secretary of the Bonus Board, as follows:

"I refer to Chapter 35.10, Code of Iowa 1966, with reference to eligibility and payment of War Orphans Educational Aid, payable by the Iowa Bonus Board. In part, Chapter 35.10 reads: "The eligibility of eligible applicants shall be certified by the Adjutant General of Iowa to the Comptroller of Iowa, etc."

"Chapter 35.9, Code of Iowa 1966, entitled Expenditure by Board, has been amended to include the Viet Nam Conflict at any time between *August 5, 1964* and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive.

"As Executive Secretary of the Iowa Bonus Board, I am in question as

to eligibility rights to War Orphans Educational Aid being paid to students whose parent was killed or died from service, while a member of our Iowa National Guard; duty status active duty training on duty; member of Armed Forces Reserve in training or special assignment on or after August 5, 1964.

"I recommend your department request the legal opinion of our Attorney General of Iowa with respect to amendment to Chapter 35.9, as to terminology involving eligibility."

In reply thereto I advise the World War Orphans' Educational Aid Fund was initiated by the 47th G. A., Chapter 88. The appropriated money for such purpose was by Section 2 of Chapter 88 designated as World war orphans' educational aid fund and the bonus board was authorized to expend such fund by Section 3 of Chapter 88 in the manner, to the persons and under the terms thereof as follows.

"Said bonus board is authorized to expend not to exceed one hundred fifty dollars ($150.00) per year for any one child who shall have lived in the state of Iowa for two (2) years preceding application for aid hereunder, and who is the child of a man or woman who died during the World war between the dates of April 6, 1917 and July 2, 1921, while serving in the army, navy, marine corps or nursing corps of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies for such child or children, not including clothing, for attendance at any educational or training institution of college grade, or in any business college or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa."

Note the expenditure was made to the child of a man or woman who, during the dates named therein, died while serving in the army, navy, marine corps or nursing corps of the United States. Such Act set out above has remained in substantially the same form, subject only to inclusion in the benefits thereof of a child of a man or woman who served in World War II or the Korean conflict, and subject to the substitution of "serving in the military or naval forces of the United States" for "serving in the army, navy, marine corps or nursing corps of the United States." Such substitution was made by the 52nd G. A., Chapter 47. Such substitute language has so remained to and including the Code of 1966, Section 35.9. The Section was amended by the 48th G. A., Chapter 57, the 57th G. A., Chapter 60, and the 57th G. A., Chapter 63. These several amendments result in the following form of what was Section 3, Chapter 88, 47th G. A., designated now as Section 35.9, Code of 1966.

"Expenditure by board. Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during World War I between the dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and September 2, 1945, both dates inclusive, or the Korean conflict at any time between June 27, 1950, and July 27, 1953, both dates inclusive, while serving in the military or naval forces of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense for such child or children incident to attendance at any educational or training institution of college grade, or in any business or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa."

Other than fixing the dates of the several wars out of which arise the rights of children of veterans and the benefits thereof, and the substitution of the words ". . . while serving in the military or naval forces of the United States, or as a result of such service . . ." for the following words in Chapter 88, 47th G. A. " . . while serving in the army, navy, marine corps or nursing corps of the United States, or as a result of such service . . .," Section 35.9, Code of 1966, is Section 3 of Chapter 88, 47th G. A., except for the increase of the benefit from one hundred fifty dollars to three hundred dollars and extending the benefit for additional services. Previous interpretation of said Chapter 88, 47th G. A., is made by an Opinion of this Department, appearing in the Report for 1938 at page 761, where it is said:

"It is apparent that the statute lays down a clear limitation or restriction in the phrase "during the World War between the date of April 6, 1917, and July 2, 1921." The following two added qualifications both are consistent with the express intent to limit the benefits to children whose parent or parents died during the war period. In the first classification are those persons who died while in service during the said period. In the next classification are those persons who died during the said period while not in the service but as a result of such service. In this latter class would fall those persons who served their country in the World War, who were discharged from the service and who subsequently died as a result of such service during the pendency of the war. The benefits of the act may not be extended to a child whose father or mother died after the war period as a result of military service since the death would not have occurred during the World War period."

It then defined a post-war orphan as follows:

"The term 'post-war orphan' includes children of World War veterans who have died since July 2, 1921, of disease or disability resulting from war service. Like the term 'war orphan,' it applies to children whose mothers are still alive as well as to those who have lost both parents."

And concluded:

"In view of the foregoing, we are of the opinion that only the children of veterans who died during the World War between the dates designated by the statute are eligible to receive the aid granted by the law."

This conclusion is supported by the language of Chapter 332, Acts of the 39th G. A., being the first World War Bonus Act. Section 4, Chapter 332, 39th G. A. provides:

"Beneficiaries defined. Every person, male or female, including army, navy, and marine corps nurses who served in the military or naval service of the United States at any time between April 6, 1917, and November 11, 1918, and who at the time of entering into such service was a resident of the state of Iowa, and who was honorably separated or discharged from such service, or who is still in active service, or has been retired, or has been furloughed to a reserve, shall be entitled to receive from the proceeds of such bonds as a bonus, the sum of fifty cents (.50) for each day that such person was in active service, such bonus not to exceed a total sum of three hundred and fifty dollars ($350.00). No person shall be entitled to such payment or allowance, whose only service was in the students army training corps, or who received from another state a bonus or gratuity of a like nature provided for by this act, or who being in such service, received civilian pay for civilian work."

I am of the opinion therefore that the child described in your letter is ineligible for the benefit of this fund for the reason that the father of the child did not die in performing active services in any of the Wars described, or as a result of such services.

August 7, 1967

MOTOR VEHICLES: Color of Y.M.C.A. bus used to transport children §321.373(18), 1966 Code. Required color for bus transporting children to camp. Zeller to Charles E. Vanderbur, Story County Attorney. 8/7/67 #67-8-4

Mr. Charles E. Vanderbur, Story County Attorney: This is in reply to your recent letter in which you submit the following:

"Several years ago the Iowa State University Y.M.C.A. acquired a used school bus. It was then painted in school bus colors and still is so painted. Please under stand that this bus is owned by the Y.M.C.A. on the campus and not owned by the University itself. The bus is used to transport area children to and from Y.M.C.A. camps and to other Y.M.C.A. activities. This particular Y.M.C.A. is both school and church related and this bus is used solely for transporting children to and from these camps and activities. Under Section 321.373(18) can this bus continue to carry standard school bus yellow colors or must it be repainted some other color?"

§321.373(18) bears upon this matter and reads as follows:

"No vehicle formerly used as a school bus shall be operated on any public highway unless the body of such vehicle shall be painted a color other than national school bus chrome. This subsection shall not apply to any vehicle owned by a school corporation, church or camp organization regularly transporting children . . ."

The test seems to be whether the use of the bus is covered by the exception stated in this statute. The key words seem to be "regularly transporting children." "The word 'regularly' means in accordance with some constant or periodic rule or practice." *France v. Munson,* 3 A2d 78.81; 125 Conn. 22; Words and Phrases Vol. 36A page 269.

If the Y.M.C.A. is transporting children to and from these camps and other activities in accordance with some uniform or constant rule or practice, I would be of the opinion that the color need not be changed or repainted.

On the other hand, if the bus is not regularly used for transporting children, you should determine the fact, and the bus should be painted some color other than the national school bus chrome.

August 7, 1967

COUNTIES AND COUNTY OFFICERS: County hospital trustees, Board of Supervisors, authority to contract ambulance service. §347.14(13), Sen. File 51, 62nd G. A. §332.3. County Hospital Trustees, or Board of Supervisors may contract for ambulance service, or operate ambulances. Zeller to Schoenthaler, Jackson County Attorney, 8/7/67. #67-8-9

Mr. David E. Schoenthaler, Jackson County Attorney: You have written to me by letter of July 26. In this letter you have stated that

Jackson County Public Hospital wishes to subsidize a portion of the expense of ambulance service for cases transported from the city of Bellevue and adjoining areas. Your questions are as follows:

"1. Can the Jackson County Public Hospital, from its emergency fund, subsidize two-thirds to three-fourths of the tentative $650.00 per month subsidy for the balance of 1967, even though several of the cases undoubtedly will be taken to a Dubuque Hospital, or hospitals other than the Jackson County Hospital? This would amount to approximately $2,250.00 for August through December.

"2. If this is authorized under §347.14(13), can the Hospital Trustees and the City of Bellevue select a funeral director to provide the ambulance service without the necessity of advertising for bids from other possible interested parties?

"3. Starting in 1968, and under the provisions of Senate File 51, can Jackson County, through the Board of Supervisors, subsidize Community Ambulance Company and one or more other ambulances in the county?"

There are two provisions of law which relate to this question. The first of these is §347.14(13), Code of Iowa, 1966, which relates as follows:

"The board of hospital trustees may:

"Purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service or to contract for such vehicles, equipment, maintenance or service when such ambulance service is not otherwise available."

The second of these is §332.3, which reads as follows pursuant to the provisions of Senate File 51, 62nd General Assembly:

"The Board of Supervisors at any regular meeting shall have power:

"To purchase, lease, equip, maintain and operate an ambulance or ambulances to provide necessary and sufficient ambulance service or to contract for such vehicles, equipment, maintenance or service."

Accordingly, in answer to the first question, I am of the opinion that you may contract directly with the funeral director in Bellevue for ambulance service from Northern Jackson County to the Jackson County Public Hospital and can pay $450.00 per month for this service. The payment, however, must be directly made for the ambulance service furnished to the Jackson County Public Hospital and not for services rendered to other hospitals.

In answer to the second question, the hospital trustees may select the funeral director and enter into direct contract with him without the necessity of advertising for bids from others. However, the city of Bellevue should make its own contract for ambulance service to other hospitals, if any.

Under the provisions of Senate File 51 the Board of Supervisors may maintain and operate an ambulance or may contract for such services with a funeral director. This contract may be made with the Community Ambulance Company or any other ambulance service. However, it should not be complicated by transferring moneys from the county hospital nor should the contract provide for services in conveying patients for other hospitals.

August 7, 1967

COUNTIES AND COUNTY OFFICERS: Zoning districts. 1) §358A.4 authorizes the county board of supervisors to divide a portion of the county into zoning districts without so dividing the entire county. 2) Zoning commission's authority is to make recommendations as to boundaries and appropriate regulations under §358A.8 it does not have enforcement authority. Turner to C. E. Worlan, Iowa Development Comm. 8/6/67 S67/8/1

Mr. C. E. Worlan, Director, Iowa Development Commission: This replies to your letter of July 25, 1967, which requests an opinion based on the following examples:

"A county board of supervisors anticipates extensively development in the northwest corner of the county. They desire to establish four zoning districts in that area (area "A") to provide the necessary control for orderly development. They believe they will not need regulations in the balance of the county. We can, however, assume they may propose to repeat this pattern on an "as needed" basis should future development elsewhere become obvious (area "B").

"Or, the county board of supervisors establishes four zoning districts in area "A" in the northwest corner of the county. Later, they establish the same four zoning districts in area "B" in the southeast corner of the county. No zoning regulations are applied to the area between "A" and "B."

(1) Can a county board of supervisors divide only portions of a county into zoning districts or must they divide the entire county into zoning districts?

(2) Would the county zoning commission have authority in the areas ("A" and "B") in which zoning is established?

(3) Would the county zoning commission have authority in the area lying between "A" and "B"?

"Your opinion is necessary in order to guide our activities in administering the 701 Federal Urban Planning Assistance Program."

The county board of supervisors may divide a portion of a county into zoning districts without so dividing the entire county. §358A.4, Code of Iowa, 1966, provides:

"Area and districts. For any and all of said purposes the board of supervisors may divide the county, or any area or areas within the county, into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; . . ."

So long as the area within a zoning district is dealt with under a comprehensive plan for that district and regulations applicable thereto are made with reasonable consideration as to the character of the area of the district and the peculiar suitability of such area for a particular purpose, and all regulations for such district are uniform for each class or kind of buildings throughout the district, the requirements of the statute will be met, and illegal "spot zoning" will be avoided. There is no requirement that the regulations for different districts be identical. *Keppy v. Ehlers*, 1962, 253 Iowa 1021, 115 N. W. 2d 198.

The second question pertains to the authority of the county zoning commission. Such authority is set out in § 358A.8 which provides that the county zoning commission shall

". . . recommend the boundaries of the various original districts, and appropriate regulations and restrictions to be enforced therein. Such commission shall, with due diligence, prepare a preliminary report and hold public hearings thereon before submitting its final report; and the board of supervisors shall not hold its public hearings or take action until it has received the final report of such commission. After the adoption of such regulations, restrictions, and boundaries of districts, the zoning commission may, from time to time, recommend to the board of supervisors amendments, supplements, changes or modifications."

There appears to be no authority vested in the zoning commission by statute other than that of making recommendations and holding hearings and making the reports to the county board of supervisors as set out above. Where an original zoning district is established the county zoning commission would make recommendations as to the boundaries of such district and subsequent thereto from time to time recommend any changes or modifications for such district.

In answer to the question as to whether the county zoning commission would have authority in the area lying between "A" and "B," the county zoning commission would make recommendations as to such area in the event that a zoning district, or districts, were anticipated for such territory.

The responsibility for enforcement of resolutions or ordinances adopted by the board of supervisors has been placed in an administrative officer which the board of supervisors shall appoint pursuant to §358.9 of the Code. The county zoning commission does not have enforcement authority.

August 8, 1967

SCHOOLS: AREA SCHOOLS. S. F. 616, 62nd G. A. Aid for the first three quarters of the 1966-67 school year should be computed on the basis of the number of full-time and part-time students enrolled in classes on May 1, 1967, according to the formula set out in §§3 and 4. The May 1, 1967, enrollment figure is to be treated as the average daily enrollment for all of the quarters of the school year, but the payment for the fourth quarter shall be computed and paid in the manner provided in §5. Turner to Johnston, Sup't., Public Instruction, 8/8/67. #S/67/8/2

Mr. Paul F. Johnston, Superintendent, Department of Public Instruction: In your letter of July 12, 1967, you presented the following:

"Your official opinion is hereby requested relative to a question that has arisen under section 6 of Senate File 616, 62nd G. A.

"That section, as finally enacted provides that state aid for junior colleges and merged area schools for the school year 1966-67 shall be computed for the elapsed quarters on the basis of the enrollment figures of the claimant schools as of May 1, 1967. It also provides that aid for the "remaining quarters" shall be computed in accordance with sections 3, 4, and 5 of the Act.

"By the time the Act becomes effective all quarters of the year 1966-1967 will have elapsed. Our question is whether the aid shall be computed for all four quarters on the basis of the May 1 enrollment figure or whether the May 1 figure shall be used for the first three quarters with the fourth quarter adjusted on the basis of actual enrollment for the entire year as reflected in the claimants' first July report under the Act.

"Since the claimants will need to allow for anticipated aid in their budget estimates, rendition of your opinion at your earliest convenience will be appreciated."

It is our view that aid for the first three quarters of the 1966-67 school year should be computed on the basis of the number of full-time and part-time students enrolled in classes on May 1, 1967, according to the formula set out in §§3 and 4. The May 1, 1967, enrollment figure is to be treated as the average daily enrollment for all of the quarters of the school year, but the payment for the fourth quarter shall be computed and paid in the manner provided in §5 which is as follows:

"* * * The aid payment for the fourth quarter shall be equal to the difference between the aggregate aid payments for the first three quarters and the total amount of aid entitlement computed on the basis of the actual information required for calculation, as certified in the following July, plus or minus such prorata amount as may be necessary to make the aggregate total of general school aid paid to all such school districts or merged areas, as the case may be, for the said year equal to the respective amounts of aid funds appropriated for payment to such districts or areas in the said year."

Any other construction would, we believe, render the last sentence of §6 of Senate File 616 meaningless. Such an interpretation would be contrary to well-settled rules of statutory construction.

August 8, 1967

COUNTIES AND COUNTY OFFICERS: Incompatibility, district court clerk-inheritance appraisers. The offices of clerk of a district court and inheritance appraisers are incompatible and may not be simultaneously held by the same person.

The Honorable Lloyd R. Smith, Auditor of State: Reference is made to your letter of August 4, 1967, in which you inquire as follows:

"Will you please give me your legal opinion as to whether elected County Clerks can also act as inheritance appraisers. I need this to clarify the condition in several counties where clerks are acting as inheritance appraisers."

This office has held in the past that the office of inheritance tax appraiser is incompatible with that of deputy sheriff, 60 OAG §8.52, state senator, 60 OAG §20.55, and member of the general assembly, OAG December 14, 1954. In an opinion which is squarely in point the attorney general ruled on March 11, 1948, that a clerk of a district court may not act as an inheritance tax appraiser. A more recent opinion dated August 1, 1962, a copy of which is attached hereto, held that the offices of clerk of the district court and appraiser in probate cases are incompatible.

The rules which govern the determination of questions of incompatibility of offices are clearly set forth in *State v. White,* 257 Iowa 606, 133 N. W. 2d 903, 904 (1965). See also *Hutton v. State,* 235 Iowa 52, 16 N. W. 2d 18 (1947); *Eller v. Iowa Employment Security Commission,* 251 Iowa, 288, 100 N. W. 2d 417, 418 (1960); *Francis v. Iowa Employment Security Commission,* 250 Iowa 1300, 98 N. W. 2d 733, 734 (1959); *State v. Spaulding,* 102 Iowa 639, 72 N. W. 288 (1897); and an attorney general's opinion of even date herewith which holds that the position of

collector of county accounts is not incompatible with the office of state representative because, unlike an inheritance tax appraiser, a collector of county accounts is not a public office.

In view of the previous decisions of the supreme court and prior opinions of this office it is our opinion that the offices of clerk of the district court and inheritance tax appraiser are incompatible.

August 8, 1967

STATE OFFICERS AND DEPARTMENTS; Compatibility, legislator and collector of institutional accounts — Art. III, §22, Constitution of Iowa. There is no constitutional or statutory prohibition against a state representative being employed by a county to collect institutional accounts because the latter position is not a public office. Moreover, the two positions are not incompatible. Strauss to Laurence E. Allen, State Representative, 8/8/67. #67-8-11

The Honorable Laurence E. Allen, State Representative: By your letter of July 25, 1967, you have requested an opinion of this office as to whether a member of the General Assembly would be guilty of an unlawful, or improper, conflict of interest if employed by a county as an officer to collect institutional accounts. These accounts represent reimbursement to the county of funds required to be expended by the county for care of mental patients or other institutional cases.

In our opinion a member of the general assembly would be guilty of no unlawful or improper conflict of interest if employed by a county as a collector of institutional accounts and there is no constitutional or statutory prohibition against such employment.

Article III, §22 of the Constitution of Iowa provides as follows:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

The foregoing provision of the constitution does not bar a member of the general assembly from all public employment but only prohibits the simultaneous holding of a seat in the legislature and a lucrative public office. Public office has been judicially defined in *Hutton v. State,* 235 Iowa 52, 16 N. W. 2d 18 (1947) wherein the court states:

"One definition approved by various courts is that to make public employment a public office, five elements are indispensable:

(1) It must be created by the constitution or legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) the office must have some permanency and continuity, and not be only temporary and occasional."

See also *Eller v. Iowa Employment Security Commission,* 251 Iowa 288,

100 N. W. 2d 417, 418 (1960); *Francis v. Iowa Employment Security Commission*, 250 Iowa 1300, 98 N. W. 2d 733, 734 (1959); *State v. Spaulding*, 102 Iowa 639, 72 N. W. 288 (1897).

Where there is no public office there can be no public officer, 42 Am. Jur. 880, Public Officers. The collector of institutional accounts is not an office having a constitutional or statutory basis for its existence. Accordingly it is not a public office but a public employment and the holding of this position by a member of the general assembly is not prohibited by Art. III, §22 of the constitution.

It is to be observed that Art. III, §22 acts as a bar to the holding of an additional lucrative office only by members of the general assembly. Thus a public officer, other than a legislator, may hold an additional public office or employment so long as there is no incompatibility between the two offices held. See e.g. §368A.22, Code of Iowa, 1966, which permits a municipal officer or employee to hold two or more compatible positions. Where two officers are found to be conflicting the result may be somewhat harsh. As pointed out by the Iowa Supreme Court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965)

"If a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N. W. 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

After noting that the application of the common law rule quoted above may result in the first of two incompatible offices becoming vacant, the court in *State v. White*, supra, offered certain guidelines for testing whether two offices or employments are incompatible:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L. R. A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

Applying the foregoing tests or criteria to the case before us we find that there is neither incompatibility nor a conflict of interest involved in a state representative being employed as a collector of institutional accounts.

Numerous attorney general's opinions have been issued in which incompatibility has been an issue. Attached as Exhibit "A" is a list of these opinions with the holding in each case indicated thereon.

August 8, 1967

CONSTITUTIONAL LAW: Appointment and Election of District Judicial Nominating Commissions — Art. V, Section 16, Constitution of Iowa, §§46.3 and 46.4, Code of Iowa, 1966, S. F. 283, 62nd G. A. Insofar as the fourteen judicial districts, the boundaries of which are unchanged by §1 of S. F. 283 are concerned, the express words contained in §§3 and 4 of such S. F. 283 which purport to repeal §§46.3 and 46.4, are a nullity and of no force and effect. §§46.3 and 46.4 were enacted to fix the number of and to provide for the initial appointment and election of district judicial nominating commissioners according to the constitutional mandate contained in Art. V §16 and the inadvertent repeal of such §§46.3 and 46.4 may not be given effect where it would leave a void with respect to the appointment and election of commissioners in the fourteen districts with unchanged boundaries. The remaining portions of §§3 and 4, which would require the appointment and election of the nominating commissioners for the new first, eighth, tenth and thirteenth judicial districts, are merely directory insofar as they require appointment and election in June, 1967, but appointments and elections thereunder must be made and held within a reasonable time. Notwithstanding the provisions of §6 of S. F. 283, the terms of office of all district judicial nominating commissioners shall continue in effect unchanged except that the terms of commissioners in the seven old districts comprising the four new districts shall terminate upon the election and appointment of new nominating commissioners for such four districts. Turner to Clarke, Assistant to the Governor, 8/8/67. #S/67/8/3.

Mr. Wade Clarke, Assistant to the Governor: You have orally requested me to clarify certain problems with respect to Senate File 283 and, in response thereto as well as to members of the bench and bar who have made similar inquiries, my official opinion is set out herein.

Senate File 283 was passed by both houses of the 62nd General Assembly on June 29, 1967, and was approved by the governor and became law on July 27, 1967. The purpose of the bill, as expressed by the title, is "to establish the judicial districts for the district courts and to provide for determination of the number of judges in each district." It repeals §604.8, Code of Iowa, 1966, which, except for minor changes adopted by amendments in 1957 (57 G. A., Ch. 263 §1), 1959 (58 G. A., Ch. 354 §1) and 1961 (59 G. A., Ch. 283 §1), had established the judicial districts since 1931. The number of judicial districts under §604.8 was twenty-one. Senate File 283 reduces the number to eighteen by consolidating seven of the old districts into four new districts as follows:

Old District	New District
1st) 20th)	1st
8th) 18th)	8th
10th)	10th (same less Delaware Co.)
13th) 19th)	13th (including Delaware Co.)

The other fourteen existing or old districts remain unchanged both as to geographical boundaries and numerical designation except that the twenty-first district was renumbered as the eighteenth.

Senate File 283 presents several questions of statutory construction and interpretation which may be stated as follows:

1. What is the effective date of S. F. 283 which passed both houses on June 29, 1967, and was signed by the governor on July 27, 1967, but which provides in §5 thereof that it shall be effective July 1, 1967?

2. May appointment and election of nominating commissioners under S. F. 283 be made at some time other than June, 1967, as required by §§3 and 4 of such act?

3. Are §§46.3 and 46.4, Code of Iowa 1966, repealed in their entirety by §§3 and 4 of S. F. 283 or are such §§46.3 and 46.4 repealed only insofar as they relate to the method of appointing and electing the members of the judicial nominating commissions for the four new districts created by §1 of S. F. 283, viz. the first, eighth, tenth and thirteenth districts?

4. Does §6 of S. F. 283 abolish the terms of all district judicial nominating commissioners or only the terms of office of the district judicial nominating commissioners appointed or elected to nominating commissions in the seven districts consolidated by §1 of S. F. 283 to form the four new districts created by such §1?

Article V, §16 of the Constitution of Iowa as added by the amendment of 1962 provides in relevant part as follows:

"There shall be a District Judicial Nominating Commission in each judicial district of the state. Such commissions shall make nominations to fill vacancies in the District Court within their respective districts. Until July 4, 1973, and thereafter unless otherwise provided by law, District Judicial Nominating Commissions shall be composed and selected as follows: There shall be not less than three nor more than six appointive members, as provided by law, and an equal number of elective members on each such commission, all of whom shall be electors of the district. The appointive members shall be appointed by the Governor. The elective members shall be elected by the resident members of the bar of the district. The district judge of such district who is senior in length of service shall also be a member of such commission and shall be its chairman.

"Due consideration shall be given to area representation in the appointment and election of Judicial Nominating Commission members. Appointive and elective members of Judicial Nominating Commissions shall serve for six year terms, shall be ineligible for a second six year term on the same commission, shall hold no office of profit of the United States or of the state during their terms, shall be chosen without reference to political affiliation, and shall have such other qualifications as may be prescribed by law. As near as may be, the terms of one-third of such members shall expire every two years."

Responsive to this mandate of the people speaking through their constitution, the legislature, in 1963 enacted §§46.3 and 46.4, Code of Iowa 1966, 60th G. A., Ch. 80, §§3 and 4 which provide:

"46.3 Appointment of district judicial nominating commissioners. In June, 1963, the governor shall appoint five electors of each judicial district to the district judicial nominating commission for terms commencing July 1, 1963. He shall appoint two such commissioners to serve until

June 30, 1965, two to serve until June 30, 1967, and one to serve until June 30, 1969. Upon the expiration of each of those terms and every six years thereafter, the governor shall so appoint district judicial nominating commissioners for six-year terms.

"46.4 Election of district judicial nominating commissioners. In June, 1963, the resident members of the bar of each judicial district shall elect five electors of the district to the district judicial nominating commission for terms commencing July 1, 1963. One of such commissioners shall serve until June 30, 1965, two until June 30, 1967, and two until June 30, 1969, as determined by lot by such commissioners. In January next before expiration of each of those terms and every six years thereafter, such members of the bar of the respective judicial districts shall so elect district judicial nominating commissioners for six-year terms commencing July 1 following."

It is to be observed that all that was required to give substance and effect to the constitutional mandate of Article V, §16, was to fix the number of appointive and elective commissioners in each judicial district somewhere between three and six and to provide for the commencement of the initial terms of the first commissioners. That is essentially all that §§46.3 and 46.4 do. These sections of the law fix the number of elective and appointive commissioners at five and provide that their terms shall commence July 1, 1963.

§§3, 4 and 6 of S. F. 283 provide:

"Sec. 3. Section forty-six point three (46.3), Code 1966, is hereby repealed and the following enacted in lieu thereof: 'In June, 1967, the governor shall appoint five electors in the first, eighth, tenth and thirteenth judicial districts established by this Act to the district judicial nominating commission for terms commencing July 1, 1967. He shall appoint two such commissioners to serve until June 30, 1969, two to serve until June 30, 1971, and one to serve until June 30, 1973. Upon the expiration of each of those terms and every six years thereafter, the governor shall so appoint district judicial nominating commissioners for six-year terms.'

"Sec. 4. Section forty-six point four (46.4), Code 1966, is hereby repealed and the following enacted in lieu thereof: 'In June, 1967, the resident members of the bar of the first, eighth, tenth and thirteenth judicial districts established by this Act shall elect five electors of the district to the district judicial nominating commission for terms commencing July 1, 1967. One of such commissioners shall serve until June 30, 1969, two until June 30, 1971 and two until June 30, 1973, as determined by lot by such commissioners. In January next before expiration of each of those terms and every six years thereafter, such members of the bar of the respective judicial districts shall so elect district judicial nominating commissioners for six-year terms commencing July 1 following.'

* * *

"Sec. 6. The terms of office of district judicial nominating commissioners appointed and elected prior to the effective date of this Act shall continue until July 1, 1967 at which date said terms shall be deemed abolished."

If the foregoing words of section 3 and 4 of S. F. 283 are given their plain and ordinary meaning the result is obvious. §§46.3 and 46.4 of the law as it presently exists would be repealed by the first paragraph of §§3 and 4 of S. F. 283 and in lieu thereof new provisions would be enacted which would provide only for the appointment and election of district

judicial nominating commissioners in the four new districts. Since §6 of S. F. 283 purports to abolish effective July 1, 1967, the terms of office of all district judicial nominating commissioners appointed prior to the effective date of S. F. 283, the result would be not only that the fourteen unchanged districts would have no commissioners but there would be no statutory provision for their selection. I cannot conclude that this is a result intended by the legislature.

I

Effective Date

As first introduced in February, 1967, Senate File 283 would have made much more substantial changes in existing districts, reducing the number thereof to twelve. The bill originally contained a publication clause which was §7. That clause would have made §§3 to 5, relating to the appointment and election of judicial nominating commissioners and the effective date of other portions of the bill, effective on publication and prior to July 1, 1967. Had the bill passed earlier in the session, this would have allowed time for the appointment and election of the new commissioners so that they could take office on July 1, 1967, at which time the balance of the bill was to become effective and the terms of the previous commissioners abolished. There is precedent for providing that a bill take effect as to one part at one time and as to another part at another. *Santo v. State*, 1856, 2 Iowa 165, 2 Clarke 165.

But by the time the legislature got around to passing the bill on June 29, there was no need of a publication clause to make part of the bill effective before July 1, only two days after passage, so this clause was deleted by amendment. This left §5 stating "*Except as hereafter provided* this Act shall be effective July 1, 1967." Without the publication clause, however, the underlined words of §5 became superfluous and meaningless.

The bill was submitted to the ogvernor for his approval during the last three days of the session and the governor exercised his constitutional prerogative under Article III, §16, Constitution of Iowa, in waiting until July 27, 1967, before approving it. Once approved, it became the law "effective July 1, 1967" under §5. Thus, it had clearly stated retroactive or retrospective operation or effect at least from the time it "became a law" on July 27, back to July 1, 1967. Within constitutional limits, the legislature may by clear and express language fix a date when a bill is to become effective, although that date antedates approval and enactment. *Krueger v. Rheem Mfg. Co.*, 1967, _____ Ia. _____, 149 N. W. 2d 142. The legislature did not exceed the constitutional limits here.

II

Appointments after June, 1967

§§3 and 4 of S. F. 283 provide that the governor and members of the bar "shall" appoint and elect the judicial nominating commissioners in the four new districts in *June*, 1967. This is an obvious impossibility since passage of the act did not occur until June 29 and, as heretofore explained, the publication clause was deleted so that the entire bill be-

came effective on July 1 as specified in the bill. It has also been noted that the bill was not approved by the Governor, and hence did not become law, until July 27th.

Where a statute specifies the time within which a public officer is to perform an official act respecting the rights and duties of others, it will be regarded as directory merely, unless it appears from the nature of the act or the language used by the legislature that the designation of time was intended as a limitation. *Hill v. Wolfe*, 1870, 28 Iowa 577.

Statutes requiring the fixing of a day for doing something which may as effectually be done at another time are regarded as merely directory. *Yengel v. Allen*, 1918, 279 Iowa 633, 161 N. W. 631.

In *State v. Miskimins*, 1955, 247 Iowa 39, 72 N. W. 2d 571, it was held that the people will be protected against disenfranchisement by refusal of public officers to call elections, although deviation from the statutes by the officers may be negligent or willful. There, the statutory requirement that the county superintendent call an election on a proposition of establishing a consolidated school district within thirty days after final determination of boundaries was directory and the election could nevertheless be held four and one half months after expiration of the statutory period.

S. F. 283, in specifying that the appointment and election of commissioners shall be in June, did not intend to limit such appointments to that time, but rather to insure prompt and timely action. A contrary construction would render §§3 and 4 utterly meaningless in this case where the acts required were impossible of performance.

There is authority in the Miskimins case to the effect that the statutory requirement for calling an election at a certain time is construed as mandatory before that time has arrived, but directory afterwards. The appointments and elections required by §§3 and 4 must still be made within a reasonable time. While I have no power or authority to specify a time as reasonable, or to legislate by writing something into the bill which clearly is not there, I hesitantly suggest, in the interest of eliminating uncertainty, that September 15, 1967, would not be an unreasonable deadline for compliance with §§3 and 4.

III and IV

Repeal of Nominating Commissions and Abolition of Terms

The general rules with respect to repealer provisions in legislative enactments are well stated in Corpus Juris Secundum as follows:

"[A] statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the legislative intent will prevail over a literal interpretation. Even words of absolute repeal may be qualified by the intention manifested in other parts of the same act; and, according to some authorities, an express declaration that a particular statute is repealed will not be given effect, where it is apparent that the legislature did not so intend; . . . ." 82 C. J. S. Statutes §282.

* * *

"[A] statute containing a repealing clause must be construed as a whole, and the legislative intent given effect, even though contrary to the terms of the repealing clause. . . . [I]ntent prevails over the literal import of the words. Express words of repeal must not be taken literally if, by doing so, the enactment is carried beyond the scope of its title and thereby other legislation is destroyed. In the construction of a repealing statute, resort may be had to the repealed or superseded statute to aid in the discovery of the legislative intent, and they may be construed in the light of each other, as well as to other measures passed by the legislature at the same session and pertaining to subjects purportedly included in the repealing act." 82 C. J. S. Statutes §386.

The foregoing statements aptly summarize the better view of the rules governing the construction and application of express words of repeal contained in statutes. Numerous decisions have given effect to and applied these principles in construing and interpreting statutes purporting to repeal provisions of law.

Thus, the supreme court of Iowa in *State ex rel. Bates v. Payton et al*, 139 Iowa 125, 117 N. W. 43, 44 (1908), declared:

"The repeal of Code, §§645, 646, by Acts 32nd Gen. Assem., above referred to, was in terms absolute. But a repealing statute, although absolute in terms, and declared to be in full force and effect from the time of publication, as provided for therein, may nevertheless continue in force, for some purposes and to some extent, the provisions of the statute repealed. In Smith v. People, 47 N. Y. 330, an absolute repeal was held to be qualified by reason of a purpose manifested in the repealing statute as to the subject-matter not covered by the repealing statute."

In *Mandell et al v. Haddon et al*, 202 Va. 979, 121 S. E. 2d 516, 521 (1961) it is stated:

"[1] The rules of statutory construction were conceived and are applied to give effect to legislative intent — not to defeat it. All rules are subservient to that intent. Shackelford v. Shackelford, 181 Va. 869, 877, 27 S. E. 2d 354, 358."

And in *U. S. v. Minker*, 19 F. Supp. 409, 414 (D. C., Md. 1937) the U. S. District Court for the district of Maryland observed that in determining the legislative intent reference may be had to the repealing statute as a whole as well as contemporary factual context surrounding enactment of the act in question.

"Here there is no room for argument as to an implied repeal, the question being whether the express repeal of the Willis-Campbell Act of itself effected an express repeal of the revenue statutes. This question must be answered not from the mere form of words used in one section of the 1935 Act but by a consideration of the statute as a whole, interpreted in the light of Congressional proceedings affecting it, and *the situation that Congress had before it*. In construing repealing statutes, it has frequently been held that a literally express repeal of a statute will not prevail where the intention of the legislative body is satisfactorily shown to be to the contrary, and this can be so shown by reference to other parts of the same statute, to other acts in *pari materia*, passed before or after, or to other contemporaneous legislation not strictly in *pari materia*, and to relevant facts and circumstances existing at the time. Smith v. People, 47 N. Y. 330, 337; Howlett v. Cheetham, 17 Wash. 626, 50 P. 522; Indianapolis Union R. Co. v. Waddington, 168 Ind. 448, 82 N. E. 1031; First Nat. Bank v. Lee County Oil Co. (Tex. Com. App.) 274 S. W. 127; Sutherland on Stat. Const. §§218, 242; 59 C. J. 900, 1102; Ex parte Public Nat. Bank, 278 U. S. 101, 104, 49 S. Ct. 43, 73 L. Ed. 202." (Emphasis added)

O'Neil et ux v. Crampton et ux, 18 Wash 2d 579, 140 P. 2d 308, 310 (1943) goes further and permits recourse to the repealed statute as well as the repealing act as an aid to construction.

"Though repealing words may be absolute in themselves, they will be held to be qualified by the intention of the legislature as manifested in other parts of the same act. Repeals may be construed as qualified or partial. *Resort to repealed and superseded statutes may be had in aid of the construction of a statute. State ex rel. Swan v. Taylor*, 21 Wash. 672, 59 P. 489; Howlett v. Cheetham, 17 Wash. 626, 50 P. 522, 523; 1 Lewis' Sutherland Statutory Construction, 2d Ed. p. 570, §293; State v. Vosgien, 82 Wash. 685, 144 P. 947; In re Phillips' Estate, 193 Wash. 194, 74 P. 2d 1015; 1 Lewis' Sutherland Statutory Construction, 2 Ed., p. 859, §452; Endlich on the Interpretation of Statutes, p. 64, §51." (Emphasis Added)

Other aids which may be utilized in giving repealing acts a reasonable interpretation have been enunciated by the supreme court of Washington:

"Express words of repeal must not be taken literally if, by so doing, the enactment is carried beyond *the scope of its title* and thereby other legislation is broken down or destroyed." (Emphasis added) Cory v. Nethery et ux. 19 Wash. 2d 326, 142 P. 2d 488, 491 (1943)

"'While it is a primary and general rule in the construction of statutes that effect should be given to words which are plain, unambiguous, and well understood, according to their natural and ordinary sense and meaning, yet it is well settled that where the literal interpretation of a particular word or phrase is repugnant to the intent of the legislature plainly manifested by the act taken as a whole, such interpretation ought not to prevail. The only object of construction is to ascertain the meaning and intention of the legislature, and, when that intention is discovered, it is controlling, although it may be contrary to the strict letter of the statute.'

* * *

"'It will manifestly appear from an examination of this so-called repealing act, and from *the history of its passage*, that the legislature at the time of its final enactment did not have in mind either the office of arid-land commissioner, or the subject of arid lands.' Howlett v. Cheetham, 17 Wash. 626, 50 P. 522, 523 (1897)." (Emphasis Added)

Numerous other cases both in the state and federal courts have expanded upon, amplified, utilized and applied the rules of construction laid down in the quoted portions of the decisions cited above. *Borough of Fort Lee N. J. et al, v. U. S. ex rel. Barber et al.*, 104 F. 2d 275 (C. C. A. 3d, 1939), *Powell et ux v. Utz et ux*, 87 F. Supp. 811 (D.C. E.D. Wash., 1949); *Toledo P. & W. R.R. v. Stover et al*, 60 F. Supp. 587 (D.C. S.D. 111., 1945); *Tamiami Trail Tour Inc. et al v. City of Tampa*, 159 Fla. 287, 31 So. 2d 468 (1947); *State v. Prince*, 52 N. M. 15, 189 P. 2d 993 (1948); *Golden Valley County v. Lundin et al*, 52 N. D. 420, 203 N. W. 317 (1925); *Groffell et al v. Honeysuckle et ux*, 30 Wash. 2d 390, 191 P. 2d 858 (1948); *Great Northern R.R. Co. v. Cohn*, 3 Wash. 2d 672, 101 P. 2d 985 (1940) and other cases cited in 82 C. J. S. §§282 and 386.

Thus, in construing the effect and meaning of the repealer provisions of §§3 and 4 of S. F. 283 we may look not only at the express language of repeal itself but at the repealing act as a whole, the statute being superseded, the legislative chronicle of the passage of S. F. 283 and generally all of the facts and circumstances which lead to the passage

of the statute before us. Viewed in this light it is evident that to give to the plain words of repeal contained in the first sentence of §§3 and 4 of S. F. 283 their ordinary, usual and customary meaning would not lend substance to the legislative intent; it would frustrate it.

As we have seen, S. F. 283 as originally introduced, contemplated a much more far-reaching realignment and consolidation of judicial districts than did the bill as finally passed. Thus §§3 and 4 of the original bill provided in the second paragraph of each of these sections the machinery, not merely for the appointment and election of district judicial nominating commissioners in the first, eighth, tenth and thirteenth districts as did the final bill, but "in each of the judicial districts established by this Act." This was eminently reasonable at the time since §1 of the original bill made changes in the boundaries of all districts theretofore existing. Hence, it was necessary to first repeal the provisions of law setting up the means for appointing and electing commissioners in the old districts and then reenact substantially the same sections to provide for the appointment and election of nominating commissioners in all of the new districts.

The same necessity undoubtedly led the draftsman of S. F. 283 to include §6 which would terminate effective July 1, 1967, the offices of all the commissioners in the old districts thereby making way for the new commissioners in each of the new districts created by the act. S. F. 283 was subjected to numerous amendments in both houses of the general assembly with the result, as we have seen, that the bill in the form finally passed made less substantial changes in the boundaries of districts than the proponents of the original bill had hoped. However, in making these amendments, some oversights obviously occurred with the result that the final bill, if literally construed, would abolish the terms of all district nominating commissioners, repeal the provisions for their appointment and election and make new provisions only for the appointment and election of commissioners in the first, eighth, tenth and thirteenth judicial districts.

Considering the legislative context in which S. F. 283 was passed and applying the rules of construction previously discussed we have no hesitancy in saying that §6 and the first sentences of §§3 and 4 of S. F. 283 were ineffective to repeal §§46.3 and 46.4, Code of Iowa, 1966, to the extent that they purport to end the terms and abolish the machinery for electing and appointing district judicial nominating commissioners in the 14 districts the boundaries of which are unchanged by §1 of S. F. 283. §6 and the second paragraphs of §§3 and 4 of S. F. 283 have application only to the four new districts created by S. F. 283 and the commissioners from the seven old districts of which such four new districts are comprised.

An additional and compelling reason exists for construing S. F. 283 as we have and in holding that, in our opinion, §§46.3 and 46.4 Code of Iowa, 1966, continue in effect so far as the nominating commission and commissioners for the fourteen unchanged districts are concerned. These sections were first enacted as a result of the amendment of the constitution in 1962 which added to Article V section 16, the text of which has hereinbefore been set forth. As previously indicated, this constitutional provision goes into considerable detail in setting up a system of district

judicial nominating commissions. All that remained for the legislature to do, apart from fixing the district boundaries, was to set the number of appointive and elective commissioners between three and six and set the machinery in motion by establishing the dates for the first appointments and elections. This was done by means of the enactment of §§46.3 and 46.4. If these sections were now to be held repealed as to the fourteen unchanged districts, we would be faced with the intolerable situation where the organic law requires that something be done by the legislature, but that body neglects or, through inadvertance, fails to do what is required to make the constitutional provision operative.

It is well settled that the provisions of constitutions are mandatory and not merely directory. This general rule is well stated in 16 Am. Jur. 2d, Constitutional Law §91 as follows:

"The general rule has been laid down that if directions are given respecting the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it to be exercised in that time and mode only. And *constitutional provisions imposing duties upon the governor and the legislature have been held mandatory.*" (Emphasis added)

In Iowa the rule is stated thus:

"The people are sovereign, and speak through their Constitution, and, when they thus speak, its mandates are binding upon all people, and on the Legislature, which is but one of the agencies of government. The government is a fictitious entity, created by the people; a coroporate entity, through which the people act. All departments of government and officers are only the instrumentalities through which the government acts. They are in one sense the agencies through which the government acts, and all the power and authority to act and the manner of acting is controlled by the fundamental law found in the Constitution. We start, then, with the proposition that the provisions of our Constitution are mandatory, and their mandates bind as closely and as firmly the legislative branch of the government as they do the citizen of the commonwealth. *The legislative branch must obey the Constitution or fundamental law, and must follow and obey its requirements and directions.* It is true some courts have held that constitutional provisions are not mandatory. *This court, however, has held consistently that the provisions of the Constitution are mandatory and binding upon the Legislature, and that any act that contravenes the provisions of the Constitution, or fails to come up to the measurements of the constitutional requirements, is not binding upon the people or any of the agencies of government, because, when the people speak, it is vox populi, vox dei, so far as the agencies of government are concerned.* See Koehler & Lange v. Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609; State v. Lynch, 169 Iowa 148, 151 N. W. 81, L. R. A. 1915D, 119." (Emphasis supplied) *Taft Co. v. Alber*, 185 Iowa 1069, 171 N. W. 719 (1919).

Thus the legislature has no discretion as to whether or not it will give effect to Article V, §16. The legislature must act in accordance with this directive and every act must be construed to give effect to this mandate.

CONCLUSIONS

Insofar as the 14 districts with unchanged boundaries are concerned, the express words of repeal contained in the first paragraph of §§3 and 4 of S. F. 283 are a nullity of no force and effect. The remaining portion

of such §§3 and 4 are effective as of July 1, 1967, except that the appointment and election of the nominating commissioners for the new first, eighth, tenth and thirteenth judicial districts need not be made in June, 1967, so long as they are made within a reasonable time. In the interest of eliminating uncertainty, I suggest compliance with §§3 and 4 be accomplished by September 15, 1967.

Notwithstanding the provisions of §6 of S. F. 283 the terms of office of all district judicial nominating commissioners shall continue in effect unchanged except that the terms of commissioners in the seven old districts comprising the four new districts shall terminate upon the election and appointment of new nominating commissioners for such four districts.

August 17, 1967

GENERAL PROVISIONS REGULATING PRACTICE PROFESSIONS: **Itinerant License — fee,** §147.75, 1966 Code of Iowa. There is no renewal provision for itinerant licenses held as of July 4, 1963, nor has the Department of Health any authority to collect any fee for such a license, (Seckington to Long, Dept. of Health) 8/17/67.#67-8-12

Arthur P. Long, M.D., Dr. P.H., Commissioner of Public Health, State Department of Health: This is in response to your letter of August 2, 1967, wherein you ask:

"1. Is it a requirement of the Department of Health to issue a new itinerant license each year to those practitioners holding an itinerant license on July 4, 1963, or is the license issued and valid on that date sufficient to fulfill needs as long as their regular license is maintained?

2. Is the Department of Health required to collect the $250.00 yearly renewal fee?"

In response to your first question. Prior to the 60th General Assembly, itinerant licenses for the various professions were issued in accordance with §147.75, of the old Code, which provided:

"Itinerant physician, itinerant osteopath, itinerant chiropractor, itinerant optometrist or itinerant cosmetologist as used in the following sections of this title shall mean any person engaged in the practice of medicine and surgery, osteopathy, osteopathy and surgery, chiropractic, optometry, or cosmetology, as defined in the chapter relative to the practice of said professions who, by himself, agent, or employee goes from place to place, or from house to house, or by circulars, letters or advertisements, solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence."

The fee for such a license as enumerated above was found in the prior Code, §147.80(8) (12) which provided:

"The following fees shall be collected by the State Department of Health:

'(8) For a license to practice as an itinerant physician and surgeon, itinerant osteopath, itinerant osteopath and surgeon, itinerant chiropractor, or itinerant optometrist, two hundred fifty dollars.

(12) For a license to practice as an itinerant cosmetologist in addition to any other fee required of cosmetologists, one hundred dollars.' "

The 60th General Assembly repealed the above provisions and inserted in lieu thereof the following provision, §147.75, 1966 Code of Iowa:

"Any person holding an itinerant practitioner's license on July 4, 1963 is hereby granted continuation of the rights and privileges granted under such license for as long as his regular license is maintained."

It is our opinion that the holders of such a license as contemplated by the above quoted section need not apply for nor does the Department of Health need to issue a new license as long as the holder maintains his "regular license."

In response to your second question, your attention is directed to §147.80, 1966 Code of Iowa. A reading of that statute clearly shows that the Department of Health has no authority to collect two hundred fifty dollars renewal fee for itinerant licenses. Thus the answer to your second question is that the Department is not required nor allowed to collect two hundred fifty dollars annual fee.

The Code does not contemplate either a renewal of any itinerants license or the issuing of a new itinerant's license, or the collection of any fee for such license.

NOTE: This opinion does not attempt to construe the provisions of Chapter 81, 1966 Code of Iowa, entitled "Itinerant Merchants" or Chapter 203, entitled "Adulteration and Labeling of Drugs," specifically §203.6, "Itinerant Vendors of Drugs and License" and §203.7, "Requirement of Itinerant-Fee," 1966 Code of Iowa.

August 17, 1967

COUNTY PUBLIC HOSPITAL: Hospital Board of Trustees, Powers & Duties. §347.13, 1966 Code of Iowa. Subsection 14 of §347.13, 1966 Code of Iowa is mandatory, and the Hospital Board of Trustees must publish quarterly in each official newspaper of the county, the schedule of bills allowed. (Seckington to Blum, Franklin County Attorney, 8/17/67) #67/8/13

Mr. Lee R. Blum, Franklin County Attorney: This is in response to your letter of August 2, 1967, wherein you ask the following:

"Must a county public hospital, under Chapter 347, 1966 Code of Iowa, publish quarterly lists of warrants for the calendar quarters ending March 31, June 30, September 30 and December 31 each year? If publication is required, must said publication be in all three of the official newspapers of Franklin County?"

In response to your question, we believe §347.13 (14) controls. That section provides:

"347.13 Powers and duties. Said board of hospital trustees shall: . . .

14. There shall be published quarterly in each of the official newspapers of the county as selected by the board of supervisors pursuant to section 349.1 the schedule of bills allowed and there shall be published annually in such newspapers the schedule of salaries paid by job classification and category, but not by listing names of individual employees."

We therefore conclude that such publication is required by law and that said publication must be made in each official newspaper in Franklin County.

August 21, 1967

MOTOR VEHICLES: Weighing truckload on public scales. §321.465, Chapter 214, 1966 Code of Iowa. Officer may direct vehicle to weigh in at nearest *public scales*, as defined herein, but not at a private commercial scale. Officer is not required to weigh vehicle at time and place of stopping. 8/25/67. (Zeller to Rowe, Jefferson County Attorney, #67-8-19.

Mr. Thomas Rowe, Jefferson County Attorney: This will acknowledge receipt of your recent letter in which you submit the following:

"Section 321.465 of the Code provides, 'Any peace officer having reason to believe that the weight of a vehicle and load is unlawful is authorized to require the driver to stop and submit to a weighing of the same either by means of portable or stationary scales and may require that such vehicle be driven to the nearest public scales . . .' It appears to me that this language could be construed to mean (1) that the peace officer could either weigh the vehicle on the spot or require him to proceed to the nearest public scale or (2) that he must first weigh him by means of a portable or stationary scale before he may require the vehicle to be driven to the nearest public scales. Therefore, the undersigned respectfully requests an Attorney General's Opinion whether the peace officer must weigh the vehicle before requiring him to proceed to a public scale.

"Assuming that the officer may weigh the vehicle on the spot or require the vehicle to proceed to the nearest public scales, the undersigned respectfully requests a further opinion whether 'Public scales' as used in this Section must meet the requirements as set forth in Chapter 214 of the Code. That is, may the officer direct the driver to any commercial scale that is deemed to be accurate?"

Answering your first question:

1. The section above quoted, states that the peace officers may require that such vehicle be driven to the nearest public scales. This is not dependent upon a weighing at the place of stopping the vehicle, and in fact the officer is not required to weigh the vehicle at any time and place although authorized to do so.

In answer to your second question:

2. The words "public scales" are not defined in Chapter 321. Public scales would seem to mean, however, scales available to the general public's use; and would not apply to a scale owned by a private party or company which is operated for its own commercial purposes. Such private scales are not scales for hire, and are not subject to regulation by Chapter 214, Code of Iowa, 1966. The legislature must have intended to provide the maximum protection against mechanical error. The fact that scales are public and constantly available for anyone's use makes them presumably accurate. And if the public scales are for hire, to anyone, they must comply with the requirements set forth in Chapter 214 of the Code of Iowa, 1966, dealing with weights and measures.

What the Legislature wished to do, was to protect our roads and highways from damage by overweight vehicles. Moreover, the statute is quasi-criminal and penal in nature, and it should, therefore, be strictly construed. Nevertheless, the statute should be construed to give effect to the legislative purpose. *State v. Balsley* (1951) 48 N. W. 2d 287, 242 Iowa 845.

Public scales are clearly, only those immediately available to the public for hire or use, and do not in my opinion include any commercial scale,

owned and operated for private purposes, which are not subject to public regulation and control, in answering your second question. Authorities in support of our opinion where an identical statute was construed are:

State v. Metropolitan Iron & Steel Co., Inc., Bergen Co. Ct., N. J., 163 A. 2d 234 (1960)

State v. Genser Trucking Co., Passaic County Court, Criminal, N. J., 207 A. 2d 721 (1965)

August 21, 1967

STATUTORY CONSTRUCTION: INDUSTRIAL LOAN ACT §536A.23 (2). Language prohibited the fixing of a service charge on any loan which is "renewed or rewritten within six months of the date of the original note" does not preclude the fixing of a service charge on additional money advanced as part of such loan. (Nolan to Smith, State Auditor, 8-21-67) #67-8-14

The Honorable Lloyd R. Smith, State Auditor: This letter is in answer to a request by Mr. Clarke E. Bailey for an interpretation of §536A.23(2) Code of Iowa which provides:

"No industrial loan company licensed under the provisions of this chapter shall have the power and authority to:

* * *

"2. Charge, receive or collect in advance a service charge in excess of one dollar for each fifty dollars of the amount of the note, nor in excess of a total of forty dollars. The service charge authorized by this section shall not be charged, contracted for, collected or received on any loan which is renewed or rewritten within six months of the date of the original note; nor on that part of a new loan made to the same borrower by the same company which is used to discharge a prior loan made to the same borrower by the same company."

Mr. Bailey's question had reference to a proposed mailing to Iowa Industrial Loan licensees wherein this section would be given an interpretation as follows:

"An industrial loan company may charge or collect a service charge not in excess of one dollar for each fifty dollars of the amount of the note, not in excess of the total of forty dollars. The service charge cannot be charged or collected on the amount of any renewed or refinanced amount within the first six months of the original date; but on that amount of a new advance providing the new advance is not made for the express purpose to gain more than the allowable original forty dollar maximum service charge. Any note rewritten or renewed after six months of the date of the original note may be charged a service charge on the basis of two percent of the balance with not more than a maximum of forty dollars. Any note rewritten after six months may be charged a service charge allowed any new loan."

I concur in this interpretation and it is my opinion that the language prohibiting the fixing of a service charge on any loan which is "renewed or rewritten within six months of the date of the original note" does not preclude the fixing of a service charge on any new part of such loan. In the absence of other direction in the context of the statute the words "renewed or rewritten" must be construed according to their common meaning as approved usage of such language permits. In Webster's Seventh New Collegiate Dictionary the word "renew" is given the meaning of

making new again or to do again or begin again; the word "rewrite" means to revise something previously written. With these definitions in mind it is my view that the prohibition applies only to such part of the loan which is renewed or rewritten as was covered by the original contract and does not apply to any additional or new advance written into the revised loan contract. This would be in accord with §536A.24 which prohibits loan companies from permitting any person to become obligated under more than one contract of loan at the same time for the purpose of obtaining a higher rate of charge than would be permitted if all of the obligations of such person to such company were consolidated into one obligation.

August 23, 1967

EXECUTIVE COUNCIL: H. J. R. 17, 61st G. A. There is no authority vested in the Executive Council to demolish the Amos Hiatt Building and the Kasson Archives Building, both located on the original Capitol Grounds and now rendered vacant by the Capitol Expansion authorized by the 61st G. A. (Strauss to Bunker, Chief, Division of Architectural Services, 8/23/67) #67-8-21

Mr. Frank N. Bunker, A. I. A., Chief, Division of Architectural Services, Board of Control of State Institutions: Reference herein is made to yours of the 17th inst. in which you submit the following:

"At the request of the Executive Council in a recent meeting we would like to obtain your opinion of the possible demolition of vacated State owned buildings as a part of the Capitol grounds development. The legislation for expansion of the Capitol grounds by the purchase of additional land surrounding the original grounds provides for permission to purchase and funds to clear the land and develop the newly purchased areas as the land is acquired.

"As a result of the purchase of the Valley Bank Building and the completion of the new State Office Building under construction will allow the Amos Hiatt office building and the Kasson Archives Building to be vacated as the new buildings are ready for occupancy. These old buildings are presently located on property owned by the State of Iowa prior to the implementation of the Capitol grounds expansion program.

"Therefore, we ask that your office consider whether existing legislation and the Code of Iowa permit the demolition of these vacated structures located on the original Capitol grounds by order of the Executive Council using State funds. It should be noted that after these buildings are vacated they wil constitute somewhat of a fire and public safety hazard as a result of possible vandalism, etc. Therefore, it is the desire of the Council to demolish these buildings using State general funds of a source to be determined, subject to your assuring the Council that the Code of Iowa authorizes them to proceed. We ask that you inform our office of your opinion at the earliest possible date so that orderly planning can proceed."

In reply thereto I advise that the situation you describe appears to be the result of the Capitol expansion. As far as the properties involved in the acquisition of property within the terms of the statutory authority and the disposition of buildings there appears to be no authority for demolition of any building so acquired. Chapter 483, Acts of the 61st G. A. provides the statutory authority over such properties. It provides:

"SECTION 1. House Joint Resolution 17 of the 61st General Assembly is hereby amended by adding the following new section:

"'Sec. 6. In addition to its other powers, the executive council shall have the following powers so as to proceed with the acquisition of additional land for the Capitol grounds:

"1. It shall have the authority to pay for all expenses incidental to the purchase of real property and improvements, including abstracting, real estate fees and legal fees.

"2. It shall have the authority to manage, rent, or otherwise use any of said property

"3. It shall have the authority to purchase encumbered property and dispose of, or contract for the disposal of, such encumbrances.

"4. It shall have the authority to contract for and pay for reasonable option agreements.'"

So far as the authority for the demolition of the Amos Hiatt building and the Kasson Archives building I find no statutory authority for their demolition. This situation is not involved directly in the Capitol expansion, but as a result thereof. As far as these buildings are concerned the normal control of them like all buildings at the seat of government remains in legislative control and not executive. The executive council is therefore without power to act.

August 24, 1967

MOTOR VEHICLES — §§321.1, 321.85, 321.91. Abandoned semitrailer bed from which the wheels have been removed is not a motor vehicle within the meaning of the term as used in §§321.85 through 321.91. (Haesemeyer to Goeldner, August 24, 1967) #67-8-22

Mr. Albert F. Goeldner, Keokuk County Attorney: By your letter of August 10, 1967, you have asked an opinion of this office as to whether or not an abandoned semi-trailer bed from which the wheels have been removed is a motor vehicle within the meaning of that term as used in §§321.85 through 321.91, Code of Iowa, 1966.

In our opinion it is not a motor vehicle. §§321.1 provides in relevant part as follows:

"The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

* * *

"2. 'Motor vehicle' means every vehicle which is self-propelled but not including vehicles known as trackless trolleys which are propelled by electric power obtained from overhead trolly wires, but not operated upon rails.

* * *

"10. 'Semitrailer' means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle.

"Wherever the word 'trailer' is used in this chapter, same shall be construed to also include 'semitrailer.'

"A 'semitrailer' shall be considered in this chapter separately from its power unit."

It is clear from the foregoing definitions that an essential element of a

motor vehicle is that it be self-propelled. It is also clear that a semitrailer is a separately defined term which although it is a "vehicle" it is not a "motor vehicle." §§321.85 through 321.91 deal only with stolen or abandoned motor vehicles. If the legislature which adopted these provisions of law had intended to include semitrailers they could have done so by using that expression. Since they failed to do so we must conclude that it was intended that the application of §§321.85 through 321.91 would be limited to "motor vehicles" as that term is defined in §321.1.

August 25, 1967

TAXATION: Personal Property Tax Credit — H. F. 686, Acts of the 62nd G. A., 1967. A partnership should be considered as a single owner of personal property and should be granted one credit not in excess of $2,500.00 assessed valuation of the partnership's personal property.

Mr. Pat Myers, Marion County Attorney: This is to acknowledge receipt of your letter of August 15, 1967, in which you posed a question substantially as follows:

Whether or not, under Section 44 of H. F. 686, Acts of the 62nd General Assembly (1967), each individual comprising a partnership would be entitled to a personal property tax credit not in excess of $2,500.00 assessed valuation on partnership property.

The answer to this question depends upon the construction of Section 44 of H. F. 686 which provides:

"Sec. 44. If personal property is owned jointly, the owners may not respectively take a tax credit on such property in excess of the proportionate ownership in said property and said proportionate ownership shall be determined by dividing the total assessed value of the property by the number of owners unless they show their actual interest and ownership on the personal property listing form provided by the assessor. Any such proportionate credit may be applied only to the extent that the owner's total respective credit of two thousand five hundred (2,500) dollars of assessed valuation is not used up and in no event is an additional credit to be allowed for property held as hereinabove described in this section."

Although for some purposes, a partnership may be considered as a form of joint ownership, it has been held that the relation which the law denotes as a partnership differs from that known as joint ownership. *Minor vs. Perry*, 19 F. Supp. 499, 450 (D. C. Ky. (1937)). Furthermore, the statute on its face, does not reveal a clear cut indication as to whether property jointly owned is to include partnership property.

Chapter 428, Code of Iowa, 1966, pertains to the listing of real and personal taxable property. Section 428.1(5) requires all corporate, company, society, or partnership property to be listed by its principal accountant, officer, agent, or partner as the assessor may demand. Section 428.15 provides that any individual partner is liable for taxes due from the partnership. The Attorney General has ruled that partnership property should be listed in the name of the partnership, not in the names of the individual partners. 1934 O.A.G. 106. In 1950 O.A.G. 176, the Attorney General ruled that, under Section 429.4 of the Code, permitting a $5,000.00 deduction against moneys and credits:

"This office is of the opinion that in case of a return made by a partnership *only one $5,000.00 deduction may be claimed.* There is no provision

in the law relating to partnerships which permits the individual partner to list his assets in the partnership for taxation separately. Both partners are jointly held liable for property taxes levied against the partnership. *It is the ruling of this office that a partnership has no different status as to the deduction permitted than a body, corporate, company, or society, all of which list their property in the same manner as a partnership and under the same provision of the code.*" (Emphasis supplied)

The Iowa statutes appear to contemplate that a partnership be considered a taxable entity for property tax purposes. Section 44 of H. F. 686 should be construed in conjunction with the Iowa statutes relating to the treatment of partnership property for taxation purposes, and not isolated out of context. It should not be presumed that the Legislature, in enacting H. F. 686, specifically Section 44, intended to disregard a partnership as a taxable entity for property tax purposes.

It is the opinion of this office that, under Section 44 of H. F. 686, a partnership should be considered as a single owner of personal property and that the partnership should be granted one credit not in excess of $2,500.00 assessed valuation of such partnership's personal property.

August 25, 1967

COUNTIES AND COUNTY OFFICERS — **Lien for institutional care** — §224.35, §224.2, §230.25. The expense for treatment of alcoholism at mental institutions whether admitted voluntary or commited involuntary constitutes a lien on the property of the patient or spouse. Five-year Statute of Limitations is applicable to such charges. (D. Hendrickson to Sackett, Clay County Attorney, 8/25/67) #67-8-15

Mr. Robert W. Sackett, Clay County Attorney: This will acknowledge receipt of your letter wherein you stated:

"My problem is essentially that our abstracter, guided by her Abstracter's Handbook, chose not to show the institutional lien for treatment of alcoholism as a lien against the patient or his spouse's property. None of this patient's treatment was as a result of the OMVI statute, 321.281, and the first treatment was on a voluntary basis, thereafter upon commitments. . . Our abstracter and through her attorney have raised these additional questions to our auditor: Hasn't the Statute of Limitations tolled any obligation for hospitalization costs received and paid more than five years ago? Only involuntary or committed hospitalizations would create liens, if any, while voluntary admissions for hospitalization and treatment would not create any liens."

Your attention is invited to an opinion of this office rendered July ....., 1967, a copy of which is enclosed, wherein it was held that Chapter 226.35, 1966 Code of Iowa pertaining to voluntary admissions for treatment of alcoholism, incorporates by reference all of the applicable provisions of Chapter 230, 1966 Code of Iowa.

Chapter 230.25, 1966 Code of Iowa, provides:

"Any assistance furnished under this Chapter shall be and constitutes a lien on any real estate owned by the person admitted or committed to such institution or owned by either the husband or wife of such person. Such lien shall be effective against the real estate owned by the husband or wife of such person only in the event that the name of the husband or wife of such person is indexed by the auditor. No lien imposed by this statute against any real estate of a husband or wife of such person prior to the effective date of this act shall be effective against the property of

such husband or wife unless prior to July 4, 1960, the name of such husband or wife of such person shall be indexed."

In view of the fact that Chapter 226.35, 1966 Code of Iowa, incorporates by reference Chapter 230, 1966 Code of Iowa, it is our opinion that the provisions of Chapter 230.25 creating a lien on the property of the individual or spouse are applicable to individuals admitted to mental institutions pursuant to Chapter 226.35, 1966 Code of Iowa.

Your letter also refers to individuals committed to institutions for treatment of alcoholism as opposed to those individuals who voluntarily admit themselves for treatment.

Commitments to institutions of persons addicted to the excessive use of alcohol are controlled by the provisions of Chapter 224, 1966 Code of Iowa. Chapter 224.1 states:

"Persons addicted to the excessive use of intoxicating liquors . . . may be committed by the commissioners of hospitalization of each county to such institutions as the board of control may designate."

Aside from the general provisions in the statute, Chapter 224 contains no specific and express direction as to the care and treatment of persons addicted to the excessive use of alcohol nor does the statute contain provisions as to the maintenance of such individuals committed to state institutions.

However, Chapter 224.2 states:

"All statutes governing the commitment, custody, treatment, and maintenance of the mentally ill shall, so far as applicable, govern the commitment, custody, treatment and maintenance of those addicted to the excessive use of such drugs and intoxicating liquor."

The Iowa court has stated that the word "all" as used in a statute does not admit of exception, addition or exclusion. *Consolidated Freightways Corp. of Del. v. Nicholas*, ____Iowa____, 137 N. W. 2d 900 (1965). *Cedar Rapids Community School Dist. v. City*, 252 Iowa 205, 106 N. W. 2d 655 (1960).

As said in 50 Am. Jur. §286 p. 269:

"It has been adjudged that the word 'all' as used in a statute, is the most comprehensive word in the language, and that the legislature cannot be thought to have used the word 'all' when it intended to include only a small part. . . ."

Therefore, Chapter 229 governing the commitment of mentally ill is adopted by Chapter 224.2, and to determine the procedures to be used for maintenance of individuals committed for excessive use of alcohol and the responsibility of payment for the costs of such treatment, it is our opinion that Chapter 230, 1966 Code of Iowa, must be consulted.

Chapter 230 gives direction as how the costs for maintaining mentally ill individuals in state institutions are to be paid. Included therein, is Chapter 230.25, 1966 Code of Iowa, which was passed by Acts of the 48th General Assembly and created a specific lien on any real estate of any person committed to a state institution. Notwithstanding the fact that Chapter 230.25, 1966 Code of Iowa, was adopted subsequent to the enact-

ment of Chapter 224.2, it is the rule in Iowa that when a statute adopts general law on a particular subject rather than a specific statute, it adopts not only existing law, but later legislation on the subject so far as it is consistent with the adopting statute. Chapter 4.3, 1966 Code of Iowa; *State v. District Court in and for Delaware County*, 253 Iowa 903, 114 N. W. 2d 317 (1962).

Therefore, we conclude that Chapter 230 is incorporated by Chapter 224.2, 1966 Code of Iowa, and the subsequent lien provisions of Chapter 230.25 are also adopted.

We are of the opinion that there is nothing to indicate that only some of the statutes pertaining to mentally ill and their support apply to treatment of alcoholics. We are cognizant of the rule that statutes creating liens must be strictly construed. 1942 OAG 27. We are also aware that Chapter 230.25 which provides for lien of assistance states:

"Any *assistance* furnished under this Chapter. . . ."

while Chapter 224.2 provides:

"All statutes governing . . . *maintenance* of those addicted to excessive use of . . . intoxicating liquors."

However, it is our opinion that *maintenance* is synonomous with *assistance*. (See *State ex rel Blume v. State Board of Education of Montana*, 34 P. 2d 515 (1934)). Therefore, to give full force and effect to the language in Chapter 224.2, 1966 Code of Iowa, we must conclude that all of the provisions of Chapter 230 pertaining to the support of mentally ill are equally applicable to the support of those committed to state institutions for treatment of excess usage of alcohol. (See *Woodbury County v. Harbeck*, 224 Iowa 1142, 278 N. W. 918 (1938)).

The ruling of this office found in 1942 OAG 27, so far as in conflict with this opinion, is hereby withdrawn.

In regards to the question raised in your letter concerning the applicability of a Statute of Limitations, your attention is invited to the following authorities:

Harrison County v. Dunn, 84 Iowa 328, 51 N. W. 155 (1892)
Cedar County v. Sager, 90 Iowa 11, 57 N. W. 634 (1894)
Scott County v. Townsley, 174 Iowa 192, 156 N. W. 291 (1916)
In Re Wagner's Estate, 226 Iowa 667, 284 N. W. 485 (1939)
1923 OAG 336; 1944 OAG 15; 1962 OAG 151

The cases and opinions above cited hold that the amounts expended for the care of individuals at state institutions constitute an "open account" which is continuous and current within the meaning of what is now Chapter 614.5, 1966 Code of Iowa. It is, therefore, subject to the five-year Statute of Limitations from the date the last item was entered in the account.

As to the effect said Statute of Limitations has on the lien created by Chapter 230.25, 1966 Code of Iowa, your attention is invited to 1962 OAG 151, wherein this office ruled:

"The lien created by §230.25, which arises and becomes effective when the procedure set forth in §230.26 is complied with by the county auditor, does not become outlawed by the Statute of Limitations running on the

underlying obligation. It cannot, however, be foreclosed by affirmative legal action by the county unless the obligee waives the affirmative defense of the limitations statute or fails to plead it and the county board of supervisors can release the lien on the conditions set forth in §230.29 which conditions allow for compromise and settlement thereof."

In view of our opinion that the provisions of Chapter 230, 1966 Code of Iowa, are adopted by Chapter 224.2, 1966 Code of Iowa, we are of the opinion that the five-year Statute of Limitations of Chapter 614.5, 1966 Code of Iowa, is also applicable pursuant to the authorities herein cited.

August 25, 1967

COUNTIES AND COUNTY OFFICERS — Statute of Limitations — §230.18. Counties should diligently prosecute actions to enforce liability imposed by §230.15. The five-year Statute of Limitations may be raised by the estate representative as an affirmative defense to a claim for the expense of care incurred by a county, 8/25/67 (D. Hendrickson to Armknecht, Montgomery County Attorney, #67-8-17

Mr. Philip C. Armknecht, Montgomery County Attorney: Your letter of April 24, 1967, has been received wherein you state the following upon which you request an opinion of this office:

"Section 230.18 provides that the estates of persons legally responsible for the support of mentally ill shall be liable for amounts paid by the various counties for the care of such persons.

"The specific question I have arises under the five-year Statute of Limitations section on Open Accounts. It would appear from a prior Attorney General's opinion, rendered in April of 1965, that the five-year Statute of limitations applies to Chapter 230.25 in that no action for the recovery of funds due may be brought but that the lien is preserved against the real estate of the person involved.

"Section 230.18 does not create a lien specifically but does create a claim against the estate of a person who has been a patient or against a person who is legally responsible for the support of the patient.

"I wonder now whether or not the county, in order to preserve that claim against the estate of that person, must take a judgment within a five-year period from the date of the last entry on the account."

Chapter 230.18, 1966 Code of Iowa states:

"The estates of mentally ill persons who may be treated or confined in any county hospital or home, or in any private hospital or sanatorium, and estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support."

It has often been held in Iowa that the expense incurred by a county for the care and support of a mentally ill person in an institution constitutes an open running account against the individual or persons legally liable for their support. *Harrison County v. Dunn*, 84 Iowa 328, 51 N. W. 155 (1892); *Cedar County v. Sager*, 90 Iowa 11, 57 N. W. 634 (1894); *Scott County v. Townsley*, 174 Iowa 192, 156 N. W. 291 (1916); *In Re Wagner's Estate*, 226 Iowa 667, 284 N. W. 485 (1939); 1923 OAG 336; 1944 OAG 15; 1962 OAG 151. The open running account is given the same status as a private account and, therefore, Chapter 614.5, 1966 Code of Iowa, which provides that the Statute of Limitations on an open account is five (5) years from the date of the last item expended, is applica-

ble and may be raised as an affirmative defense to an action brought to collect sums expended on behalf of mentally ill persons. (See cases and opinions above cited.)

However, by virtue of Chapter 230.25, 1966 Code of Iowa, the county does have a lien on property owned by the mentally ill person or spouse of such person, but there are no provisions which create such a lien against persons legally liable for the support of such mentally ill person as defined in Chapter 230.15, 1966 Code of Iowa. Thus, it is necessary for the county to collect from said individuals, in the same manner as any other claim, by action, judgment and execution. No lien exists until it is obtained by the judgment of the court. *Thade v. Spofford*, 65 Iowa 294, 17 N. W. 561 (1884).

In addition, to the above procedure, counties may file a claim against the estate of the mentally ill person or the estates of those legally liable for their support under the provisions of Chapter 230.18, 1966 Code of Iowa, above quoted. These claims must be filed within the time limits provided in Chapter 633.410, 1966 Code of Iowa. *In Re Wagner's Estate*, supra.

Assuming that the county has filed a claim in the estate within the time limit as scheduled in Chapter 633.410, the question becomes whether or not the personal representative may raise as an affirmative defense to the claim, the five-year Statute of Limitations as provided for in Chapter 614.5, 1966 Code of Iowa. Since the Iowa court regards the claim of a county for said expenses as a mere debt to be enforced against an estate the same as any other indebtedness, *In Re Wagner's Estate*, supra, the Statute of Limitations becomes vital.

Chapter 633.411, 1966 Code of Iowa states:

"It shall be within the discretion of the personal representative to determine whether or not the applicable Statute of Limitations shall be pleaded to bar a claim which he believes to be just, provided, however, that this section shall not apply where the personal representative was appointed upon the application of a creditor."

Your attention is further invited to Chapter 633.412, extending the Statute of Limitations if claim is filed within six months from date of decedent's death and to Chapter 633.413, barring claims where Statute of Limitations may be applicable if administration of the estate is not commenced within five years.

In an early Iowa case, *Harrison County v. Dunn*, 84 Iowa 328, 51 N. W. 155 (1892), the Iowa court held, in interpreting the forerunner of what is not Chapter 230.18, as follows:

"When the county paid its debt to the state, the payment gave rise to an obligation of the estate of the county, and a right of action therefore. With the right of action began the running of the statute. The point that such claims remain in force until relieved by affirmative action by the board of supervisors is not well taken. The statute merely permits the board to relieve the estate for a particular reason, as might any other creditor under the law; but the failure to so act does not affect the operation of the Statute of Limitations. We think there is nothing in the authority given the board of supervisors to collect such debts that operates in any way to suspend the operation of the statute, and that the action is barred thereby."

In view of the foregoing, it is our opinion, that counties assume a risk in having an administrator of an estate affirmatively raise the five-year Statute of Limitations to a claim duly filed in said estate. Therefore, we feel that counties should diligently prosecute actions to enforce liability imposed by Chapter 230.15, 1966 Code of Iowa, in order to forestall the affirmative defense of the running of the Statute of Limitations on any claim that is duly filed in an estate.

August 25, 1967

COUNTIES AND COUNTY OFFICERS — §§85.2, 85.61 — County Superintendent of Schools is an employee of County Board of Education and not the county for purposes of workman's compensation, 8/25/67. (D. Hendrickson to Barlow, Palo Alto County Attorney — #67-8-16.)

Mr. Charles H. Barlow, Palo Alto County Attorney: This will acknowledge receipt of your letter wherein you request an opinion on the following question:

"Whether or not the County Board of Supervisors is liable, either on a workman's compensation theory or upon a negligence basis, for any injuries which could be sustained by the County Superintendent of Schools. The Board feels that this information is necessary to determine what type of insurance protection could be purchased and in order to determine whether the County Board of Supervisors or the County Board of Education, itself, should furnish this."

Your attention is invited to Chapter 85.2, 1966 Code of Iowa, which states:

"85.2 Compulsory when. Where the state, county, municipal corporation, school district, *county board of education,* or city under any form of government is the employer, the provisions of this Chapter for the payment of compensation and amount thereof for any injury sustained by an employee of such employer shall be exclusive, compulsory, and obligatory upon both employer and employee, except as otherwise provided in Section 85.1." (emphasis added)

Chapter 85.61 defines employer as follows:

"1. Employer includes and applies to any person, firm, association, or corporation, state, county, municipal corporation, school district, *county board of education,* and the legal representatives of deceased employer. . . ." (emphasis added)

This Chapter was amended by Chapter 85 §2, Acts of the 60th General Assembly, and the explanation of such amendment states:

"It has always been assumed that the county board of education was included in the governmental units that came under the workman's compensation law. However, there have been rulings that the employees of the county board of education were not employees and therefore were not covered by workman's compensation. This bill is to clear up that point."

Therefore, it is our opinion that the county board of education is an employer within the terms of the workman's compensation law. (See 1964 O.A.G. 70.)

Senate File 508 which was approved on June 8, 1967, by the 62nd General Assembly and became law July 1, 1967, amends Chapter 85.61, 1966 Code of Iowa, by adding to 85.61(2) the following to the definition of "workman" or "employee":

"Every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, county boards of education, municipal corporations, or cities under any form of government, and including, members of the Iowa highway safety patrol and conservation officers."

The county board of education has the power and duty to appoint the county superintendent and fix his salary. (Chapter 273.13. 1966 Code of Iowa.) In addition Chapter 273.18, 1966 Code of Iowa, enumerates the powers and duties of the superintendent but such powers and duties shall be under the direction of the board of education. The county board of education has the powers and duties relating to matters affecting the county school system as a whole. (Chapter 273.12, 1966 Code of Iowa.)

The Iowa court has often held that for purposes of workman's compensation, factors for determining an employer-employee relationship are (1) right of selection, or to employ at will; (2) responsibility for payment of wages by employer; (3) right to discharge or terminate relationship; (4) right to control and work; and (5) whether the party sought to be held as employer has responsible authority in charge of work or for whose benefit work is performed. *Prokop v. Frank's Plastering Co.*, 257 Iowa 766, 133 N. W. 2d 878 (1965); *Sister Mary Benedict v. St. Mary's Corp.*, 255 Iowa 847, 124 N. W. 2d 548 (1963).

Therefore, in view of recent legislative enactments and in view of the recent pronouncements of the Iowa court, it is our opinion that the county superintendent is an employee for purposes of Workman's compensation of the county board of education and not of the county board of supervisors.

As to your inquiry concerning what type of insurance protection the county board of supervisors should purchase, your attention is invited to 1964 O.A.G. 70, wherein it is stated at page 71:

"With respect to your question regarding liability insurance, the county is authorized by section 332.3(2) to purchase liability insurance for 'county employees.' Since employees of the county board of education are not employees of the county, the county board of supervisors is neither obligated nor empowered to purchase such insurance."

We conclude that the term "employees" as used in the above quote now includes the county superintendent.

However, your attention is invited to Senate File 710 entitled "An Act Relating to the Tort Liability of Governmental Subdivisions." This law was passed by the 62nd General Assembly and becomes affective January 1, 1968.

A copy of said bill is herein enclosed for your information. Should you have further questions, please feel free to contact this office.

August 25, 1967

STATE OFFICES AND DEPARTMENTS — Meetings open to public — Senate File 536. Meetings of governmental agencies are to be open to the public except meetings of agencies specifically exempt by law; meetings of agencies dealing with or making records specifically re-

quired to be confidential, or if affirmative vote of two-thirds (2/3) of members present of said agency so specify, 8/25/67. (D. Hendrickson to A. Downing, Chm., State Board of Social Welfare, #67/8/20).

A. Downing, Chairman, State Board of Social Welfare: This will acknowledge your letter of August 1, 1967, in which you request an opinion of this office. Your question is here set forth as presented:

"Please refer to Senate File 536 requiring meetings of governmental agencies to be open to the public.

"Since several of the public assistance statutes require our files and records to be confidential and since we presume that this pertains to all county boards of social welfare as well as to the State Board of Social Welfare, we would appreciate an informal interpretation of the legislative intent in connection with the Senate File referred to above, particularly with regard to the procedure to be followed in conducting meetings.

"Does this mean that board meetings shall be open to the public insofar as policy discussions are concerned, but that the board meetings shall be considered executive sessions and not open to the public wherein matters involving the confidentiality of records and the discussion of personnel are concerned."

Senate File 536 is an act "requiring meetings of governmental agencies to be open to the public." This clearly means that all meetings conducted by your agency are to be open to the public.

However, there are exceptions to this general rule. Section one of Senate File 536 provides for closed meetings when such are clearly provided to be closed by law.

"Section 1. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, *unless closed meetings are expressly permitted by law.*" (emphasis added)

This means that the exemption must be specifically set forth in the Code of Iowa and that the provision is expressly associated with the meeting that is to be closed. Section three of Senate File 536 provides for closed meetings upon the two-thirds vote of the board. This allows the agency a degree of discretion in determining when meetings should be closed. However, it should be noted that any meeting closed by this method must be supported by a statement indicating the reason for the decision, and, also, no type of meeting will thereafter be considered closed by practice or pattern.

"Section 3. Any public agency may hold a closed session by affirmative vote of two-thirds (2/3) of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some provision of the Code expressly permits such action to be taken in a closed session. *No regular or general practice or pattern of holding closed sessions shall be permitted.*" (emphasis added)

As suggested in your letter, meetings, otherwise open, can not be made closed by merely calling them executive sessions. The statute is clear, all meetings are included, and are to be open unless exempted. Section one (three) states:

"Wherever used in this Act, 'public agency' or 'public agencies' includes all of the foregoing, and *'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal.*" (emphasis added)

The full effect of the "open meetings" act (S. F. 536) can not be seen unless viewed with its companion bill, the "open records" act (S. F. 537). Senate File 537 is an act "to protect the right of citizens to examine public records and make copies thereof." The general rule is that public records are open to public examination unless exempted. If a public record is declared to be confidential, it therefore follows, by necessary implication, that all meetings either dealing with these records or making these records must also be confidential, any other interpretation would make much of Senate File 537 a nullity. Therefore, if records are exempted from public examination in instances where meetings are not specifically exempted, the meetings, by implication, likewise become exempted. The exemptions in Senate File 537 are as follows:

"Section 2. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential.

"Section 7. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

1. Personal information in records regarding a student, perspective student, or former student of the school corporation or educational institution maintaining such records.

2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.

3. Trade secrets which are recognized and protected as such by law.

4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.

5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.

6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.

10. Personal information in confidential personnel records of the military department of the state.

11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts.

"Section 8. In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this Act that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Such injunction shall be subject to the rules of civil procedure except that the court in its discretion may waive bond. Reasonable delay by any person in permitting the examination of a record in order to seek an injunction under this section is not a violation of this Act, if such person believes in good faith that he is entitled to an injunction restraining the examination of such record.

"Section 11. If it is determined that any provision of this Act would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information."

The above exemptions from Senate File 537 become exemptions to Senate File 536 through section one of Senate File 536 where they are not otherwise expressly stated as exemptions.

It therefore is my opinion that the Board of Social Welfare must conduct open meetings in every instance except where an exemption, as outlined in this opinion, would allow closed meetings.

August 25, 1967

BANKS AND BANKING: PUBLIC FUNDS.

1. §453.6 prescribing the limitations on the rate of interest to be determined by public officials and bank applies to time deposits of §453.9 and §453.10 funds.

2. The exception specified in §453.5 pertains to the requirement of proffer and not to the limitations placed on interest rates.

3. Iowa banks may not pay interest on time deposits of less than 90 days. §528.11 as amended.

4. The rate of interest is to be determined before the funds are invested in time deposits and unless the agreemnt clearly states otherwise the rate is to be constant during the period of such deposit. (Nolan to Chrystal, Sup't. of Banking, 8/25/67) #67-8-24

Mr. John Chrystal, Superintendent, Department of Banking: This is in answer to the request for an opinion on several questions submitted by Deputy Superintendent Holmes Foster in two letters concerning the proper interpretation of §453.6 of the Code as amended by H.F. 697 recently enacted by the 62nd G. A. The questions presented are as fololws:

1. Whether public funds of kinds referred to in §§453.9 and 453.10 of the Code are subject to the provisions of §453.6 as amended by H.F. 697 when invested in bank time certificates of deposit, that is may the bank pay and the public body or officer receive a rate of interest on such funds which may exceed or which may be more than one percent below the rate established as payable on state funds?

2. When invested in bank time certificates of deposit are such funds subject to the rate set in accordance with §453.6 by virtue of the exception from §453.5?

3. Does an Iowa bank have power under §528.11 as amended to accept such funds in a time certificate of deposit for periods of less than ninety days?

4. Is the rate of interest fixed as payable on funds invested in time certificates of deposit by the political subdivisions of this state in accordance with §453.6 of the Code as amended by H.F. 697 to be the rate paid to the maturity of the certificate issued or renewed during the period for which the rate is fixed or is it to be the rate earned during the period fixed on all outstanding certificates regardless of the rate prevailing at issue?

In answer to the above questions I wish to advise as follows:

1. Both §453.9 and §453.10 provide for the making of time deposits as provided in Chapter 453 and the receiving of time certificates of deposit therefor. The section pertaining to the making of time deposits is §453.6 which, as amended by H.F. 697, now reads as follows:

"Henceforth public deposits shall be deposited with reasonable promptness and shall except for time certificates of deposit be evidenced by a pass book entry by the depository legally designated as depository for such funds.

"A committee composed of the superintendent of banking, the commissioner of insurance and the treasurer of the state shall meet on or about the first of each month and by a majority action shall establish the rate to be earned on state funds placed in time deposits during the period until the next meeting of the committee. State funds invested by the treasurer of the state in bank time certificates of deposit shall draw interest at the rate so determined, effective on the date of the investment.

"Public funds invested in bank time certificates of deposit by a public body or officer other than the treasurer of state shall draw interest at rates to be determined by the public body or officer and the bank, which rates shall not be greater than the rate set under this section for state funds nor more than one (1) percent of interest below that rate."

In my opinion the statute set out above clearly applies to §453.9 and §453.10 funds and the limitations contained therein is controlling as to rate of interest to be determined by the public official and the bank.

2. The exception for §453.9 and 453.10 funds which is contained in §453.5 relates to the requirement that a proffer of public funds be made to duly approved banks before investments are made in interest-bearing notes, certificates or bonds of the United States and not to the limitations on interest rate specified in §453.6.

3. While it appears that Iowa banks may accept time deposits of §453.9 and §453.10 funds for periods of less than 90 days, I find no authority for such banks to pay interest on time deposits for periods less than 90 days. §528.11, as amended clearly provides:

". . . No interest in any event shall be paid upon time deposits other than savings deposits for any period less than ninety (90) days."

4. It is my opinion that §453.6 requires that rate of interest be determined before the funds are invested and that unless the agreement to make such time deposit clearly states otherwise that such rate shall be constant rather than variable during the period of such deposit.

August 25, 1967

BANKS AND BANKING: CREDIT UNIONS. 1. Credit Unions may not deposit funds with the central credit union as an investment under §533.4. 2. They may invest in the shares of the central credit union to the limit prescribed by statute. (Nolan to Chrystal, Sup't., Dept. of Banking, 8/25/67) #67-8-25

Mr. John Chrystal, Superintendent, Department of Banking: This is in reply to a request for advice on several questions pertaining to investment of funds by credit unions as follows:

1. Whether a credit union which is a member of a central credit union is prohibited by §533.4(4) or any other section of the law from making a deposit of its funds with the credit union as distinguished from investing in its shares.

2. Would §533.4(4) limit the aggregate investment by a single credit union in the shares of building and loan associations and the shares and deposits of other credit unions to twenty-five percent of its capital?

It is my opinion that the first question must be answered in the affirmative. §533.4 provides:

"A credit union shall have the following powers to:

* * *

"4. Deposit in state and national banks and, to an extent which shall not exceed twenty-five percent (25%) of its capital, invest in the paid-up shares of building and loan associations and of other credit unions."

Where the statute is written in clear and explicit terms, it is the policy of the courts to regard the statute as meaning what it says and to avoid giving it any other construction than that which the words demand. 1954 O.A.G. 24. It is therefore my opinion that the credit unions may not make deposits of funds with the central credit union, but may invest in the shares of such credit union up to the twenty-five percent (25%) of capital allowed by the statute.

Since we have stated above that the law appears to prohibit the deposit of credit union funds in another credit union the second question becomes moot.

August 28, 1967

GENERAL ASSEMBLY: ITS LAW MAKING POWERS AND OTHERWISE. The constitutional duty of the General Assembly in making laws is performed when such laws are signed by the President of the Senate, Speaker of the House and approved by the Governor and then known as statutes. However, in giving expression to the legislative will not amounting to a law the General Assembly uses resolutions, either a simple resolution, or a concurrent resolution, or a joint resolution, whose respective use is described. (Strauss to Robinson, Secretary, Executive Council, 8/28/67). #67-8-23.

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa. Reference is herein made to yours of the 31st ult. in which you submitted the following:

"I have been directed by the Executive Council, in their meeting of July 25, 1967, to request from you an opinion as to the legal distinction between a resolution and a statute, and whether or not a resolution has the force or effect of law."

As far as the distinction between a statute and the resolution is concerned it is to be said that the making of laws is the constitutional function of the legislature and the performance of this function is represented by statutes. The result of a Bill originating in either House of the Legislature and passed by both Houses, signed by the Speaker and the President of the Senate, is a law when approved by the Governor. On the other hand, a resolution of the legislature may be a simple resolution, or a concurrent resolution, or a joint resolution, and these are used "in giving expression to the legislative will in subsidiary and incidental matters." Iowa Manual of Legislative Procedure, Third Edition. These several resolutions are described therein on page 27 as follows:

"A simple resolution is to be distinguished from an ordinary motion by its form; it is above an ordinary motion in formal dignity. A concurrent resolution is similar to a simple resolution, except that it is adopted by both branches of the legislature, instead of by just one house: it expresses the action of the legislature as one body, while a simple resolution expresses the action of but one of the branches of the legislature. A joint resolution is above a concurrent resolution in formal dignity and, although it is similar to a concurrent resolution, it has thrown around it all the formalities of a bill and passes through all the stages that a bill passes through: it is, in addition to the ordinary use of the resolution, employed for the making of temporary laws, for proposing amendments to the Constitution, and for administrative orders."

With respect to concurrent resolutions and their use by the General Assembly, the foregoing Manual at pages 30 and 31 states:

"Concurrent resolutions do not differ greatly in their function from simple resolutions, except that they express the will of the whole legislature. By them joint conventions and sessions are arranged; Congress is memorialized to take some action; recommendations for amendments to the Federal Constitution are suggested; final adjournment and recesses beyond the constitutional limit during the session are provided; and joint rules are adopted. Moreover, conveniences for the legislature are established by concurrent resolution, such as providing for mail service and for parking facilities during the session. *Furthermore, the concurrent resolution is used for issuing administrative orders.* For example, by it the Superintendent of Printing is directed to furnish copies of different publications of the State, such as the Code, the session laws, legislative bills and journals to county officials and members of the press. This use of the concurrent resolution approaches very near to the character of law-making, and will be discussed later in that connection."

And on page 38 thereof specific uses by the General Assembly of the concurrent resolution is exhibited:

"Even to this day the General Assembly does in certain instances control and direct the affairs and property of the State by concurrent resolution. For example, the 1945 session of the legislature directed the Superintendent of Printing to deliver to each county auditor the daily legislative journals and copies of bills introduced. In like manner the rules are

ordered printed and bound. Moreover, by concurrent resolution certain officers of each house are authorized to remain at the capitol to wind up the affairs of the legislature after its adjournment. While all measures of this type are of a law-making character, the procedure involved in their adoption is much different from that employed in the case of legislation resulting from bills or joint resolutions. The latter pass through a first, second, and third reading and are presented to the Governor for his approval; but concurrent resolutions are simply offered, adopted, and concurred in by the other branch of the legislature — their primary use being not the making of law, but the expression of the legislative will in subsidiary and incidental matters."

As far as the effect these several resolutions have as law, it is to be said that the will of the legislature as expressed by joint resolution is considered by the courts not to have the force and effect of the law. It is nevertheless an effective means of expresisng the will of the legislature for administrative purposes and such may be enforced. 49 Am. Jur., States, Territories, and Dependencies, page 254 states:

"Although the Constitution provides, generally, that laws shall be enacted otherwise than by resolution, it may also sanction the performance of particular acts by the legislature which may be carried into effect by a joint resolution. Thus, where a state Constitution provided that a proposed city charter should be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and, if approved by a majority vote of the members elected to each house, it should become the charter of such city, it was held that a joint resolution approving the charter was sufficient to render it valid. It has also been held that a resolution of the legislature in conflict with an existing law is invalid and of no effect. Even though a joint resolution may not have the force and effect of law, it is nevertheless an effective means of expressing the will of the legislature for administrative purposes, and, as such, it may be enforced."

And this rule does not appear to embrace concurrent resolutions.

Ordinarily, resolutions are stated to be such in the title and immediately following the title commence with the words "Be It *Resolved* by the General Assembly of the State of Iowa." But quite often what appears from the title to be called a resolution is followed by the words "Be It *Enacted* by the General Assembly of the State of Iowa." In such instances, the so-called resolution becomes a law when approved by the Governor. Article III, §1, Constitution of Iowa.

September 9, 1967

DOMESTIC LAW — ISSUANCE OF MARRIAGE LICENSE: §595.3(5), 1966 Code of Iowa. Clerk of Court cannot issue marriage license to a person who has been released from a mental institute as not cured until such person receives a certificate from the superintendent of the institution from which he was discharged as having regained his good mental health. (Seckington to Fenton, Polk County Attorney, 9/8/67) #67/9/1

Mr. Ray A. Fenton, Polk County Attorney: This is in response to your letter of August 7, 1967, wherein you ask the following question:

"This concerns a patient who was committed to the Mental Health Institute at Clarinda as a Criminal Sexual Psychopath and subsequently discharged as 'not cured.' He and a lady ex-patient applied for a marriage license and Mrs. Doty, the license clerk noting the terms of his discharge, doubted the legality of issuing a license.

"The Clerk of the District Court now desires an Attorney General's Opinion on whether a license may be issued to a patient whose discharge is thus qualified and, in particular, a patient whose commitment has been effected under the Criminal Sexual Psychopath Act."

After we received the above letter, I checked with the Board of Control about the patient in question. According to their file, the patient had been committed to the Clarinda Mental Health Institute not as a Criminal Sexual Psychopath but as a mentally ill person. Therefore, this letter will not answer your request on the basis of the Criminal Sexual Psychopathic law, but on the basis of the patient being a mentally ill person.

§595.3, 1966 Code of Iowa, provides:

"Previous to the solemnization of any marriage, a license for that purpose must be obtained from the Clerk of the District Court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case:

". . . 5. Where either party is mentally ill or retarded, a mental retardate, or under guardianship as an incompetent."

The patient in question here was discharged as not cured. This is done pursuant to §226.24, 1966 Code of Iowa, which provides:

"When a patient is discharged at a time when he has not fully recovered his good mental health, he may at any time, under such rules as the board of control may prescribe, apply to the superintendent of the hospital where he was confined for a certificate of recovery. The superintendent, under like rules, shall examine such person or cause such examination to be made and if satisfied that such person has regained his good mental health, shall issue duplicate certificates showing such recovery."

§226.25, 1966 Code of Iowa, provides:

"The duplicate certificates mentioned in §226.24 shall be delivered as in case of a discharge when cured, and the same record shall be made with the same effect."

The record made, as quoted in the above section, has reference to §§226.19, 226.20 and 226.21, 1966 Code of Iowa. Those sections are as follows:

"226.19 Discharge — certificate. All patients shall be discharged immediately on regaining their good mental health and the superintendent shall issue duplicate certificates of full recovery, one of which he shall deliver to the recovered patient, and the other of which he shall forward to the clerk of the district court of the county from which the patient was committed."

"226.20 Duty of clerk. The said clerk shall, immediately on receipt of such certificate, record the same at length in the record of the proceedings against said party as a mentally ill person."

"226.21 Certificate and record as evidence. Either of said certificates or the record thereof shall be presumptive evidence of the recovery of such person and shall restore him to all his civil rights."

The last quoted section refers to the fact that the person so discharged is restored to all his civil rights. This, we think, includes the right to receive a marriage license under §595.3, 1966 Code of Iowa.

In answer to your question, we think that until the patient receives a certificate showing that he has regained his good mental health, he is not entitled to a license to marry under §595.3, 1966 Code of Iowa. Therefore, the Clerk of the District Court should not issue said license until such time as the patient receives the necessary certificate.

September 12, 1967

WELFARE: Uniform Support of Dependents Law — Chapter 252A, 1966 Code of Iowa. Procedure for bringing action pursuant to this chapter when both petitioner and respondent live in Iowa, but different counties. (Supplementing Informal Attorney General's opinion, dated July 10, 1967.) (Williams to Ramsay, Winnebago County Attorney, 9/12/67) #67/9/3

Mr. Richard C. Ramsay, Esq., Winnebago County Attorney: I have your request for an opinion as to the procedure to be followed in connection with an action under the Uniform Support of Dependents Law, Chapter 252A, 1966 Code. In your request you cite the following facts:

"Petitioner is a resident of Cerro Gordo County, Iowa, and the Respondent is a resident of Winnebago County, Iowa. Petitioner filed her petition in Cerro Gordo District Court for the support of a minor child, alleged to be the child of the Respondent. The Cerro Gordo Court entered its order finding that jurisdiction could not be had on Respondent in Cerro Gordo and that copies of the petition, etc., should be forwarded to Winnebago County where the Respondent lived.

". . . It would seem that the Petitioner and her witnesses must travel to the Respondent's county or that the Respondent and his witnesses must travel to Petitioner's county if the evidence is to be taken other than with depositions."

Your attention is called to the Attorney General's opinion on this subject, dated July 10, 1967 and to the decision of the Supreme Court of Iowa therein cited.

Since Section 252A.5, Subsection 1 specifically permits this proceeding to be brought "where the petitioner and the respondent are residents of or domiciled or found in the same state" and Section 252A.6, 1966 Code of Iowa, outlines the manner of commencement of action and trial, the procedure is the same whether the action is intrastate or interstate. The Rules of Civil Procedure as to the acquiring of jurisdiction of the respondent (by giving the notice "summons" to the respondent) equally applies. (Section 252A.6, Subsection 2, 1966 Code of Iowa) The subsequent subsections of said Section 252A of the 1966 Code also apply, whether the action is intrastate or interstate.

Therefore, to be specific in your particular case, when you file your petition in Cerro Gordo County, if the Court finds that the petitioner is a dependent of the respondent, it should so certify in an order. (Section 252A.6, Subsection 3, 1966 Code of Iowa). You should then cause three copies of (a) the petition, (b) the order — "certificate" of dependency and (c) a copy of the chapter to be transmitted to the District Court in Winnebago County, even though the initiating state and the responding state are in this instance both the state of Iowa. (Section 252A.6, subsection 3, 1966 Code of Iowa.)

The Clerk of the District Court in Winnebago County should then docket the cause as an original action and notify the County Attorney, who is to act as petition representative. (Section 252A.6, subsection 4, 1966 Code of Iowa). The County Attorney should then procure an order from the Court setting a time and place for hearing in accordance with the laws of this state with due regard to the time before which a defendant is required to respond following the service of an original notice. (See R.C.P. 50, 52, 53, 56 and 57.) A copy of said order for hearing, "summons," together with the original notice required to be served on a defendant, should then be served upon the respondent. (See R.C.P. 50, 52, 53, 56 and 57.)

At the hearing, as provided in Section 252A.6, Subsection 5, 1966 Code of Iowa the County Attorney shall appear for the petitioner and the petitioner and her witnesses need not appear. At that hearing, inquiry shall be made as to the respondent's ability to pay support for his dependent, and at said hearing the respondent may interpose any defense he may have to the action.

As provided in Section 252A.6, Subsection 6, 1966 Code of Iowa, if the respondent controverts the petition and enters a verified denial of any or all of the material allegations thereof, the presiding Judge of the District Court in Winnebago County, Iowa should then stay the proceeding and transmit to the Judge of the District Court of Cerro Gordo County a transcript of the clerk's minutes showing the denial entered by the respondent. (Section 252A.6, Subsection 6, 1966 Code of Iowa).

The following subsections of Section 252A.6, 1966 Code of Iowa, then outline the procedure to be followed by the District Court in Cerro Gordo County (as the "initiating state") and the District Court in Winnebago County (as the "responding state") in bringing the case to a final determination. In the event however that the respondent does not controvert the petition the order for support entered by the District Court in Winnebago County will determine the matter and pursuant to an execution garnishment proceedings or attachment proceedings against the property of the respondent may be brought. Or an action for contempt of court may be brought in the event of willful disobedience of the order of court.

If one keeps in mind that the words relating to the courts of the "initiating state" and "responding state" both refer to Iowa in intrastate proceedings, there will be no difficulty in carrying out the statutory procedure.

I trust that this interpretation of the statute is clearly expressed but if you have further questions, please feel free to write again.

September 12, 1967

DISTRICT JUDGES, NINTH JUDICIAL DISTRICT, Senate File 283, 62nd G. A. The Ninth Judicial District, in addition to the number of judges it is entitled to by virtue of the provisions of Section 2(2) of S.F. 283, is entitled to one other judge. (Strauss to Synhorst, 9/12/67) #67-9-2.

The Hon. Melvin D. Synhorst, Secretary of State: Acknowledgment is made of yours of the 28th ult. in which you stated:

"Does a vacancy exist in the district court of the Ninth Judicial District pursuant to the provisions of S.F. 283, Acts of the Sixty-second General Assembly such as would require the Secretary of State to notify Chairman of the Ninth Judicial district nominating commission in accordance with the provisions of Sec. 46.12, Code of Iowa, 1966, that such a vacancy has occurred?"

It has been the view of the Supreme Court that upon the creation of an office by the General Assembly a vacancy occurs, which vacancy is subject to being filled in the manner provided by law. This rule is recognized by an opinion of this department appearing in the Report for 1960 at page 87, 88, stating as follows:

"Chapter 354, Acts of the Fifty-eighth General Assembly, provided for an increase in the number of District Court Judges in Polk County from seven to eight. The Governor appointed a Judge to fill his eighth position 'until a successor is elected and qualified, in accordance with the provisions of Section 69.8(2) and 69.11, Code 1958, and Senate File 302, Acts of the 58th General Assembly.'

"What will be the commencement and length of the term of the Judge who is elected by Polk County voters at the November 8, 1960 General Election to fill this newly created Judgeship?

"The other seven District Judges in Polk County will be elected for four year terms starting in January, 1963.

"If there will be a new four year term starting in January, 1961, will it then be necessary to elect a Judge for the short term between the November 1960, General Election and January 1961?

"In reply thereto we advise:

"Under the provisions of chapter 354 (S.F. 302) Laws of the 58th General Assembly the number of district judges of the ninth judicial district (Polk County) was increased from seven to eight. A vacancy in office occurs instantly upon the passage and approval of a legislative act, which authorizes the governor to appoint an additional district judge in a named district. (See Schaffner v. Shaw, 191 Iowa 1047, 180 N. W. 853.)"

Insofar as your query involves the question whether a vacancy in the Ninth Judicial District exists, under the provisions of S.F. 283, Acts of the 62nd General Assembly, it is to be said that such act provides in Sec. 2(2) that:

". . . the seat of government shall be entitled to one (1) additional judgeship."

Such statement followed provisions of that section fixing the number of judges to which each of the judicial districts is entitled from time to time, according to the formula set forth therein, to-wit, giving equal weight to cases filed and the population of the districts. The seat of government is the City of Des Moines, Constitution, Art. II, §8.

The numbered bill by title and content deals only with the offices of the district judge and this increase authorized for the seat of government concerns an additional district judge. The seat of government being Des Moines, and the office to be filled being a district judgeship and the City of Des Moines being a city of more than 50,000, it follows that the

Ninth Judicial District will not only be entitled to one judge for 550 combined civil and criminal filings and 40,000 population, or major fraction of either, but in addition thereto one other judge. In other words by applying the formula set forth fixing the number of judges in Sec. 2(2) to the Ninth Judicial District results in such district being entitled to one judgeship in addition to the number it is entitled to under the formula set forth. You are therefor required to notify the Chairman of the Ninth Judicial Nominating Commission in accordance with the provisions of §46.12, Code of 1966, that a vacancy exists in such district.

September 13, 1967

STATE OFFICERS AND DEPARTMENTS: Auditor of State — reports filed — H.F. 697, 62nd G. A. The expression "fiscal year of the political subdivision" as used in §7 of H.F. 697 means the period of twelve consecutive months regularly employed by each of the political subdivisions subject to the provisions of H.F. 697. In the case of municipalities (except Davenport) and counties this would be the calendar year. Insofar as school districts are concerned it would be the year ending June 30. Davenport's fiscal year would be the twelve month period ending March 31. (Haesemeyer to Smith, Auditor of State, 9/13/67) #67-9-4

The Hon. Lloyd R. Smith, Auditor of State: By your letter of August 4, 1967, you have submitted a request for an opinion of this office with respect to the following inquiry:

"House File No. 697, an Act relating to the investment of funds not needed for current expenses of the state and its political subdivisions, was approved by the Governor on June 22, 1967 and published on June 29, 1967.

"Section 7 gives me the responsibility of administering the reports required under this Act. Will you please give me your opinion as to the date to start, and more specifically the meaning of 'providing within fifteen (15) days following the close of each fiscal year of the political subdivisions.'"

Sec. 1 of H.F. 697 broadened §452.10, Code of Iowa, 1966, so that such section provides directions for the safe keeping of funds not only by the state treasurer and each county treasurer but in lieu thereof by the state treasurer and the treasurer of each political subdivision.

Sec. 2 of H.F. 697 amended §453.1, dealing with the deposit of public funds, to make it clear that the words "the treasurer . . . of each county, city, town, and school corporations, . . ." as used in the first clause of the first sentence of such §453.1 have the same meaning as the expression "the treasurer of each political subdivision" as used in the second clause of such first sentence of §453.1 as amended by Sec. 2 of H.F. 697.

Sec. 7 of H.F. 697, the provision which gives rise to your inquiry, provides:

"The treasurer of each political subdivision except townships shall submit an investment report to the auditor of state on forms provided within fifteen (15) days following the close of each fiscal year of the political subdivision. The report shall be comprised of the folowing information, all of which shall relate to the previous calendar year: total demand deposits placed in depositories; total funds invested; description and dis-

position of investments; dates of investments; rates of interest earned or returned on the investments; and such other information as the auditor of state may reasonably require pertaining to public funds."

The question we are therefore required to resolve involves a determination of whether the expression "each fiscal year of the political subdivision" as used in Sec. 7 of H.F. 697 means, (1) the calendar year, (2) a twelve month period ending on June 30th of each year or, (3) some other period of twelve consecutive months.

The existing provisions of law relative to the fiscal years of the state and its various subdivisions are incomplete and in some respects conflicting and contradictory.

Thus §8.36, Code of Iowa, 1966, provides:

"The fiscal year of the government shall commence on the first day of July and end on the thirtieth day of June. This fiscal year shall be used for purposes of making appropriations and of financial reporting and shall be uniformly adopted by all departments and establishments of the government."

Unquestionably Sec. 7 of H.F. 697 is a statutory provision dealing with "financial reporting"; and if it can be said that "political subdivisions" are departments or establishments of the government, §8.36 would seem plainly to fix the fiscal year as the twelve month period ending on June 30th of each year. However, §24.2, Code of Iowa, 1966, provides:

"As used in this chapter and unless otherwise required by the context:
1. The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district.

* * *

4. The words 'fiscal year' shall mean the year ending on the thirtieth day of June, and any other period of twelve months constituting a fiscal period, and ending at any other time, except in the case of school districts it shall be the period of twelve months beginning on the first day of July of the current calendar year."

If the words "political subdivisions" as used in Sec. 7 of H.F. 697 are assigned the same meaning as the word "municipality" as used in §24.2, it would appear that any period of twelve months regardless of when it begins or ends would suffice as a fiscal year for such a political subdivision. However, the definitions set forth in §24.2 are limited by the terms of such §24.2 to instances where such defined terms are used in Chapter 24.

§363.29, Code of Iowa, 1966, provides:

"The fiscal year for all municipal corporations for which taxes are collected through the office of the county treasurer and for all departments, boards, and commissions thereof shall begin on the first day of January each year and shall end on December 31 following."

The expression "political subdivisions" as used in §§452.10 and 453.1 as amended by H.F. 697 certainly is a much broader term than the words "municipal corporations for which taxes are collected through the office of the county treasurer and . . . all departments, boards, and commis-

sions thereof" which are contained in §363.29. Nevertheless, to the extent that municipalities and their departments fall within the broader expression "political subdivisions," §363.29 does indicate that the appropriate fiscal year is the calendar year, and in actual practice all municipalities, with the exception of Davenport, are on a calendar year basis. Davenport is not bound by the provisions of §363.29 because it is not a municipal corporation "for which taxes are collected through the office of the county treasurer" and has in the past operated on a fiscal year ending on March 31 of each year.

In our opinion §8.36 has no application because political subdivisions are not departments or establishments of the government. The definition of fiscal year contained in §24.2, subsection 4, is of no assistance in construing H.F. 697 because as we have seen the definitions contained in §24.2 are limited in their application by such §24.2 to instances where such terms are used in Chapter 24. §363.29 which establishes that the fiscal year of municipal corporations (except Davenport) and their departments is the calendar year is of but limited helpfulness since a municipality is only one of a number of political entities and instrumentalities which may be described as falling within the general class of political subdivisions.

Hence, we are left with no clear statutory requirements with respect to the fiscal years of counties and school districts. In practice the counties have all adopted the calendar year as their fiscal year and school districts have traditionally been on a fiscal year ending on June 30 of each year. Thus in actual practice three different fiscal years are in use by political subdivisions of the state and in our opinion the expression "fiscal year of the political subdivision" as used in Sec. 7 of H.F. 697 means the period of twelve consecutive months regularly employed by each of the political subdivisions subject to the provisions of H.F. 697. In the case of municipalities and counties this would be the calendar year. Insofar as school districts are concerned it would be the year ending June 30. Davenport's fiscal year would be the twelve month period ending March 31.

Support for this conclusion that the expression "fiscal year" was to have a different meaning depending on the particular political subdivision involved in each case is to be found in the language of Sec. 7 itself. If the framers of H.F. 697 had intended that the fiscal year in all cases was to be the "calendar year" they would have used those words as they did in the second sentence of Sec. 7. If "fiscal year" was intended to mean the twelve months period ending June 30 it would have been much clearer and simpler to say in the first sentence of Sec. 7 "on or before July 15 of each year" instead of "within fifteen (15) days following the close of each fiscal year of the political subdivision." Since it must be presumed that the legislature used the language it did by design and with some purpose in mind, we conclude that the general assembly must have had in mind the fact that the various political subdivisions have different fiscal years.

As indicated in your letter H.F. 697 became law on June 29, 1967. Accordingly, the first report required to be filed with the auditor of state by school districts should cover the calendar year 1966 and be filed as

soon as practicable. Municipalities and counties should file their first reports by January 15, 1968, and such reports should relate to the calendar year 1967. Davenport's first report for the calendar year 1967 should be filed not later than April 15, 1968.

September 15, 1967

STATE SANITORIUM — County Payments: §271.17, 1966 Code of Iowa. County liable for payment must pay from the poor fund pursuant to §§255.16, 255.20, 255.21, 255.22, 255.24, 255.25 and 255.26, 1966 Code of Iowa, which sections are incorporated in §271.17(1), 1966 Code of Iowa. The county cannot pay from the Institutional Fund, §444.12, 1966 Code of Iowa. (Seckington to Jansen, Johnson County Attorney, 9/15/67) #67-9-8

Mr. R. W. Jansen, Johnson County Attorney: This is in response to your letter of June 29, 1967, wherein you ask the following question:

"Whether a bill for treatment of indigent patients at the Alcoholic Treatment Center at Oakdale should be paid by the County Auditor from the Poor Fund or the Institutional Fund?"

In response thereto, please find enclosed the Attorney General Opinion dated July 6, 1967, from David B. Hendrickson to Mr. William Faches, Linn County Attorney. So far as that opinion applies to your question, it is incorporated herein.

The method of payment for the second and third classes of patients referred to in the above cited opinion is self-explanatory. Therefore, the following will be applicable to the first class of patients referred to in the above cited opinion.

Section 271.17(1) incorporates §§255.16, 255.20, 255.21, 255.22, 255.24, 255.25 and 255.26, 1966 Code of Iowa. Section 255.26, 1966 Code of Iowa, is the pertinent section, the second paragraph of which provides:

"The county auditor, upon receipt of such certificate, shall thereupon enter the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer authorizing him to transfer the amount from the poor or county fund to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer; and he shall include the amount so transferred in his next remittance of state taxes to the treasurer of state, to accrue to the credit of the university hospital fund."

Since that section is the one to be used for payment by the county for patients admitted pursuant to §271.17(1), 1966 Code of Iowa, it is clear that the payment should be made from the poor fund and not the Institutional Fund.

This conclusion is supported by a reading of §444.12, 1966 Code of Iowa, which provides in part:

"The board of supervisors for each county shall establish a state institution fund and shall at the time of levying other taxes, estimate the amount necessary to meet the expense in the coming year of maintaining county patients, including cost of commitment and transportation of patients at the Mount Pleasant Mental Health Institute, Independence Mental Health Institute, Cherokee Mental Health Institute, Clarinda Mental Health Institute, the state sanatorium for the treatment of tuberculosis at Oakdale or any similar tuberculosis institution established and main-

tained by any county under the provisions of chapter 254, the Glenwood state hospital-school, the Woodward state hospital-school, the Iowa juvenile home at Toledo, The Iowa Annie Wittenmyer Home at Davenport, the Iowa braille and sight-saving school at Vinton, the school for the deaf at Council Bluffs, the state psychopathic hospital at Iowa City, and for the establishment of a community mental health center as provided in section 230.24, and for the support of such mentally ill or mentally retarded persons as are cared for and supported by the county in the county home or elsewhere outside of any state hospital for the mentally ill or mentally retarded, shall levy a tax therefor. Cost of outpatient care of tuberculosis patients administered under the supervision of a tuberculosis sanatorium may be paid from the state institution fund. *Said fund shall not be diverted to any other purpose . . .*"

The pertinent part of §444.12, 1966 Code of Iowa being quoted above, it is clear that this fund cannot be used to pay for any patient at Oakdale except a tubercular patient. All other patients must be paid for in accordance with §271.17, 1966 Code of Iowa and sections incorporated therein.

Therefore, it is our opinion that a bill for treatment of indigent patients at the Alcoholic Treatment Center must be paid from the Poor Fund, unless they are patients of the second or third class, in which case payment is made as outlined in the enclosed opinion.

September 15, 1967

TAXATION: Moneys and Credits — §§422.62, 422.71, Code of Iowa, 1966. Nowhere in the Code of Iowa is any procedure, either expressly or impliedly, set forth pertaining to the correction of errors made in the 1965 abstract of assessment in regard to the percentage payments each county would receive from the moneys and credits replacement fund. The procedural remedy, if any, for correction of errors upon which a claim for replacement of moneys and credits is based is a matter for the Legislature.

Mr. E. Michael Carr, Delaware County Attorney: This is to acknowledge receipt of your letter of September 1, 1967, in which you requested an opinion as follows:

"When Delaware County submitted to the State Tax Commission its 1965 abstract upon which the claim for replacement of moneys and credits is based this abstract was short by $475,711.00. This has been checked and reviewed numerous times by the County Auditor and County Assessor and has been confirmed by them.

"There has been correspondence between Ballard Tipton of the State Tax Commission and Frank J. McSpadden, the Delaware County Assessor, as to how this error might be corrected as it is our understanding that the 1965 abstract serves as the basis for the Moneys and Credits Replacement funds received from the state.

"It is estimated that this error if not corrected could cost Delaware County approximately $2,000.00 per year indefinitely. We request an opinion from you as to what procedural steps should be taken to correct this error."

Section 422.62, Code of Iowa, 1966, provides in part that the amount of the proceeds of the additional tax imposed by Section 422.5(6) shall be certified by the State Tax Commission to the State Treasurer and the amount thereof withdrawn and credited to a permanent fund created in the Treasurer's Office to be known as the "Moneys and Credits Tax Replacement Fund."

Section 422.5(6), Code of Iowa, 1966, provides:

"422.5(6). In addition to the tax imposed in subsection 5 hereof, on all taxable income in excess of nine thousand dollars, three-fourths percent. This additional tax shall be effective for all taxable years ending after January 1, 1965, except that for taxable years beginning before January 1, 1965, and ending thereafter, shall be collected on the basis of the proportion which the number of months in any such fiscal year, commencing with the month of January, 1965, bears to the total year. This additional tax shall be in lieu of all taxes imposed by section 429.2 on the property therein described of individuals, administrators, executors, guardians, conservators, trustees or an agent or nominee thereof."

Section 422.71, Code of Iowa, 1966, provides:

"422.71. Allocation to moneys and credits replacement fund in each county. The commission shall determine the percentage which the aggregate taxable value for the year 1965 of the property described in and subject to taxation under section 429.2 owned or held by individuals, administrators, executors, guardians, conservators, trustees or an agent or nominee thereof, and the aggregate taxable value for the year 1965 of the property described in and subject to taxation under Section 431.1 for the year 1965 but not subject to taxation under said section for the year 1966, in each county bears to the total aggregate taxable value of such property reported from all of the counties in the state and shall certify the percentage for each county to the state comptroller prior to January 1, 1967. In January of 1967 and in January of each succeeding year thereafter, the state comptroller shall apply said percentage to the money which shall have accumulated in the moneys and credits tax replacement fund prior to such January and thereby determine the amount thereof due to each county. The state comptroller shall draw warrants on the moneys and credits tax replacement fund in such amounts payable to the county treasurer of each county and transmit them. The county treasurer shall apportion these amounts in the manner provided in section 429.3 in the proportions the moneys and credits tax replacement fund has been allocated to each taxing district as shown by the information furnished to the county treasurer by the county auditor."

A careful reading of Section 422.71 shows that the Legislature "froze" the percentage which each county would be entitled to receive from the moneys and credits tax replacement fund. This percentage payment is based upon what the taxable value reported by each county for the year 1965 for the property described in Section 422.71 bears to the aggregate taxable value of such property reported from all counties in the State for the year 1965. The State Tax Commission, pursuant to Section 422.71, has determined such percentage for each county based upon the taxable values of the property for the year 1965 as shown by the 1965 abstracts certified, pursuant to Section 441.45, to the Commission by the various county assessors.

Nowhere in the Code of Iowa is any procedure, either expressly or impliedly, set forth pertaining to the correction of errors made in the 1965 abstract in regard to the percentage payments each county would receive from the moneys and credits replacement fund. Section 422.71 provides for fixed percentage payments not only for the year 1967, but for all succeeding years thereafter. Thus, the procedural remedy, if any, would be a matter for the Legislature.

September 15, 1967

WELFARE — Work as a condition of granting relief — §§252.27, 252.42, 1966 Code of Iowa. County Board of Supervisors may require persons receiving public assistance to work only on streets or highways at the prevailing hourly wage rate or on joint projects between county and cities, towns or United States government. (D. B. Hendrickson to Letz, Hardin County Attorney, 9/15/67) #67-9-10

Mr. Carl R. Letz, Hardin County Attorney: This will acknowledge your letter of July 27, 1967, in which you request an opinion of this office. Your question is herein set forth as presented:

"The Director of the Department of Social Welfare of Hardin County, Iowa, has requested legal advice from me as to the legality of a program he wishes to institute in Hardin County, Iowa.

"The proposed program would require persons receiving public assistance in any form to work on County parks under the supervision of the County Conservation Board for a rate of compensation of $1.25 per hour, the theory being that this would reduce the amount of public assistance to the recipient and would further encourage the recipient to find more productive employment.

"I have advised the Director that I would request your opinion on this matter.

"§252.27 of the Iowa Code lends some support to this type of project, however, under that section statutory authority is granted only to the extent that recipients may be required to work upon the streets or highways at the prevailing local rate per hour as a condition of receiving relief. This section does not, it seems to me, encompass the County parks, nor does said section support the hourly rate proposal.

"Also §252.42 states that the County Board of Supervisors shall have the power to use the poor fund to join and cooperate with the United States Government and/or cities and towns within their boundaries or both in sponsoring work projects. My Director relies heavily upon this section. However, it seems to me that said section does not fully give authority for the project proposed, and I respectfully request your opinion as to this problem presented."

The two Code sections are as follows: Section 252.27 of the Code of Iowa (1966):

"Form of relief — condition. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money. The amount of assistance issued to meet the needs of the person shall be determined by standards of assistance established by the county boards of supervisors. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

Section 252.42 of the Code of Iowa (1966):

"Co-operation on work-relief projects. Notwithstanding the provisions of any laws to the contrary, the county board of supervisors shall have the power to use the poor fund to join and co-operate with the United States government, and/or cities and towns within their boundaries, or both the United States government and cities and towns within their boundaries, in sponsoring work projects, provided that the money used from the poor fund for such purposes does not exceed the cost per month

of supplying relief to the certified persons working on projects who would be receiving direct relief if they were not employed on said work projects."

The plain language of Chapter 252.27 indicates that the County Board of Supervisors may require able-bodied persons to work on streets and highways. This section does not authorize work projects other than those projects that are connected with or in conjunction with streets and highways.

This office has previously ruled that amounts paid such persons performing work on streets and highways shall be paid out of secondary road funds and not the poor fund. 1932 O.A.G. 117. However, the statute states that the amounts paid shall be determined by the prevailing hourly rate and therefore, if the proposed payment of $1.25 per hour does not reflect the prevailing hourly rate for such work in the community, then it is our opinion that the proposal as presented to us by your letter can not be put in force under the provisions of Chapter 252.27, 1966 Code of Iowa.

You made further inquiry whether such proposal may be instituted pursuant to the provisions of Chapter 252.42 as above quoted.

Chapter 252.42 authorizes the County Board of Supervisors to expend funds from the county poor fund when the County Board of Supervisors deems it in the best interest of the county to join with a city, town or the United States government in a joint work project.

The proposal as outlined in your letter does not, in our opinion, reflect a joint project with a city or town or with the United States government, but rather, such project would be work done for another county board, as such. Therefore, if this is not a joint project, then the only authority for such project, in our opinion, would be Chapter 252.27 which, as we have already stated, could not be used since Chapter 252.27 allows the County Board of Supervisors to require recipients of welfare to work on streets and highways at the prevailing hourly rate.

Aside from Chapter 252.27 and Chapter 252.42, we find no authority for a project as suggested in your letter.

September 15, 1967

MOTOR VEHICLES: Dismantled or destroyed vehicles — §§321.52, 321.126, 321.128, Code of Iowa, 1966. When is a motor vehicle dismantled or destroyed and its identity eliminated?

Mr. Jack H. Leverenz, Deputy Commissioner, Department of Public Safety: We have your recent letter wherein you state as follows:

"Pertaining to a dismantled vehicle, Section 321.52, Subsection 1, of the Iowa Code states in part:

" 'When a vehicle is permanently dismantled or destroyed so that it can no longer be used on the public highway or is sold by the owner, dealer or otherwise, for junk, . . .'

"Section 321.126, Subsection 1, states:

" 'Such vehicle is destroyed by fire or accident, or junked and its identity as a motor vehicle entirely eliminated or removed and continuously used beyond the boundaries of the state, . . .'

"Section 321.128 states:

" 'The department is hereby authorized to make such payments according to the above provisions, when sufficient proof of such destruction by accident, or the junking and entire elimination of identity as a motor vehicle, . . .'

You have also stated:

"Due to the construction of modern day automobiles, it is imperative that we change our requirements for dismantling. Presently a vehicle with a unitized body, if dismantled to the extent that the remainder of the body after the salvageable parts have been removed is cut immediately ahead of the firewall, it completely destroys the value of the remaining unitized body which would be considered the body and frame on a standard type motor vehicle. Changing the manual to comply with a standard for all automobiles, we have considered that a dismantled vehicle could include the remaining portion of the body and connected frame or in the case of a unitized body that particular part."

You have also asked the following questions:

"Is the determination that a vehicle which has had the motor, transmission, differential, and/or other salvageable parts removed and which has the only remaining parts attached described as the body and the frame, or the unitized body, if applicable, and which has the front portion of the vehicle entirely removed including the hood, front running gear, and the motor, and other parts with the exception of the frame, properly defined as a dismantled motor vehicle for the aforementioned procedures in motor vehicle registration?"

"If this vehicle is dismantled under Section 321.52, and if there will be an application for a refund for the registration of this dismantled vehicle, to what descriptive degree must it be dismantled to be included under Section 321.126 as having its identity as a motor vehicle entirely eliminated?' "

"For purposes of administration of motor vehicle registration are the phrases in the respective aforementioned questions, 'dismantled vehicle which can no longer be used on the public highways,' 'identity as a motor vehicle entirely eliminated,' and 'the entire elimination of identity as a motor vehicle,' synonymous?"

In answer to your first question, it seems to me that a determination that a vehicle has had the motor, transmission, differential and the front of the vehicle entirely removed including the hood and front running gear and which has as its remaining parts the body and the frame, or the unitized body, would properly be defined as a dismantled motor vehicle for the purposes and procedures involved in a refund of fees.

Secondly, if this vehicle is dismantled as above provided, it would be sufficient to include it under §321.126, Iowa Code, 1966, as having "its identity as a motor vehicle entirely eliminated."

In answer to your third question, for purposes of administering the motor vehicle law the two phrases, "dismantled vehicle which can no longer be used on the public highways" and "identity as a motor vehicle entirely eliminated" are equally applicable for the registration of motor vehicles or for the purpose of authorizing the issuance of a refund.

The above description provided in the answer to question one would comply with any one of the three sections, §321.52, or §321.126, or §321.128.

September 15, 1967

CHILD WELFARE SERVICES: Foster Care — Day Care — Use of federal and state funds by Iowa State Social Welfare Department: Chapter 235, 1966 Code of Iowa. (Williams to Peterson, Black Hawk County Attorney, 9/14/67) #67/9/5

Mr. Roger F. Peterson, Esq., Black Hawk County Attorney: You have asked for an informal Attorney General's Opinion concerning the use of federal and state money for children who are in a day care center from funds received under the foster care program. In your letter you state:

"Black Hawk County has established a day care center which was under the supervision and control of the Iowa State Department of Social Welfare, and which was discontinued as of the 1st of July, 1967. This was financed by the said Department with funds other than county funds.

"They have requested from you an opinion as to whether they have the authority to continue the day care center with funds from the foster care program. I would like to note the opinion that was dated July 6, 1964, which concerned this matter to the same Board from the Attorney General. However, I believe that this involved entering into a contract with an outside agency for the provision of this service."

There are two Attorney General's Opinions seemingly somewhat concerning this question. One is dated December 22, 1958. Since that Attorney General's Opinion, however, the Legislature amended the Iowa statute. Therefore, that opinion is obsolete and non-applicable. The second Attorney General's opinion is an advisory letter to the State Board dated July 6, 1954. This also is not exactly in point for the reason that it concerns the making of a contract for a lump sum payable to establish a day care center for children. This advisory letter holds that the statutes of Iowa, even as amended by the 60th General Assembly, do not permit the use of funds in that manner.

However, on a per child basis, federal and state funds may be used for day care which is part of or a certain kind of foster care program contemplated by State Statute.

Section 235.1, 1966 Code of Iowa was amended by the 60th General Assembly of the state of Iowa by inserting the words in the definition of "child welfare services" to wit:

"235.1 Definition . . . 'child welfare services' means social welfare services for the protection and care of children who . . . including when necessary care and maintenance in a foster care facility."

The 60th General Assembly also added sub-paragraph 9 to Section 235.3, 1966 Code of Iowa which reads:

"235.3 Powers and duties of the State Board. . . .

'9. Make such rules and regulations as may be necessary for the distribution and use of funds appropriate for child welfare services.' "

The rules and regulations, since the enactment of the statute, appear in the Employees' Manual. (The Department is in the process of having

the previous rules appearing in the 1966 Edition of Iowa Departmental Rules updated to correspond with the current rules and regulations appearing in said Manual.) In addition to the words "Federal Funds" the words "state funds" will appear in the revision.

On page 664 of the present Iowa Departmental Rules appearing in the 1966 publication of the rules and regulations as filed in the office of the Secretary of State pursuant to Chapter 17A, 1966 Code of Iowa, read:

"Use of Federal Funds in the Payment of Foster Care

"Foster care payment is defined as foster care service for which payment may be made by the Department from federal funds.

"The reimbursement from federal funds for foster care payment is available to a county department of social welfare for a child or youth under the age of twenty-one receiving services . . . or for a child who is living in an approved care facility under voluntary or public support . . . and is in need of financial support because one or more of the following conditions has deprived him of parental support: . . .

" '4. Foster care service has been voluntarily requested by his parent, guardian, or custodian but without the ability of the person responsible for him to pay all or a portion of the cost of foster care.' "

The following paragraphs of said rules and regulations outline the procedure for reimbursement to the County Department.

Therefore, if the Board of Supervisors of Black Hawk County provides a facility under voluntary or public support which is approved for day care under foster care services to children who are deprived of parental support, the County Board for Social Welfare of Black Hawk County may be reimbursed for costs of maintaining a child or children in the day care facility as being a child or children in need of foster care services. In other words, it is the opinion of the undersigned that day care service is a type of foster care service contemplated by the Legislature in the Child Welfare program found in Chapter 235, 1966 Code of Iowa.

If you have further questions concerning this matter, please feel free to write again.

September 15, 1967

LABOR: Rules relating to employment safety — §§88.6, 88A.1, 88A.2, Chapter 104, 1966 Code of Iowa. Safety rules may apply to any place or occupation; agricultural pursuits are not excepted.

Mr. Dale Parkins, Commissioner, Department of Labor: You have written me by letter of August 25, 1967, asking my opinion as follows:

"We request an opinion on whether Chapter 88A, Iowa Code, 1966, is applicable to 'agricultural pursuits.' Your office's issuance of an advisory opinion on this question would be greatly appreciated.

"This question was discussed at the meeting of the Employment Safety Commission on August 23, 1967. The problem is that Section 88.6, Iowa Code, 1966 contains an express exception for 'agricultural pursuits.' On the other hand, Section 88A.2(5)(6), Iowa Code, 1966, states 'including but not limited to' Sections 88.2 through 88.9. Does this language mean that the Commission is not limited to the exception in 88.6, or that the Commission can promulgate rules in addition to those subjects expressly covered in the above sections?"

Chapter 88, Code of Iowa, 1966, deals specifically with certain health and safety appliances required to be installed and maintained in "manufacturing or other industrial establishments or concern operated by machinery." However, §88.6 further states as follows:

". . . The provisions of this chapter shall not apply to agricultural pursuits."

The succeeding Chapter 88A has no such exception. §88A.1 reads as follows:

"It is the policy of this state that every employer shall furnish and maintain a safe place of employment for employees and shall cause all places of employment to be in all respects constructed, equipped, arranged, operated and maintained so as to provide reasonable and adequate protection for the lives, health, and safety of all persons employed or working therein or frequenting the same, taking into consideration the nature of the employment and work."

In §88A.2 the following definition appears:

" 'Place of employment' means any place, permanent or temporary, where any individual is employed or works for compensation.

" 'Employment safety' means all matters relating to safety and health within the scope of this chapter (including but not limited to all provisions of section 88A.1), sections 88.2 through 88.9, inclusive, and chapter 104."

Accordingly, since the employment safety in the above chapter 88A has no provision therein excepting agricultural pursuits, it is my opinion that the commission may write or publish new rules for safety, which will apply to agricultural pursuits as well as any other occupation. These rules may also apply to any place of work, where the lives, health or safety of the employees is affected or where the employer should provide more adequate protection for the persons working therein. The authority to write safety rules is fully set forth in §88A.11.

September 15, 1967

LIQUOR, BEER AND CIGARETTES — Class "C" Beer Permit Fee — §124.24. Amendments of House File 364, 62nd G. A. to §124.24, Code of Iowa, 1966 became effective August 15, 1967, according to Senate File 856, 62nd G. A. Records of "B" and "C" permittee beer sales volume from the prior full calendar year are to be considered in establishing "C" beer permit fees. (Claerhout to Carpenter, Sec., Beer Permit Board, 9/15/67) #67-9-6

Virginia Carpenter, Secretary, Beer Permit Board, Iowa Liquor Control Commission: By your letter of August 1, 1967, you have requested an opinion regarding House File #364 which is an amendment to Section 124.24, Code of Iowa, 1966.

Specifically, your questions are:

"1. What is the official date that House File #364 goes into effect?

"2. Is the fee set by local issuing authorities based on the relative volume of beer sales as shown by the records, between the volume of class "C" permit holders as to the volume of class "B" permit holders?"

As amended by House File #364, Section 124.24 reads in part:

"The permit fee for class "C" permits shall be fixed by the authority empowered by this chapter to issue permits, at fifty (50), one hundred fifty (150) or three hundred (300) dollars. Such permit fee shall be graduated among the above amounts by such authority for individual permit holders, based on the relative volume of beer sales to the permit holders as shown by the records required to be kept by section one hundred twenty-four point twenty-seven (124.27), as against that of all other permit holders during the next full prior calendar year within that jurisdiction, but shall in no event be less than fifty (50) dollars. No class 'C' permit fee shall exceed the fee as established by the issuing authority for class 'B' permits."

With reference to question number 1, I am of the opinion that the statute became effective on August 15, 1967. Senate File 856, 62nd G. A. provides in part:

"All Acts and resolutions of a public nature which are passed prior to July 1 at a regular session of the general assembly and which are approved by the governor on or after such July 1, shall take effect on August 15 next after his approval."

While the Governor approved House File #364 on July 5, 1967, the bill was "passed" in the second house on June 27, 1967, and thus had passed both houses before July 1, 1967. Since it did not become a law until it was signed by the governor after July 1, S.F. #856 applies.

Your second question must be answered by reviewing the words of the amendment. The pertinent part of H.F. #364, 62nd G. A., states:

"Such permit fee shall be graduated among the above amounts by such authority for individual permit holders, based on the relative volume of beer sales to be kept by section one hundred twenty-four point twenty-seven (124.27), as against that of all other permit holders during the next full prior calendar year within that jurisdiction, but shall in no event be less than fifty (50) dollars."

The words "all other permit holders" appear to be plain and unambiguous. The word "all" is commonly understood and usually does not admit of an exception, addition or exclusion" according to the Supreme Court of Iowa. *Consolidated Freightways Corp. of Del. v. Nicholas*, 1965, Iowa , 137 N. W. 2d 900, 904. Section 124.27 provides that both "B" and "C" permittees shall keep records of beer *purchases* by them. Class "A" permittees would not be so included because Section 124.27 requires "records showing the amount of beer *sold* by" them. (Emphasis added). Thus, according to H.F. #364, the beer sales to the permit holder would include both "B" and "C" permittees. I am of the opinion that the phrase "all other permit holders," refers to "B" and "C" permittees. The basis used to determine a graduated fee should include the consideration of the records of all other "B" and "C" permit holders.

However, it should be noted that whether or not the volume sales of the Class "B" permittees are considered in graduating the Class "C" fees, there is no effect upon the results. The relationship in the order of beer sales volume between one "C" permittee and another remains constant regardless of the number of "B" permittees that may be placed between them on a numerically ararnged list of sales volumes. The practical application of graduating "C" permit fees among the amounts allowed by the law is clearly within the power of the issuing authorities. Logic and common sense demand that the lesser fee limit be applied to

those permittees with the lowest beer sales volume (to include applicants without a beer sales volume record for the prior year) while the higher fees should be applicable to permittees with higher sales volume.

It is also noted with regard to the effective date of H.F. #364, that the records to be considered by authorities in graduating the permit fees are based upon "the next full prior calendar year." If "next" is given its ordinary meaning, the authorities would never have records upon which to graduate "C" permit fees. A calendar year is neither full nor prior until the first day of January of the following year. Therefore, I am of the opinion that the prior full calendar year records were intended to be considered in determining the class "C" permit fees.

September 15, 1967

COUNTY AUDITOR, Chapter 293, 38th G. A., Chapter 307, 61st G. A., Section 342.1, Code of 1966, A County Auditor is precluded by the provisions of Chapter 293, 38th G. A., Chapter 307, 61st G. A., and by §342.1, Code of 1966, from serving as Administrator of the County Zoning Commission with additional compensation therefor, or the office of Director of Civil Defense with mileage and his expenses therefor. (Strauss to Atwell, Supervisor of County Audits, 9/15/67) #67-9-9

Mr. H. E. Atwell, Supervisor of County Audits: Reference is herein made to yours of the first inst. in which you submitted the following:

"May a County Auditor also serve as a Zoning Administrator for his County and receive a salary from the County of $600.00 per year for this work? In addition to the two jobs mentioned above, can this same County Auditor hold a third job with the title of Deputy County Director of Civil Defense and receive mileage and expenses for this work?

"An early opinion from your office would be appreciated as this problem now confronts us in one of the Counties now being audited for the year of 1966."

In reply thereto I advise that prior to the 38th General Assembly the compensation of the county auditor was by express statute, being §479A of the Supplemental Supplement to the Code of 1915, provided to be in full payment for all services performed by him under color of his office. The foregoing numbered statute was repealed by Chapter 293, 38th General Assembly. The effect of this repeal was expressed in an opinion of this department appearing in the Report for 1922 at page 280, which stated the following:

"Hon. Glenn C. Hayes, Auditor of State: We have your letter of recent date in which you request the opinion of this department upon the following proposition:

" 'Can the board of supervisors allow the county auditor compensation for his services in drainage matters in addition to the regular salary of the county auditor provided for in chapter 293, acts of the 38th, as amended by chapter 74, acts of the 39th general assembly? If so, would the county auditor be permitted to retain the compensation received for services in drainage matters or would he be required to turn the same in to the county treasury, under provisions of section 479a supplemental supplement, 1915?'

"We think there is one provision in the statute that fully answers your inquiry, and that is section 479-a of the supplemental supplement to the code, 1915, which reads as follows:

" 'The auditor shall accept the salary herein provided in full compensation for all services performed by him under color of his office. All fees of every kind and nature which he receives for services performed in his official capacity or on matters pertaining to the records in his office, shall belong to the county, and shall be paid into the county treasury quarterly.'

"This section is still a part of our law even though section 479 of the supplemental supplement to the code, 1915, has been repealed and a substitute enacted therefor by the 38th general assembly, and with a further modification by the 39th general assembly. We think that this absolutely precludes the county auditor from receiving any compensation other than the salary fixed by law for the performance of his official duties."

With respect to the salary of the auditor in connection with the repeal chapter 293, Laws of the 38th General Assembly provided:

"Each county auditor shall receive for his services the following compensation: . . ."

And thereafter the act provided for compensation in the several counties according to the population.

Salaries of such officers have been fixed by subsequent general assemblies in the manner set forth in Chapter 293, 38th General Assembly. Typical of such a statute is the language of Chapter 307, 61st General Assembly, which provides:

"The annual compensation of the county auditor, county treasurer, county recorder, and clerk of the district court shall be computed from the following table:

Thereafter are several tables setting forth the population of the several counties and the taxable value of the property therein by which the compensation was measured.

Fortifying the reasoning and conclusion of the 1922 opinion heretofore exhibited is the provision of §342.1, Code of 1966, as follows:

"Fees belong to county. Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

The opinion appearing in the Report for 1922 heretofore exhibited is confirmed. In view of the foregoing legislative history I am of the opinion that the county auditor in question would be unable to serve on the zoning commission and receive a salary therefor, and in addition would be unable to hold a third job as Deputy County Director of Civil Defense and receive mileage and expenses for this work.

September 18, 1967

HIGHWAYS: Secondary roads and secondary bridge system. Chapter 28E, §§306.2, 309.3, 309.9, 309.42, 309.68, 309.73 and 309.80, Code of Iowa, 1966. A city which controls its own bridge funds and a county may enter into an agreement under Chapter 28E to construct a bridge and approaches which intersect at an approximate right angle the boundary between them provided that such an agreement does not require the county to expend secondary road funds in an amount greater than is required to construct the approaches and that portion of the

bridge lying wholly within the county. The word "along" as used in §309.73 means lengthwise with as distinguished from "across" and the provisions of such section are inapplicable to bridge which would pass over a city-county boundary at an approximate right angle. (Turner to McNamara, State Representative, 9/18/67) #S67-9-1

The Hon. Walter L. McNamara, Iowa State Representative: This is in response to your letters of July 8 and 29, 1967, wherein you related the following:

"The Board of Supervisors of Linn County, Iowa, and the City of Cedar Rapids, Iowa, entered into a contract dated February 21, 1967, amended April 4, 1967, providing for the construction of certain roads in the City of Cedar Rapids, Iowa, and in Linn County, Iowa, and a bridge across the Cedar River with the roads extending to and from said bridge. The project is divided into three sections.

"The southerly section consists of a road lying entirely within the city limits of Cedar Rapids, Iowa, and is to be paid for by the City of Cedar Rapids.

"The center section of the project consists of a road and approach to the bridge on the southerly side of the river lying within the city limits of Cedar Rapids, Iowa, and a bridge across the Cedar River to the northerly side thereof and a road northerly therefrom to a location specified in the contract. The road and approach to the bridge on the southerly side of the Cedar River are located within the city limits of the City of Cedar Rapids. The city limits extend along the northerly side of said river and the bridge would be located in said city. The road northerly from said bridge would be located in Linn County, Iowa, and outside the city limits.

"The costs of the center section, including roads located within said city limits and the bridge located within said city limits are to be paid for 53% by the city and 47% thereof from the secondary road funds of Linn County, Iowa.

"The northerly section is to be paid for from the secondary road funds of Linn County, Iowa." (Your letter of July 8, 1967)

* * *

"The city limits are the ordinary high water mark on the northerly bank of the Cedar River. The right-of-way of the Chicago, Rock Island & Pacific lies along said northerly bank and in order to clear the right-of-way, the bridge will extend over the right-of-way. There are no drawings available to indicate exactly how the bridge will be constructed at this point but at this point the bridge or approach will cross the city limits into Linn County." (Your letter of July 29, 1967)

Your letter of July 8, 1967, then proceeds:

"You are most respectfully requested to render a legal opinion with reference to the legality of the contracts and the expenditure of secondary road funds of Linn County, Iowa, thereunder, including a legal opinion as to the following questions:

"1. Are the roads and bridge contemplated in said contracts lying within the city limits of the City of Cedar Rapids secondary roads and a part of the secondary bridge system as provided in Sections 306.2 and 309.3 of the Code of Iowa?

"2. Are the roads and bridge provided for in said contracts lying within the city limits of the City of Cedar Rapids secondary roads and a bridge for which secondary road funds may be used as provided in Section 309.9 of the Code of Iowa?

"3. Are the roads provided for in said contracts lying outside the city limits of the City of Cedar Rapids and within Linn County and any part of the bridge provided for in said contracts which may cross the city limits and lie within said county secondary roads and a part of the secondary bridge system as provided in Sections 306.2 and 309.3 of the Code of Iowa?

"4. Are the roads provided for in said contracts lying outside the city limits of the City of Cedar Rapids and within Linn County and any part of the bridge provided for in said contracts which may cross the city limits and lie within said county secondary roads and a bridge for which secondary road funds may be used as provided in Section 309.9 of the Code of Iowa?

"5. Where the roads contemplated by said contracts are not located along the corporate limits of Cedar Rapids, Iowa, as distinguished from crossing such limits at some point but said roads or a part of the bridge structure or approach may at some point cross such city limits into the county, and where the City of Cedar Rapids, Iowa, has a population in excess of 8,000 and controls its own bridge funds, are such roads in whole or in part secondary roads and is such bridge a bridge within the meaning of Section 309.73 of the Code of Iowa?

"6. Do all or any part of said contracts require the approval of the Iowa State Highway Commission before said contracts may be performed in whole or in part by Linn County?

"7. If Linn County is not authorized by other provisions of law to carry out said contracts and expend secondary road funds therefor, does Chapter 28E of the Code of Iowa confer such power upon Linn County?

"8. If the contracts and the expenditures from the secondary road funds of Linn County, Iowa, for the projects therein set forth are not authorized by any provision of law hereinbefore referred to, is there any other provision of the Iowa laws and statutes which authorizes the execution and consummation of such contracts and the expenditure of the secondary road funds of Linn County in connection therewith?"

The sections of this opinion which follow are numbered to correspond to the foregoing numbered questions which you have raised.

1. §§306.2(3) and 309.3, Code of Iowa, 1966, provide:

"306.2 Definition of road systems. The following words and phrases when used in this chapter or in any chapter of the Code relating to highways shall respectively have the following meaning:

* * *

3. Secondary roads. The term 'secondary roads' or 'secondary road system' shall include all public highways, outside of cities and towns, except primary roads and state park and institutional roads."

"309.3 Secondary bridge system. The secondary bridge system of a county shall embrace all bridges and culverts on all public highways within the county except on primary roads and on highways within cities which control their own bridge levies, . . ."

Since the road and that portion of the bridge which you describe lie within the city limits of the city of Cedar Rapids they are not by definition, respectively, a secondary road or a part of the secondary bridge system.

2. §309.9 provides in pertinent part as follows:

"309.9 General pledge. The secondary road fund is hereby pledged to and shall be used for any or all of the following purposes at the option of the board of supervisors:

1. Construction and reconstruction of secondary roads and costs incident thereto.

* * *

3. Payment of all or part of the cost of construction and maintenance of bridges in cities and towns having a population of eight thousand, or less and all or part of the cost of construction of roads located within an incorporated town, of less than four hundred, population, which lead to state parks.

* * *

6. Any legal obligation or contract in connection with secondary roads and bridges which is required by law to be taken over and assumed by the county, . . ."

It is clear from the foregoing that secondary road funds may be used only for the construction and reconstruction of secondary roads and costs incident thereto. It can hardly be said that construction of a bridge of the size here involved would involve costs only "incidental" to those of a secondary road. Subsection 3 of §309.9 clearly has no application since the population of Cedar Rapids greatly exceeds the figures mentioned therein. §309.9(6) does not apply because the county is not required by law to take over and assume any legal obligation or contract in connection with secondary roads and bridges. If anything, it is entering directly into a contract in connection with such roads and bridges; but that is not the same thing as being required by law to take over an obligation or contract. Therefore, it is our opinion that §309.9 furnishes no authority to expend secondary road funds for the road and that portion of the bridge which lies within the city limits of Cedar Rapids.

3. It seems clear that the roads provided for in said contracts lying outside the city limits of the city of Cedar Rapids and within Linn County and that part of the bridge provided for in said contracts which lies within said county are, respectively, secondary roads and a part of the secondary bridge system. See those portions of §306.2 and 309.3 hereinbefore set forth.

4. As indicated in our answer to your third question, secondary road funds may be used only for the construction and maintenance of secondary roads. However, §4.1 makes it clear that the term "roads" includes bridges. Hence, it is our opinion that the roads provided for in said contract lying outside the city limits of the city of Cedar Rapids and within Linn County and that part of the bridge provided for in said contracts which lies within said county are, respectively, secondary roads and a bridge for which secondary road funds may be used pursuant to §309.9.

5. §309.73, Code of Iowa, 1966, to which you refer provides in pertinent part as follows:

"Bridges and culverts on highways or on parts thereof, which are located along the corporate limits of cities which control their own bridge funds and which are partly within and partly without such limits and which highways are in whole or in part secondary roads, shall be constructed under plans and specifications, jointly agreed on by the city council and board of supervisors, and approved by the highway commission. The city and county shall share equally in the cost. All matters in dispute between such city and county relative to such bridges and culverts shall be referred to the highway commission and its decision shall be final and binding on both the city and county."

The majority of the requirements for the application of this section to your facts are readily met. However, a substantial question remains as to whether or not a bridge which will be located partially within the corporate limits of Cedar Rapids, at an approximate right angle thereto, and partially within Linn County is a bridge which is "located along" the city's corporate limits. The difficult question we are thus called upon to answer requires a determination of whether "along," as used in §309.73 is meant to include only bridges which are parallel to and in the course of a highway which forms a city-county boundary, or whether a bridge which crosses such corporate limits at right angles is also included within the meaning of that term. Cogent and persuasive arguments may be advanced in behalf of both positions.

The word "along" is not defined in the statute and we have been unable to find an instance in which the Iowa supreme court has been directly called upon to judicially define the term. But see *Milburn v. The City of Cedar Rapids*, 12 Iowa 246 (1861); *Stahr et al v. Carter*, 116 Iowa 380, 90 N. W. 64 (1902). Hence, we must turn to secondary authorities for aid in construing "along" as it is used in §309.73.

In an opinion of then Attorney General Lawrence F. Scalise to Pottawattamie County Attorney F. J. Kraschel the meaning of the words "located along the corporate limits of cities" as used in §309.73 was considered, and it was concluded that such expression would not include a situation where the bridge and the roadway of which it was a part were at right angles to the boundary of the city-county boundary. The following language is found in this opinion:

"Also, Section 309.73, supra, applies only to bridges on secondary highways or parts thereof which are 'located along the corporate limits of cities . . . and which are partly within and partly without such limits.' In reading this in relation to the facts presented as a part of your inquiry, it is this office's opinion that said bridge is not on a secondary highway or part thereof which is 'along' the corporate limits. The long axis of the bridge is at approximately right angles to the town limits and is part of a secondary road. Such secondary road is not located 'along' the corporate limits but enters at an approximate right angle thereto which would put it outside of those secondary highways or parts thereof' as are provided for by Section 309.73."

Webster's Third New International Dictionary of the English Language, Unabridged, defines "along" as follows:

"along — prep. 1: over the length of (a surface) [he crawled — the fence until he reached the gate] [halfway — the street they stopped] 2: in the course of (as time or distance) [somewhere — the years — Ben Riker] 3: in a line parallel with the length of direction of [a ship sailing — the coast] or on a line through the center or central axis of [the boundary runs — the road] — distinguished from across 4: in accordance with

"along — adv. . . . 2 a: in a line parallel with the length or direction — usu. used with *by* [cottages — by the river] . . . 5 a: at a loosely fixed point within a specified or implied extent of time, distance or development."

The following definition of the word is found in Funk and Wagnall's New Standard Dictionary of the English Language:

"along — adv. 1. Over or through length in time or space; onward: said of progressive motion, often of motion parallel with something, and in this sense usually with *by;* as, to go *along* down the road; a brook running *along* by the hedge; the years glide swiftly *along.* 2. At points extending through or over the length (of anything); by the side; near; often with *by;* as, the grasses grew *along by* the brookside. 3. In company, conjunction, or association, either as going or being with another: usually followed by *with;* as, he takes his valise *along;* consider this truth *along with* that.

"along — prep. 1. Through or over the length of; on the line of; in the direction of; as, the ship sailed *along* the coast; an electric shock runs *along* the nerve. 2. At points extending through or over the length of; in or by the course of; by the side of; throughout: said of space or time; as, the trees grow *along* the road; *along* his life were scattered many blessings."

Since it is apparent that the word "along" may be used both as a preposition and an adverb it becomes necessary to parse the first sentence of §309.73 to determine the grammatical sense in which "along" is used therein. We have discussed this question with Mr. Wayne Faupel, grammarian and code editor, and it was concluded that in the sentence we are now considering "along" is used as a preposition rather than as an adverb.

This determination lends some support to the proposition that "along" in the context of §309.73 contemplates that in order for such section to be applicable the bridge in question must lie athwart a highway and in a line through the central axis of the boundary between the city and county. It is to be observed that in defining "along" as a preposition Webster's third meaning makes it clear that "along" is "distinguished from across" but includes "in the course of . . . in a line parallel with the length or direction of . . . or on a line through the center or central axis of." The first of the two prepositional definitions in Funk and Wagnall's is to much the same effect.

Note should be taken also of the fact that the subordinate clause, "which are located along the corporate limits of cities . . ." modifies "highways or . . . parts thereof" rather than the compound subject, "bridges and culverts." Thus, it is the highway which must lie along or "in the course of" the corporate limits. By the same token it is not a bridge or culvert but a highway or part thereof which must be "partly within and partly without such limits."

The statute provides that, "The city and county shall share equally in the cost." This requirement is consistent with a situation in which the center line of a road forms the boundary between a city and county, which is the more usual case, since any bridge lying in the course of such highway would fall precisely one-half in the county and one-half in the city. It is not so consistent with a situation where the bridge is at approximately a right angle to the boundary line, since there is no reason to suppose that in such a case exactly fifty percent of the bridge would lie in the county and fifty percent would fall within the corporate limits of the city. The case we have here to consider illustrates the point. The bridge which you describe would appear to lie primarily in the city and, indeed, in partial recognition of this fact the city has agreed to pay more than one-half the cost of the bridge, viz. fifty-three percent (53%).

Additional support for the proposition that §309.73 was not intended to embrace situations where a bridge or culvert is at or near a right angle to the line of a city-county boundary may be derived from a comparison of that section with §309.68. This latter section provides:

"Intercounty highways. Board of supervisors of adjoining counties in this state shall, subject to the approval of the state highway commission:

1. Make proper connections between roads which cross county lines and which afford continuous lines of travel.

2. Adopt plans and specifications for road, bridge, and culvert construction, reconstruction, and repairs upon highways *along and across* county boundary lines, and *make an equitable division* between said counties of the cost and work attending the execution of such plans and specifications." (Emphasis added)

It is a rule of statutory construction so well-settled as to be almost axiomatic that statutes in *pari materia* must be read and construed together. *Lewis Consolidated School District v. Johnston*, 256 Iowa 236, 127 N. W. 2d 118, 124 (1964) and cases cited therein. Applying this rule to a comparison of §309.68 and 309.73 it is clear that the legislature recognized that a distinction exists between "along" and "across" and that the former is not inclusive of the latter. Thus, §309.68 speaks in terms of highways "along and across" county boundaries while §309.73 is limited in its application to bridges and culverts on highways, or parts thereof, which are located "along" the corporate limits of cities. Moreover, as we have indicated previously, where a boundary is co-extensive with the center axis of a highway, a bridge on such highway would in virtually all cases fall precisely one-half in the city and one-half in the county, while a bridge at right angles to such axis would not necessarily be so equally divided. In apparent recognition of this distinction the legislature in §309.68 provided for an "equitable division" of the cost rather than, as in §309.73, that "the city and county shall share equally in cost."

In view of the foregoing, we are constrained to conclude that the omission of "across" in §309.73 was deliberate and that if the legislature had intended to include situations where a bridge was located on a highway at an angle to a boundary and at the point of intersection it would have used the word "across" or an expression of similar import in addition to "along."

It should be noted too that §309.73 relates not only to bridges but also to culverts. There may be some conceivable logic in suggesting that a bridge crossing over a river or stream, which watercourse forms a city-county boundary, is a bridge which is located along the corporate limits of a city for the reason that it would not be unusual for a stream like a road or highway to form such a boundary. The same may hardly be said of a culvert. In the case of most culverts it would be purely fortuitous for a culvert to be so located so that its longitudinal axis was precisely coincidental with a boundary between a city and a county. Unlike bridges required by rivers and streams, culverts do not ordinarily delineate natural geographical boundaries. Roads and highways, however, do frequently form such boundaries and culverts found along such roads and highways in all cases lie one-half in the city and one-half in the county.

It has been suggested that the legislature intended to include within the terms of the statute the present situation, by the use of plurals in referring to bridges, culverts and highways and that the plural usage indicates that the legislature envisioned "along" to mean points on a line and not only something having the property of being parallel with and on top of the city limits.

Some support for this position may be found in Funk and Wagnall's second prepositional definition of "along." However, while it may be said that a series of bridges at right angles to a river or stream which forms a boundary are "along" such boundary in the sense that they are points on the line of such boundary, the same may be said with equal logic of a series of bridges forming part of a highway boundary. And as we have indicated previously, there are several other reasons which tend to support the position that "along" does not mean at right angles to.

Accordingly, it is our opinion that the words "bridges and culverts on highways or on parts thereof, which are located along the corporate limits of cities" limit the applicability of §309.73 to only those situations where the highway forms the boundary and where the long axis of the bridge is co-extensive with the central axis of such highway.

6. Since, in our opinion §309.73 is inapplicable to the situation you have presented the approval of the highway commission which that section requires need not be obtained. However, as hereinafter stated it is our opinion that an agreement of the type in question may be entered into pursuant to Chapter 28E and in view of the fact that the contract clearly involves expenditures in excess of the limits set forth in §309.42 and §309.80 it is our opinion that state highway commission approval would be required by those sections and by §28E.10 before the contract could become effective.

7. In our opinion Chapter 28E furnishes adequate authority for Linn County and the City of Cedar Rapids to enter into and carry out a co-operative agreement of the type in question and to expend secondary road funds therefor, although probably not in 53-47% ratio.

Chapter 28E provides in the first three sections thereof:

"28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end.

"28E.2 Definitions. For the purposes of this chapter, the term 'public agency' shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term 'state' shall mean a state of the United States and the District of Columbia. The term 'private agency' shall mean an individual and any form of business organization authorized under the laws of this or any other state.

"28E.3 Joint exercise of powers. Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government

when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

* * *

"28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties."

It seems clear that Linn County and Cedar Rapids are each a "public agency" as that term is defined in §28E.2 and if under §28E.3 the county and city could each individually have constructed the bridge and approaches, or their respective parts thereof, then they may agree under §28E.12 to jointly do the same. Mindful of the admonition in §28E.1 that the chapter is to be liberally construed we have no hesitancy in expressing the opinion that they had such individual powers and may combine to exercise them jointly. OAG 9/22/67. Indeed, it seems likely that this is precisely the type of intergovernmental and interagency cooperation which §28E contemplates. It should be made clear however, that, as we have previously stated, the county has no authority to expend secondary road funds to pay for any portion of the bridge and the approaches thereto which lie within the city of Cedar Rapids. Hence, it may not under Chapter 28E enter into a contract which commits such funds for that purpose. In other words to the extent that the 53-47 percent ratio agreed upon does not accurately reflect the costs of construction of that portion of the facility lying within each of the contracting political subdivisions, an agreement entered into under Chapter 28E may not be used to commit the county's secondary road funds.

8. Apart from Chapter 28E, we have found no other provision of law under which the contracts and expenditures could be jointly undertaken.

September 21, 1967

CONSTITUTIONAL LAW: Use of public funds for the construction of a chapel, Art. 1, §3, Bill of Rights, Constitution of Iowa, S.F. 865, 62nd G. A. Senate File 865, a bill to authorize construction of a chapel at Camp Dodge and to appropriate $130,000 therefor is patently unconstitutional. Art. 1, §3, Bill of Rights, Constitution of Iowa, plainly prohibits the use of tax revenues to build a place of worship. (Turner to Messerly, State Senator, 9/21/67) #S-9-67-2.

The Hon. Francis L. Messerly, State Senator, Black Hawk County: You have requested an opinion of the attorney general as to the constitutionality of Senate File 865, a bill enacted by the 62nd General Assembly to authorize construction of a chapel at Camp Dodge and to provide an appropriation of $130,000 therefor.

Both the Constitution of the United States and the Constitution of the State of Iowa provide in identical words that their respective legislative bodies:

"shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Amend. 1, Bill of Rights, Const. of U. S.; Art. 1, §3, Bill of Rights, Const. of Iowa).

But there is added to the Iowa clause the following additional prohibition:

"*nor shall any person be compelled to* attend any place of worship, *pay* tithes, *taxes*, or other rates *for building* or repairing *places of worship*, or the maintenance of any minister, or ministry." (Emphasis added)

The underscored words are pertinent to this issue and, when read together, say:

"nor shall any person be compelled to pay taxes for building places of worship."

Webster and all of the many dictionaries I have examined define a chapel as a place of worship. Thus, S.F. 865 is so clearly and patently unconstitutional under the latter clause of Iowa's constitution that it seems remarkable that the General Assembly would have enacted it or that, having done so, an attorney general's opinion could add force to words that so obviously say "the state cannot build a chapel with taxes exacted from the people."

In *Moore v. Monroe*, 1884, 64 Iowa 367, 20 N. W. 475, the Iowa Supreme Court said of Art. 1, §3, here under consideration:

"The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden."

I asked Edward L. O'Connor, a former Iowa attorney general and presently a highly respected practicing Iowa lawyer, for his views of your question. His carefully considered legal opinion is set out in a three page letter, a copy of which is hereto attached and made a part hereof with his very gracious permission. I concur fully with Mr. O'Connor's opinion that this act is "plainly, clearly and palpably" unconstitutional, that in the light of Art. 1, §3 its presumption of validity "vanishes into thin air because the act is in hopeless conflict with the above constitutional provision," and generally with his other conclusions.

I assume that the explanation for this apparent disregard of the constitution lies in the fact that this act was introduced and placed on the calendar by the Senate Appropriations Committee on June 23, 1967, passed by the Senate on June 27 and by the House on June 29, all during the last very busy nine days of the session, which was adjourned on July 1, 1967. Doubtless, during those days, in which literally dozens of bills were passed, the express constitutional prohibition was simply overlooked.

But if my assumption is incorrect and this act was knowingly passed in the face of debate which pointed to the constitution, I feel compelled to caution the legislature against repetitions of such practice. It is a universal rule, followed by every court in the nation, without exception, that any given act of a legislative body is *presumed* to be constitutional. The burden on any who would overcome that presumption is heavy. Courts assume that legislators, who are sworn to uphold the constitution,

perform their duty in this respect and follow the commands of the people — the highest law of the land. Because of his oath, and because of this presumption, it is the first duty of any legislator to resolve for himself, insofar as practicable within the limits of his capabilities, that every law for which he casts an affirmative vote is constitutional. He should resolve any doubts he may have by casting his vote against the act rather than in its favor. Thus, will the presumption of validity justifiably flourish.

On the other hand, common and repeated failures of entire legislatures to perform this duty, most high, will result not only in unconstitutional acts which may go unchallenged largely because of the presumption, but in the eventual disregard and destruction of the presumption itself. A general assembly which adopts a philosophy of enacting laws which seem desirable, albeit constitutionally questionable, on the theory that the courts will cure its transgressions, becomes a breeding ground of contempt for the constitution. The seeds of that contempt will grow and flower in future assemblies as more unconstitutional laws are adopted on the precedent of the earlier unchallenged acts. Such contempt for and erosion of our constitution, if unchecked, will destroy our government.

September 22, 1967

EXECUTIVE COUNCIL. §§21.2(4), 21.2(7) and 21.6, Code of 1966; The Executive Council is without power to authorize the transfer of appropriated funds from the agency designated therein to another agency. Nor does it have power to direct the Car Dispatcher to transfer the title to state-owned automobiles to certain designated agencies. Power to assign such cars is vested in the Car Dispatcher and his determination of expenditures from the Car Dispatcher's revolving fund is subject to review by the Executive Council. (Strauss to Jandt, Director, Division IX, 9/22/67). #9-67-13

Mr. Richard L. Jandt, Director, Division IX, Department of Agriculture: Reference is herein made to yours of the 15th inst. in which you submitted the following:

"The Department of Agriculture has been advised by the State Comptroller that the Attorney General has ruled the following agencies are not a part of the Agriculture Department, to wit: Iowa Beef and Cattle Producers Association, Iowa State Dairy Association, Iowa State Sheep Association, Iowa Swine Producers Association, and State Horticultural Society.

"We are also advised by the Comptroller that the 62nd General Assembly appropriated separate funds to these agencies for the biennium in which we are now operating.

"Heretofore, motor vehicles have been assigned to these agencies, and have been considered a responsibility of the Secretary of Agriculture. We are advised by the Comptroller that the Secretary of Agriculture can no longer be responsible for these vehicles and in no way can we support them from our appropriations.

"The Comptroller further recommends that the Executive Council authorize the State Car Dispatcher to transfer titles and funds credited to these cars to the agencies concerned upon payment to the State Car Dispatcher of all debts incurred against these units and that this must be done prior to September 30, 1967.

"We would like an opinion covering the following points, to wit:

"1. Does the Executive Council have the authority to authorize the State Car Dispatcher to transfer titles and funds credited to such vehicles to a particular agency?

"2. Does the Executive Council have the authority to require payment to the State Car Dispatcher of all debts incurred against these units (Motor Vehicles) from the particular appropriation of the particular agency?

"3. If such action is authorized by the Executive Council and if the State Car Dispatcher does secure payment from the particular agency of debts incurred against these units, then is such payment returned to the Department of Agriculture (as in the case of depreciation credits)?"

In reply thereto I advise:

The funds to which you refer are the amounts appropriated by the 62nd G. A. under S.F. 853 of $20,000.00 to the Beef Producers' Association for state aid, $20,000.00 to the Dairy Association for state aid, $16,500.00 to the Horticultural Societies for state aid, $14,500.00 to the Iowa Sheep Association for state aid and $20,000.00 to the Swine Breeders' Association for state aid, each of the foregoing for each year of the biennium beginning July 1, 1967.

1. The action of the Executive Council in authorizing the car dispatcher to transfer the foregoing appropriated funds to the above designated agencies is an unconstitutional use of legislative power. Article III, §24, of the Constitution provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law"

Such designation by the Council of this appropriated money to the several designated agencies, being money over which the Council has no statutory control, obviously is as much an appropriation by the Council as the original appropriation by the legislature. This would authorize the use of such appropriated money to these several agencies by the Car Dispatcher, a wholly different state agency.

2. Insofar as your question involves the authority of the Executive council to authorize the Car Dispatcher. to transfer title to certain vehicles, from the file before me it appears that the cars in question previously were assigned to the foregoing named agencies by the Secretary of Agriculture, which responsibility the department is relieving itself of in view of the separate appropriations to these agencies by the 62nd G. A. Insofar as the title to the cars described above is concerned and the proposed transfer thereof by the Car Dispatcher I would advise there is no such authority in the Council or in the agencies themselves. As far as titles to automobiles are concerned and the transfer thereof to state agencies it is to be observed that under the provisions of §21.2(4), Code of 1966, the Car Dispatcher "shall purchase all new motor vehicles for all branches of the state government" and as far as title to the cars is concerned §21.2(7) provides "the state car dispatcher shall cause to be marked on every state owned motor vehicle a sign in a conspicuous place which indicates its ownership by a state, except cars necessary for use in police work." The title to these cars assigned by the Secretary of

Agriculture to the named agencies now and at all times is in the State of Iowa and insofar as assignment of such cars is concerned §21.2(7) provides the following:

"The state car dispatcher shall cause to be marked on every state-owned motor vehicle a sign in a conspicuous place which indicates its ownership by the state except cars necessary for use in police work. All state-owned motor vehicles shall display registration plates bearing the word "official" except cars assigned for use in police work for which ordinary plates may be used when necessary but only upon order of the state car dispatcher who shall keep an accurate record of the registration plates used on all state cars."

And such state car dispatcher additionally is authorized to assign state owned cars from a state pool of cars to state officers or employees for specific trips.

3. In answer to question number 2 I advise that the Executive Council has no original authority to require payment to the state car dispatcher of all debts incurred against the described motor vehicles assigned to the Secretary of Agriculture and as far as depreciation on motor vehicles is concerned such is the liability of the department to which the cars are assigned. On the record before me this is an obligation of the Secretary of Agriculture and is not reimbursable. The Executive Council may act in review of the dispatcher's determination of expense including depreciation. See §21.6, Code of 1966.

September 23, 1967

TAXATION: Real Property Tax — H.F. 686, Acts of the 62nd G. A., 1967, Section 428.4, Code of Iowa, 1966. Under Section 428.4, as amended by H.F. 686, a building erected by a tenant on the landlord's land is to be listed and assessed as real property against the owner of the building. The County Board of Review has the power to reconvene itself subsequent to its adjournment, order the assessor to make the appropriate changes in the assessment rolls to reflect laws enacted by the 62nd G. A., and to hear taxpayer protests concerning the application of those laws.

Mr. Jack H. Bedell, Dickinson County Attorney: This is to acknowledge receipt of your letter of August 2, 1967, in which you posed two (2) questions which we quote as follows:

"My first question pertains primarily to the amendments to Section 428.4 of the 1966 Code of Iowa, which amendments are contained in Section 42 of House File 686. As the last portion of Section 428.4 of the 1966 Code now reads, commencing after the semicolon it states 'but if such buildings are erected by another than the owner of the land, they shall be listed and assessed to the owner as real property.' My first question is whether or not the 'owner' which is last referred to is the owner of the buildings or the owner of the land, in short whether or not land which has been leased by an owner thereof to a tenant and which has been improved by the placement of a building on the land by the tenant should be taxed as land with its improvement thereon to the owner of the land and the building taxed to the tenant and the same be taxed as real property.

"My second question is whether or not the change from personal property to real property, as is required by Section 428.4 as amended by House File 686, can be completed by any county governmental agency after the Board of Review has adjourned for 1967. It would appear that

there is a legislative requirement of change but there is a question of the right on the part of the owner of the property to be taxed, to object or be heard before the Board of Review on the question of change since the $2,500.00 personal property exemption will be lost to the taxpayer if this is to be taxed as real property. In short, should this change be made in 1967 following adjournment of the Board of Review, and, if so, by whom? Is there a possibility that this change can be made and the Board of Review reconvened or called by the State Tax Commission or through some other means?"

Section 428.4, prior to its amendment by Section 40 of H.F. 686, provided in pertinent part:

". . . But if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years duration shall be assessed as real estate."

In construing this language of the statute, the Attorney General stated in 1962 O.A.G. 445, 446:

"The general rule applicable to buildings erected on land by a person who is not the owner of that land is that, in the absence of an agreement to the contrary, the building remains the personal property of the builder and does not become part of the real estate. Brown vs. Turner, 20 S. W. 660 (Mo. (1892)), Eisenzimmer vs. Dell, 32 N. W. 2d 891 (N. D. (1948)). Section 428.4 recognizes this rule by calling for such a building to be assessed as personal property in the name of the owner thereof, nor does it abrogate the rule when a lease of longer duration than three years is involved because the language refers to assessment only. It is our opinion that the building remains in fact personalty although assessed as realty. See 1942 O.A.G. 160 and 1925-26 O.A.G. 152."

In *Crews vs. Collins*, 252 Iowa 863, 109 N. W. 2d 235 (1961) the Supreme Court adopted, at 252 Iowa 868, the District Court's construction of the last part of Section 428.4 to-wit:

"It would seem to the Court that this provision of the code would apply only to a situation where one person owned the land and another person under lease of more than three years in length placed buildings upon the land, and owned the buildings and by agreement of the parties the buildings did not become a part of the real estate, and perhaps would be subject to removal at the expiration of the lease."

Section 428.4, Code of Iowa, 1966, as amended by Section 40 of H.F. 686, provides in pertinent part:

". . . But if such buildings are erected by another than the owner of the land, they shall be listed and assessed to the owner as real property."

Section 39 of H.F. 686 expressly excludes buildings within the contemplation of Section 428.4 as personal property. Such buildings erected by a tenant will now be considered real property for the purposes of listing and assessment for property tax. Section 428.4, as amended by H. F. 686, directs that the buildings shall be assessed to the owner thereof which was the case prior to the amendment of the statute except that the buildings were considered to be personal property. Therefore, the assessor must determine whether the landlord or the tenant is the owner of the building erected by the tenant. Upon such determination the assessor should then assess the building as real property to the owner thereof, as the case may be.

In answer to your second question, the following language from the case of *Younker Bros., Inc. vs. Zirbel*, 234 Iowa 269, 12 N. W. 2d 219 (1943) wherein the Court stated at 234 Iowa 273 is deemed significant:

"It may be noted, and it is significant, that in the provisions specifying the various times or periods at or in which the duties of the board are to be performed, there are no commands that they shall not be performed at any other times. Section 16 provides that the board shall be in session in the discharge of its duties during the month of May. But the chapter 202 nowhere prohibits the performance of these duties at any other reasonable time not prejudicial to the rights of an owner or taxpayer. Any action of the board in performing such a duty is nowhere in the statute declared to be void and of no effect . . ."

Again, at 234 Iowa 276, the Court stated:

". . . While the aggrieved owner or taxpayer is required under Section 23, to file his protest between the inclusive dates of May 1 and May 20, if the original assessment is not raised, he is, of course, entitled to file a protest to the action of the board if it increases his assessment subsequent to May 31, as was done in this case."

Thus, it would appear that the Board of Review has the power to reconvene itself in order to effectuate the provisions of H.F. 686.

Furthermore, the Board of Review, pursuant to Section 441.28, can order the assessor to make changes in the assessment rolls to reflect the new laws enacted by the 62nd General Assembly and made effective for the year 1967. Also, the Board, under the authority of *Younker Bros., Inc. vs. Zirbel*, supra, can hear taxpayer protests concerning the implementations of the new laws

September 23, 1967

AGRICULTURE -- Constitutional law; Chapter 169, Acts of the 62nd G. A.; §163.30. Exemption of Iowa auction markets from requirement that Iowa feeder pigs shall be ear tagged is constitutional. (Zeller to H. Fischer, State Representative, 9/23/67) #67/9/15

The Hon. Harold O. Fischer, State Representative: This is in reply to your recent request raising the question of constitutionality of Senate File 353, Acts of the 62nd General Assembly, as follows:

[Ch 169, Acts 62nd G A]

"A number of constituents have indicated a deep concern regarding the constitutionality of Senate File 353 which amends Section 163.30 of the Code. The provision in question reads as follows:

"'All native Iowa swine that are purchased for further resale as feeders, except as slaughter animals or for the production of biological products, and except the swine sold at Iowa auction markets operating under a valid Iowa permit, shall be individually ear tagged with an approved Iowa swine tax, affixed to either ear, at the time of purchase by the purchaser before leaving the premises of the seller, or by the purchaser prior to leaving the premises of the livestock market from which they were consigned for sale, provided, however, this Act shall not apply to native Iowa swine raised from birth, and consigned or sold to an Iowa auction market operating under a valid Iowa permit. The attached swine ear tag numbers shall be recorded in series inclusive for each separate lot of swine on the appropriate certificates and such certificates must accompany the swine from the premises of the seller or livestock market. A record shall be kept by the purchaser, seller, or the approved

market if consigned there for sale, of the number on the attached swine ear tags. These records shall be made available to any state inspector.' "

"It appears that to require feeder pig dealers to tag all swine purchased for resale while exempting Iowa auction markets is in violation of Article I, Section 6 of the Iowa Constitution and Section 1 of the 14th Amendment to the Federal Constitution in that this law lacks uniform application and provides arbitrary and discriminatory classifications."

Article I, §6 of the Iowa Constitution provides:

"Laws uniform, Sec. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

The uniformity of operation required by Article I, §6, does not mean that laws must operate alike upon every citizen of this state. A law is held to be uniform generally if it operates alike upon all, within a reasonable classification. Such classifications must be based upon something substantial, distinguishing one class from another in such manner as to suggest the reasonable necessity for such classification. Under the equality clause, the only inquiry to be made is whether the law is uniform or arbitrary. See *Diamond Auto Sales vs. Erbe*, 251 Iowa 1330, 105 N. W. 2d 650 (1960).

In the above statute providing for resale of native Iowa swine, it is provided that all swine resold as feeders shall be ear tagged except: (a) animals sold for slaughter, (b) animals sold for production of biological products, (c) native Iowa swine sold at Iowa auction markets, operating under a valid permit.

The evil intended to be guarded against by this statute is the spread of disease such as cholera. In order to prevent contagion and in order to fix responsibility for feeder pigs imported from other states or resold on other markets Iowa feeder pigs are required to be ear tagged, subject to the above exceptions.

If there is any discrimination here, it is in favor of Iowa farmers and Iowa auction markets where native Iowa pigs are immediately offered for sale at auction. Such sale is by active competitive bidding usually to other Iowa farmers who know the origin of the pigs, and who know that they are native Iowa swine, at the time and place of purchase. Under such conditions the native Iowa swine are not required by this statute to be ear tagged, which might involve an additional cost of only ten cents per head. The Iowa farmer, so selling native Iowa swine is benefited thereby.

Feeder pig dealers, however, buy feeder pigs, in the majority of cases, from persons other than the breeders of native Iowa swine, do not operate auction markets, and intermingle the pigs for resale purposes. Such conditions make it necessary to require ear tagging of feeder pigs for sale or resale by such dealers.

If there is any reasonable ground for the classification and if the law operates upon all those within the same class, there is uniformity at least to the extent required by the Constitution. The statute itself is a legislative finding that there are sufficient differences to justify the

classification. *Dickinson vs. Porter*, 240 Iowa 393, 35 N. W. 2d 66. The Iowa Supreme Court has held statutes valid, which draw distinctions between different forms of business organizations and between co-operative associations and corporations for profit. *Clear Lake Co-operative Ass'n. vs. Weir*, 200 Iowa 1293, 206 N. W. 297 (1925); *State ex rel Dairy vs. Iowa Co-op. Assoc.*, 250 Iowa 839, 95 N. W. 2d 441 (1959).

The citizens of this state may be preferred by statute in employment. *Heim vs. McCall*, (U. S. Supreme Court) 239 U. S. 175 (1915)

In view of the above decisions and considering the strong presumption in favor of the constitutionality of a statute, I am of the opinion that Senate File 353 is not in conflict with Article I, §6 of the Iowa Constitution.

October 3, 1967

CITIES AND TOWNS: Civil Service. §365.29, Code of Iowa, 1966, as amended by Chapter 314, Acts of the 62nd G. A. Cities which are not special charter cities or which do not meet the requirements of §363.11, Code of Iowa, 1966, do not conduct partisan elections. Civil service employees are not entitled to a leave of absence to run for non-partisan elective office. (Martin to Riley, State Senator — 10/3/67) #67-10-1.

The Hon. Tom Riley, State Senator: I have received your letter of September 23, 1967, in which you request an Attorney General's Opinion as follows:

"Does an employee of the city of Cedar Rapids who is covered by Civil Service have the right to an automatic leave of absence without pay while seeking a position on the City Council or, since this is not a partisan election, is he entitled to seek such office without having to take leave of absence or, must he resign in this particular case?"

Your letter calls for the construction of Senate File 484, Acts of the 62nd General Assembly which provides as follows:

"'Any employee who shall become a candidate for any partisan elective office for remuneration shall, commencing thirty (30) days prior to the date of the primary or general election and continuing until such person is eliminated as a candidate, either voluntarily or otherwise, automatically receive leave of absence without pay and during such period shall perform no duties connected with the office or position so held.'"

Sections 363.2, 363.11 and 43.112, Code of Iowa, 1966, clearly indicates that the nomination procedure to be followed for municipal primary elections in Cedar Rapids, is that contained in Chapter 363, Code of Iowa, 1966. Cedar Rapids is not a special charter city and has adopted no ordinance under §363.11 providing for nominations under either Iowa Code Chapters 44 or 45.

Iowa Code Chapter 44 allows individuals to band together for the purpose of nominating candidates for public office despite the fact that they are not a political party within the definition contained in §43.2, Code of Iowa, 1966.

Iowa Code Chapter 45 provides for nomination of candidates by petition using many of the statutory procedures set out in Chapter 44.

The procedure called for in Iowa Code Chapter 363 divorces from the prescribed mode of conducting municipal primary nominations, party or non-party caucuses or nominating conventions and petition nominating. Section 363.19, Code of Iowa, 1966, further evidences the non-partisan flavor of these contests by requiring that no party designator appear on the ballot in conjunction with a candidate's name.

The bifurcation of the Iowa law is clear. Cities which do not govern by reason of special charter and which do not meet the requirements of §363.11, Code of Iowa, 1966, may not conduct partisan elections for municipal offices.

A civil service employee of Cedar Rapids is therefore not entitled to a leave of absence under §3 of Senate File 484, Acts of the 62nd General Assembly to run for a Cedar Rapids municipal office, due to the non-partisan character of the election.

In answer to your question concerning resignation, the opinion of the Attorney General dated March 29, 1965, from Brick to Resnick, a copy of which is enclosed herewith, is dispositive of the issue. That opinion requires the resignation of a civil servant prior to his running for elective public office.

October 4, 1967

TAXATION: Ascertainment of school budget and uniform levy under H.F. 686, Acts of the 62nd G. A., 1967. In preparing its budget, each school district must show its anticipated receipts from all sources other than taxation, including state aid and the income tax rebates, and the County Auditor, in making the uniform levy under Section 4 of House File 686, after ascertaining 40 percent of the budget askings of the various school districts in the county, must first subtract the aggregate amount of such receipts from sources other than taxation before spreading the remainder as a uniform rate throughout the basic school tax unit.

Mr. Stanley R. Simpson, Boone County Attorney: This is to acknowledge receipt of your letter of September 1, 1967, in which you requested an opinion dealing with certain provisions of H.F. 686, Acts of the 62nd G. A. (1967), substantially as follows:

"Section 2, sub-sections 1 and 2, of the act provides as follows:

"Section 2. Definitions of terms used in this Act:

"1. The 'basic school tax unit' is conterminous with the county school system and is a term to define a local tax area to be used for public school support only.

"2. The 'basic school tax' on property is a uniform levy on all taxable property in the basic school tax unit for support of public schools within the unit. This levy will be the millage necessary to raise an amount of money equal to forty (40) percent of the total of the proposed general fund expenditures, *reduced by anticipated receipts from other sources of all the school districts in the basic school tax unit.* (Emphasis mine.)

"Section 4 of the act provides in part as follows:

"Sec. 4. The county auditor of each county shall, prior to making the levies for school purposes in this county, starting with the 1967-68 school budgets and continuing with each school year thereafter, total the askings for general school purposes of the various school districts in the

basic school tax unit. He shall then multiply said yearly total by forty hundredths (.40) and spread the levy to raise the amount thus ascertained at a uniform rate over all the taxable property in the basic school tax unit.

"The act also provides for the distribution of a portion of state income tax receipts to each county's basic school tax equalization fund as well as an additional distribution of state aid to each public high school district in amounts determinable by formula set forth in the act.

"Query: In preparing its budget, must each school district show its anticipated receipts from the state sources above mentioned (income tax and state aid), and, must the county auditor in making the uniform levy under Section 4 above quoted, after ascertaining 40 per cent of the budget askings of the various school districts in the county, first subtract the aggregate amount of such receipts from state sources before spreading the remainder as a uniform rate throughout the county?"

Section 3 of H.F. 686 provides for the establishment of a "basic school tax equalization fund" in the county treasurer's office from which operating revenues are to be distributed to the various school districts within the local basic school tax unit. Section 4 further provides that the amount raised under that section is to be placed by the county treasurer in the basic school tax equalization fund.

Section 5 of H.F. 686 provides:

"Sec. 5. On or before August 15, 1967, and each year thereafter, the state tax commission shall make an accounting of the individual state income tax collected under division two (II) of chapter four hundred twenty-two (422), Code of Iowa, applicable to tax returns for the most recent completed tax year, as defined by section four hundred twenty-two point four (422.4), subsection four (4), Code of Iowa, from taxpayers in each of the various school districts in the state and certify to the state comptroller and the state department of public instruction forty (40) percent of the total credited from the taxpayers of each basic school tax unit."

Section 6 of H.F. 686 provides:

"Sec. 6. The county auditor shall, by August 15, 1967, and each year thereafter, certify to the state department of public instruction the amount of the basic school tax, as provided by section four (4) of this Act, to be placed in the basic school tax equalization fund."

Section 7 of H.F. 686 provides:

"Sec. 7. The state comptroller shall pay the state income tax collected, as provided in section five (5) of this Act, to each county treasurer in equal semiannual installments on or about April 1 and October 1 of each year, with the first installment to begin April 1, 1968. There is hereby appropriated from the general fund of the state the amounts necessary to make such payments. The county treasurer shall deposit said payments in the basic school tax equalization fund."

Section 12 of H.F. 686 provides in part that for the purpose of computing state financial aid to local school districts under a prescribed formula in Section 14, the Department of Revenue shall furnish data to the State Department of Public Instruction which shall then compute the real value of taxable property and the adjusted gross income within each public high school district.

Section 11 of H.F. 686 provides:

"Sec. 11. The local school district's state share of the cost of public education in each school district maintaining a public high school shall be determined by the ratio of its property value to that of the entire state, together with the ratio of its income to that of the entire state."

Section 17 of H.F. 686 provides:

"Sec. 17. At the close of each school year but not later than July 15 the local public high school district shall supply to the state department of public instruction the information required by it for calculation of state aid under this Act.

"Forms for such purpose shall be supplied by the state department to each public high school district no later than June 1 of each school year. After the aid payable has been calculated and validated for accuracy, the state department of public instruction shall certify to the state comptroller the amount of aid payable to each public high school district and he shall forthwith draw warrants, payable from moneys in the general fund of the state herein appropriated, and cause the same to be delivered to the respective public high school districts of the state of Iowa."

First of all, we must note that the "basic school tax" is not defined as the millage required to raise 40 percent of the total general fund askings, but instead as the rate necessary to raise 40 percent of such askings, "reduced by anticipated receipts from other sources of all the school districts."

Chapter 24, Code of Iowa, 1966, is denominated the "Local Budget Law." Section 24.2(1) defines a "municipality" as follows:

"24.2(1) The word 'municipality' shall mean the county, city, town, school district, and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district."

Section 24.3, Code of Iowa, 1966, provides:

"24.3 Requirements of local budget. No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed, and considered, as hereinafter provides:

"1. The amount of income thereof for the several funds from sources other than taxation.

"2. The amount proposed to be raised by taxation.

"3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing, which in the case of school districts shall be the period of twelve months beginning on the first day of July of the current calendar year.

"4. A comparison of such amounts so proposed to be expended with the amounts expended for like purposes for the two preceding years."

Section 24.8, Code of Iowa, 1966, provides:

"24.8 Estimated tax collections. The amount of the difference between the receipts estimated from all sources other than taxation and the estimated expenditures for all purposes, including the estimates for emergency expenditures, shall be the estimated amount to be raised by taxation upon the assessable property within the municipality for the next ensuing fiscal year. The estimate shall show the number of dollars of taxation for each thousand dollars of the assessed value of all property that is assessed."

In *Dyer vs. Des Moines*, 230 Iowa 1246, 30 N. W. 2d 562 (1941), the Iowa Supreme Court held that in the absence of a specific provision in a statute allowing the handling of funds contrary to the provisions of the local budget law, the provisions of the budget law would continue to be applicable. House File 686, Acts of the 62nd G. A. (1967) fails to contain any provision which would indicate that the local budget law is inapplicable. In fact, Section 2(2) of House File 686 appears to indicate that this new law is to remain consistent with the provisions of Chapter 24 of the Code requiring the estimating of receipts from sources other than taxation. Therefore, the steps taken in the preparation of the budget should be as follows:

1. Prior to July 15 of each year, each high school district is required under Section 17 to furnish the State Department of Public Instruction with the information necessary for it to calculate such district's share of the new state aid.

2. Thereafter, the State Department of Public Instruction certifies to the State Comptroller the amount of aid payable to each district.

3. There is no reason why this amount should not be immediately communicated to each school district for use in the preparation of its budget. If the exact amount has not as yet been ascertained, a reasonably accurate estimated amount could be supplied to each district. Note that this is presently the procedure under the old forms of state aid. Each district is now notified as to the estimated amount of aid it will receive under Chapters 285, 286 and 286A. The same information could continue to be supplied with reference to the new state aid.

4. In preparing its budget, each school district will subtract the actual or estimated amount of such state aid from its total General Fund askings to arrive at the amount to be raised for its General Fund by taxation. The budget forms presently in use specifically require this with reference to the old forms of state aid and, of course, this is the explicit requirement of Chapter 24 which continues to govern the formation of school budgets.

5. After all school budgets have been filed with the County Auditor, the Auditor will first ascertain 40 percent of the total askings for General Fund purposes. He will then subtract from this amount the total of the actual or estimated state aid to be paid to each school district. He will then spread a levy sufficient to raise the balance of the 40 percent on a uniform basis throughout the county.

6. The Auditor will then compute how much of the money produced by this uniform levy will be allocated to each school district on a per pupil basis. Having done so, he will then levy the remainder of each district's budget on property within the district itself.

7. As provided in Section 32 of House File 686, if the amount of state aid in any school district's budget was originally based on an estimate, the State Comptroller shall determine the final millage for each school district when the actual amount of state aid is ascertained and certify this amount to the County Auditor who will substitute this millage for the millage which he had originally or provisionally computed.

While the anticipated receipts from income taxes will not be paid directly to school districts, but will be paid to the County Treasureres pursuant to Section 7 of House File 686, such receipts do constitute revenue from sources other than tax levies by the basic school tax units. Therefore, it would appear to be necessary for the County Auditor, after he is notified by the State Comptroller of the total income tax to be refunded

to each county, to notify each school district as to its per pupil share, so that the school district shall include its share of income taxes in its budgeting under anticipated receipts from all sources other than taxation. In all other respects, the procedure outlined above would continue to govern.

It is my opinion that in preparing its budget, each school district must show its anticipated receipts from all sources other than taxation, including state aid and the income tax rebates, and the County Auditor, in making the uniform levy under Section 4 of House File 686, after ascertaining 40 percent of the budget askings of the various school districts in the county, must first subtract the aggregate amount of such receipts from sources other than taxation before spreading the remainder as a uniform rate throughout the basic school tax unit.

October 9, 1967

LEGAL SETTLEMENT OF MINOR — An illegitimate minor child takes legal settlement from mother under §252.16(6). A voluntary release for adoption to an institution under §252.16(3) does not effect a change of legal settlement and annulment of later adoption proceedings left child with initial legal settlement derived from mother. §252.16(2), (3), (6), 1966 Code of Iowa. Ivie to Fenton, Polk County Attorney, 10/9/67). #67-10-5.

Mr. Ray A. Fenton, Polk County Attorney: This is in response to your letter of June 5, 1967, in which you asked for a reconsideration of an Attorney General's Advisory Letter issued December 12, 1966. In that letter the following problem was set forth:

"A child was born to a Story County mother out of wedlock. The mother, without any consultation with the Story County Department of Social Welfare, released her child to the Iowa Children's Home Society in Polk County, Iowa. It was the intention of everyone concerned at the time the child was released to the Iowa Children's Home Society that the child would be placed for adoption as soon as it had attained sufficient age to do so. But, as it developed, the child was mentally retarded and was not adoptable. The child is still in the custody of Iowa Children's Home Society in Polk County and they are attempting to obtain financial assistance from either Polk County or Story County.

"The Story County Department of Social Welfare has not been involved in any respect in making arrangements or placing of the child or, in fact, did they have any knowledge of the child or its whereabouts until Polk County made a request for financial assistance. It has been our position up to this point that Story County did not have any responsibility to provide financial assistance for the child. I would like to request your assistance in advising us as to whether or not Story County is obligated to provide financial assistance for the care of the child in question, which is in the custody of Iowa Children's Home Society and which has been placed in a Polk County foster home."

The conclusion of the advisory letter was that Polk County was liable for the support of the child because the child got a derivative settlement from the Iowa Children's Home Society, the mother of said child not having any legal relationship with the child.

After examining the above referred to advisory letter together with the authorities cited hereinafter, I conclude that the advisory letter of December 12, 1966, should be withdrawn, even though I do agree with that portion of such advisory letter that states as follows:

"The problem therefore resolves itself into one of legal settlement. That is to say, that the county where the child is found to have legal settlement is the county liable for his care."

The child described in the problem setforth above, took the legal settlement of its mother, Story County, Iowa, by virtue of §252.16(6), 1966 Code of Iowa, which reads as follows:

"Illegitimate children take the settlement of their mother. . . ."

The legal settlement so taken by the child, remains the legal settlement of that child until a statutory change of legal settlement has been accomplished.

Section 252.16(2) states:

"Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year."

But in the case of *State ex rel. Rankin v. Peisen*, 233 Iowa 865, 10 N. W. 2d 645 (1943), wherein the court was discussing the legal settlement of two minor children, the court stated:

"It is clear that no act of these feeeble minded infants, who are virtual wards of the juvenile court, could affect their settlement."

In 1936 O.A.G. 562, this office ruled:

"It is our opinion that the legal settlement of a minor may be changed in the same way that the domicile of such minor may be changed. If such minor is legally adopted he takes the legal settlement of his parents by adoption. The legal guardian of the person of a minor under order of court, probably has authority to change the domicile and legal settlement of his ward, and under the authority of §5301 of the Code (now §252.5) and the case of *In Re Benton*, 92 Iowa 202, 60 N. W. 614, grandparents who have taken the personal custody of their indigent minor grandchildren and have assumed the support of said grandchildren, and who therefore stand in loco parentis, have authority to change the legal settlement of such minors so that it will be the same as their own. *A minor cannot, himself, change his legal settlement, nor can persons not legally liable for his support and not standing in loco parentis change such legal settlement.*"

Section 252.16(3) states:

"Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not, or any institution supported by charitable or public funds in any county in this state, or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

In light of the above section, it is apparent that the relationship between the minor child and the Iowa Children's Home Society could not have accomplished a change of legal settlement for the minor child, and the minor child's legal settlement therefore remained in Story County during such time as the Iowa Children's Home Society had custody of the child.

The *Peisen case, supra*, involved a dispute between Hardin and Keokuk Counties with regard to the legal settlement of two minor children whose legal settlement was taken from their father who at the time was a resi-

dent of Hardin County, Iowa. The parents of the minor children were deprived of the custody of those children by order of the court in Hardin County, and the children placed by the court with American Home Finding Society of Ottumwa, Iowa. Shortly thereafter the children were placed for adoption with a family having legal settlement in Keokuk County. Subsequent to the adoption, it was discovered that the children were feeble minded and the adoption was annulled by order of court and the children were placed in the Glenwood State Institution. The court, determined that when the adoption was annulled it was in effect an order that ". . . the relation of parent and child by adoption never legally existed." The court held that all parties reverted to their former legal status with the court finding that the children had their legal settlement in Hardin County.

The only significant differences in the factual situation presented in the *Peisen case* and the state of facts presented herein for our review are: (1) That in the *Peisen case* the children were removed from their parents by court order whereas in the instant situation the mother of the child voluntarily released the child to the Iowa Children's Home Society without any intervention of the court; (2) That in the *Peisen case* adoption had commenced and was voided because of the mental condition of the children involved, whereas in the instant case such determination was made prior to proceedings being commenced. These distinctions, however, do not call for a different result in the two cases since in neither case does the severance voluntary nor the severance by court order in itself change the legal settlement of a minor child.

In summary it is clear that the child involved in the problem submitted had legal settlement in Story County, Iowa; the placing of that child to the Iowa Children's Home Society did not and could not change the legal settlement to Polk County; and the legal settlement of the child still remains in Story County, which county is legally liable for the support of said minor child.

October 9, 1967

WELFARE INCOME EXEMPTIONS FOR CHILDREN ELIGIBLE FOR AID TO DEPENDENT CHILDREN — Under Chapter 239, 1966 Code of Iowa and Section 4, House File 687, 62nd General Assembly and Title IV, Section 402 of the Federal Social Security Act, Williams to A. Downing, Chairman, State Board of Social Welfare, 10/9/67). #67-10-4.

Mr. A. Downing, Chairman, State Board of Social Welfare: I have before me your request for an Informal Attorney General's opinion.

In your letter you state the problem as follows:

"You are aware of the recent activities of Community Improvement Inc. in providing employment for unemployed young people in the city of Des Moines. Similar projects have been developed in other Iowa comunities. This poses a problem in that a considerable number of these young employees come from ADC families and by statute and federal policy we must consider income in determining assistance.

"Youth employed on this project earn $1.25 per hour and work a 40 hour week. A full month's employment would result in a monthly income of $216.67.

"Our current policy with regard to income disregard of ADC children is as follows:

1. Disregard the first $5.00

2. Deduct—Non-personal work expense (special clothing, tools, equipment, supplies, transportation, etc.)

3. Disregard the next $50.00 (Not to exceed $150.00 for the grant).

4. Deduct personal work expenses (Income tax, social security, transportation, other enforced deductions).

5. Apply the balance in determining the amount of assistance.

"The application of this formula to a full month's employment of an ADC youth would result in an *approximate* deduction from the assistance grant of $100.00.

"We should like to request an informal opinion from you in relation to the authority of the Board to make exceptions to our present policy. The policy of the Department is stated in the Employees' Manual under Section VI-3-7 through VI-3-13."

House File 687 was passed at the 62nd General Assembly of the state of Iowa. Section 4 of that bill reads as follows:

"Sec. 4 In computing aid to dependent children payments the income of the recipient and eligible children shall be exempted in accordance with the provisions of Title IV, Section 402, of the federal Social Security Act."

Section 402, Title IV of the Federal Social Security Act, which is referred to in said House File 687, reads as follows:

"*State Plans for Aid and Services to Needy Families With Children*

Sec. 402(a) A State plan for aid and services to needy families with children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; except that, in making such determination, (A) the State Agency may disregard *not more than* $50 per month of earned income of each dependent child under the age of 18 but not in excess of $150 per month of earned income of such dependent children in the same home, (B) the State agency may, subject to limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (C) the State agency may, before disregarding the amounts referred to in clauses (A) and (B), disregard not more than $5 of any income;"

In view of the State statute and the Social Security Act which it incorporates by reference, the State Board of Social Welfare has legal authority to disregard the income received by youth as employees of the Community Improvement Inc. so long as the rules and regulations exempting said income are within the scope of the said state and federal laws.

October 9, 1967

WELFARE: Foster Care to Veterans' Children; under section 232.53, 1966 Code of Iowa, as amended by House File 152 of the 62nd G. A., counties furnishing foster care to children of Veterans may be reimbursed there-

fore by the State Treasurer only for placements by court commitments. (Williams to Gering, Vice Ch., State Board of Social Welfare, 10/9/67). #67-10-7.

Mr. Henry Gering, Vice Chairman, State Board of Social Welfare: You have asked for an Informal Attorney General's Opinion concerning the interpretation of Section 232.53, 1966 Code of Iowa, in the light of House File 152 passed by the 62nd General Assembly of the State of Iowa. You posed the following questions:

"1. Under Section 232.53, 1966 Code of Iowa, as amended by House File 152 (62nd General Assembly of Iowa), can a County claim reimbursement from the State Treasurer for payments made in behalf of veterans' children who were placed in foster care placements by voluntary application as well as veterans' children placed by Court Order?

"2. What is meant by the words 'foster care' within the meaning of House File 152, 62nd General Assembly of Iowa?

"3. What items of expenses would be covered by the foster care services contemplated under said House File 152?"

Section 232.53 is located in Chapter 232 captioned, "NEGLECTED, DEPENDENT AND DELINQUENT CHILDREN."

Section 232.53, as now amended by House File 152, reads as follows (amended portion italicized):

"*232.53 Recovery of Costs.* The county charged with the cost and expenses under Sections 232.51 and 232.52 may recover the costs and expenses from the county where the child has legal settlement by filing verified claims against the county. A detailed statement of the facts upon which the claim is based shall accompany the claim. Any dispute involving the legal settlement of a child for which the court has ordered payment under authority of this section shall be settled in accordance with sections 252.22 and 252.23. *The County charged with the cost of foster home care for a child may recover the cost of such care from the general fund of the state if the child would otherwise have been eligible for admission to the Iowa Juvenile Home or the Annie Wittenmyer Home under the provisions of subsection one (1) of section two hundred forty-four point three (244.3) of the Code. The county shall make claim to the state treasurer who shall approve or disallow the claim.*"

Thus, the State will reimburse the county for foster care furnished to veterans' children, (other than those placed in the Iowa Juvenile Home or the Annie Wittenmyer Home in view of House File 398, 62nd General Assembly amending Section 244.14, 1966 Code of Iowa) provided the Veterans' children qualify for admission to the Annie Wittenmyer Home as set forth in Section 244.3, Subsection 1 of the 1966 Code of Iowa. This subsection reads as follows:

"*244.3 Admissions.* Admission to said homes shall be granted to resident children of the state under eighteen years of age, as follows, giving preference in the order named:

1. Destitute children, and orphans unable to care for themselves, of soldiers, sailors, or marines."

House File 152 amended Section 232.53, 1966 Code of Iowa, and Section 232.53 refers to the preceding section regarding recovery of costs, which reads as follows:

"*232.51 Expenses.* Whenever legal custody of a minor is transferred by the court or whenever the minor is placed by the court with someone other than the parents or whenever a minor is given physical or mental examinations or treatment under order of the court and no provision is otherwise made by law for payment for the care, examination, or treatment of the minor, the costs shall be charged upon the funds of the county in which the proceedings are held upon certification of the judge. Except where the parent-child relationship is terminated, the court may inquire into the ability of the parents to support the minor and after giving the parents a reasonable opportunity to be heard may order the parents to pay in the manner and to whom the court may direct, such sums as will cover in whole or in part the cost of care, examination, or treatment of the minor. If the parents fail to pay the sum without good reason, the parents may be proceeded against for contempt or the court may inform the county attorney who shall proceed against the parents to collect the unpaid sums or both."

Since Section 232.51, 1966 Code of Iowa, relates to children involuntarily removed from parental custody by the Court, the provisions of House File 152 amending Section 232.53 of the 1966 Code of Iowa cover only those placements by Court Order (as distinguished from voluntary placements) of "children who are residents of Iowa, under eighteen years of age and destitute or orphans unable to care for themselves, of soldiers, sailors, or marines." This rules out foster care provided at a request on behalf of such children where no court placement was ordered which are referred to as voluntary placements.

"Foster care" within the meaning of said House File 152 means a full-time place of abode substituted for the parental home of the minor child and does not include the "day care" type of foster care.

The "costs of foster home care" which for reimbursement can be had are the same items set forth in Section 232.51 as heretofore construed by administrative policy. These items include board, room, clothing, incidental expenses, and reasonable personal allowance to the minor, as well as the reasonable charges for physical and/or mental examinations and treatments.

October 9, 1967

INSTITUTIONS: STATE SINKING FUND §454.2. The state sinking fund law is not applicable to deposits made by treasurers of institutions under control of Boards of Regents. (Noland to Gernetzky, State Board of Regents, 10/9/67). #67-10-11

Mr. Carl Gernetzky, Adiministrative Assistant, State Board of Regents: This replies to your request for an opinion on the following question: Does the present State Sinking Fund Law as amended by H.F. 697 Acts of the 62nd General Assembly apply to deposits by Boards of Regents Institutions in various banks?

In 1936 O.A.G. 240 at page 248 the following appears:

"There is no requirement for treasurers of the different institutions under the Board of Education to deposit public funds in their hands in depositories approved by their respective boards or by the Executive Council of the State of Iowa. These deposits of public funds are outside the purview and scope of the Brookhart-Lovrien State Sinking Fund for Public Deposits. Special provision is made for the deposits of public funds in the custody of and under the control of the state board of education by paragraph 8 of §3921 of the 1931 Code of Iowa.

* * *

"Such collections and deposits in banks by such officials should not be construed as regular public deposits for the reason that in many instances they only remain in the bank for a sufficient length of time for clearance and the bank could not possibly have any commercial use of such deposits to justify or permit them to pay interest on the same. It appears to be the intent of the legislature that such collections and deposits should be transmitted to the state treasurer every month, and that the state treasurer then should make the public deposit in his own name, and when the treasurer so does, the public deposit then comes within the provisions of the Brookhart-Lovrien State Sinking Fund for Public Deposits."

Since this opinion was issued the Acts of 1955 (56th G. A.) Chapter 131, changed the name of the state board of education to State Board of Regents. Further, it appears again necessary to make clear that there still exists a distinction between the deposits of public funds made under the authority of §262.9(8) Code of Iowa, 1966, and the deposit of public funds which are secured by the state sinking fund under §454.2. There has been no amendment to the state sinking fund law which would make it applicable to the deposits made by the treasurers of the institutions under the control of the Board of Regents.

The recent legislation enacted by the 62nd General Assembly in House File 697 contains an amendment to §453.6 which should not be applied as a guide where the Board makes time deposits to "collect the highest rate of interest consistent with safety." See 1936 O.A.G. 246. The amendment pertaining to the rate of interest provides as follows:

"Public funds invested in Bank time certificates of deposit by a public body or officer other than the treasurer of state shall draw interest at rates to be determined by the public body or officer and the bank, which rate shall not be greater than the rate set under this section for state funds, nor more than one (1) percent of interest below that rate."

However, this does not affect or change the requirement of security for deposits made by treasurers of institutions under the control of the Board of Regents and the practice of obtaining an escrow agreement from the bank to secure such deposits should continue the same as in the past.

October 9, 1967

STATE OFFICERS AND DEPARTMENTS — Used motor vehicles, defined — §21.2, Code of Iowa, 1966, House File 692, 62nd General Assembly. An undriveable wreck is not a "used motor vehicle" within the meaning of §21.2, Code of Iowa, 1966, as amended by H.F. 692, 62nd G. A. and the state car dispatcher is not required to dispose of such wrecks at public auction. (Haesemeyer to Langford, State Car Dispatcher, 10-9-67) #67-10-9

Mr. J. R. Langford, State Car Dispatcher: Reference is made to your letter of September 8, 1967, in which you state:

"House File #692 amending Chapter twenty-one, Code 1966, enacted by the 62nd General Assembly provides in fact:

"Section 1(6): 'All used motor vehicles turned in to the State Car Dispatcher shall be disposed of by public auction. . . .'

"Occasionally motor vehicles are turned in to this office that have been

involved in accidents where they are considered total wrecks, either for insurance purposes where liability rests without the state, or in cases where the state being self-insured (for collision) must bear the cost of repair which exceeds the market value minus salvage.

"In the former instance, recovery by the state is predicated on an agreement with the insurance company involved, and concurrence with your office, as to market value minus salvage, and the latter is of course a loss to the state.

"In view of the circumstances connected with these total loss vehicles, an opinion is requested as to

"(1) Whether the words 'used motor vehicles' as used in the section quoted above applies to undriveable wrecks, and

"(2) Must these wrecks be sold at public auction as and with the used vehicles turned in to this office in the regular course of replacement, or may they be disposed of by salvage bids?"

In response to the first question which you have presented it is to be observed that although the term "used motor vehicle" is not defined in Chapter 21, Code of Iowa, 1966, nor in House File 692, it is defined in §§321.1(2) and 322.2(6). Under these sections, a "used motor vehicle" means any motor vehicle of a type *subject to registration* under the laws of this state which has been sold at retail and previously registered in this or any other state. The only vehicle which are subject to registration are those which are "driven or moved upon a highway." §321.18. As an undriveable wreck is not driven or moved upon a highway, it is not subject to registration and, therefore, does not fall within the scope of the term "used motor vehicle."

Furthermore, it is also doubtful that an undriveable wreck would even be considered a "motor vehicle" since §321.1(2) defines this term to mean every motor vehicle which is self-propelled.

Consequently House File 692, §1(6) does not apply to undriveable wrecks and the state car dispatcher is not required to dispose of the wrecks by public auction. Therefore, if provided by the rules and regulations promulgated by the state car dispatcher and approved by the executive council as required under §21.2(8), the undriveable wrecks turned into the state car dispatcher may be disposed of by salvage bids or any other suitable method.

October 9, 1967

SCHOOLS: TUITION: If a child moves out of the school district where he was enrolled at the beginning of the year the district is not required to continue to furnish such child tuition-free education. (Nolan to Mossman, Benton County Attorney, 10/9/67) #67-10-10

Mr. Keith Mossman, Benton County Attorney: Your letter of August 31, 1967, requested an opinion concerning the following matter:

"The parents of students now enrolled in the Vinton Community School District are now legal residents of this district. The father is a hired farm hand and will soon be taking new farm employment within the county, and he will occupy a house in the Urbana Consolidated School District temporarily, until his employer can find him a rented house in the Vinton District. The children are at the present time enrolled tuition-free in the Vinton Community School District. The question involved is

whether if during the semester the parents move to a house outside the district if the parents would be required to pay tuition for the children, who will continue to attend the Vinton District."

We wish to call your attention to *Nishna Valley Community School District v. Malvern Community School District*, 255 Iowa 132, 121 N. W. 2d 646, where the court discusses the obligation of a district under a temporary agreement to provide tuition and transportation for their pupils and where the court held that such agreement did not extend for the full school year in view of the fact that the existence of the rural districts extended only "until further order of . . . Court." In this case the court states:

"The result would not be unlike a voluntary move by parents from one district to another. If done during the school year, their children, of course, could not remain in the original district without paying their own tuition and transportation, for a change in residence usually makes necessary a change of school systems.

* * *

". . . As a general rule in a school district where adequate school facilities are available, pupils resident in such district must avail themselves of the facilities so furnished, and they do not have the absolute right to attend a school in another at the expense of their local board. 79 C.J.S. Schools and School Districts, §451, page 362; 47 Am. Jur., Schools, §151, page 406."

From this we conclude that the status at the time of enrollment does not necessarily determine the child's residence for the whole school year and therefore should a child move out of the school district where he was enrolled at the beginning of the year there is no requirement that such school district continue to furnish the child tuition-free education.

October 9, 1967

STATE OFFICERS AND DEPARTMENTS — Review of departmental rules — Chap. 17A, Code of Iowa, 1966, as amended by Senate File 348, 62nd G. A. House File 702. Proposed rules must be submitted to the departmental rules review committee and to the attorney general in the style and form prescribed by the code editor before the forty-five and thirty day periods provided for in Ch. 17A begin to run. Requirement of §17A.5 that proposed rules be submitted to departmental rules review committee at least ten days prior to meeting of such committee to consider such rules is directory rather than mandatory. (Haesemeyer to Shirley, State Senator, 10-9-67) #67-10-12

The Hon. Alan Shirley, State Senator: By your letter of September 26, 1967, you have requested an attorney general's opinion with respect to the rules which were proposed to be promulgated by the state tax commission to implement the chances in the sales and use tax laws made by House File 702, 62nd General Assembly. The relevant portions of your letter are hereinafter set forth as follows:

"On September 1, 1967, the State Tax Commission mailed to the members of the Departmental Rules Review Committee a set of proposed rules relative to the indicated taxes. Eleven (11) of the proposed rules were not included in the submittal but were called to the Committee's attention by the following language: 'Proposed rule is being studied by the State Tax Commission and as soon as disposition is made, you will be informed.' I enclose the same with a Xerox copy of the State Tax Commission's letter of submittal.

"On September 16 a new submission was made to the Departmental Rules Committee including all fifty-nine (59) rules but not in the style and form required for Administrative Rules. I enclose a copy of the same with a Xerox copy of the letter of transmittal attached.

"On September 20 a third submittal was made to the Departmental Rules Committee of all fifty-nine (59) rules in the style and form as required for Administrative Rules. I enclose a Xerox copy of the letter of transmittal and believe your office has a copy of said rules.

"Chapter 17A of the Code as amended by Senate File 348 passed by the last General Assembly provides that an agency promulgating must, 'submit a copy of each proposed rule to each member of the Departmental Rules Committee at least ten (10) days prior to that scheduled meeting of the committee at which consideration is desired.' Which submittal of the State Tax Commission is sufficient to start the ten day period tolling? Can the Departmental Rules Review Committee consider and take action on the proposed rules at the Committee meeting on Wednesday, September 27, 1967?

"Which submittal is sufficient for the purpose of tolling the forty-five (45) day period which the Departmental Rules Review Committee can have rules under consideration and the thirty (30) day period which the Attorney General may have rules under consideration? Could the submittal of September 1 be considered the original submittal and the two subsequent submittals be considered a revision of the rule pursuant to Section 17A.9?

* * *

"Chapter 17A as amended by Senate File 348 provides, 'all rules, temporary or permanent, shall become effective thirty (30) days after filing with the Secretary of State, but another date may be specified prior to the filing date.' The last sentence of the rules submitted by the State Tax Commission on September 20 reads as follows, to-wit: 'These rules shall become effective as provided in Chapter 17A of the Code after filing in the office of the Secretary of State.' Do the rules become effective upon filing with the Secretary of State or thirty (30) days thereafter? Could the State Tax Commission revise the rules pursuant to 17A.9 while the rules are before the Departmental Rules Review Committee to provide that the rules become effective upon filing in the office of the Secretary of State?"

In reply to your first question, it is our opinion that only the submission of September 20, 1967, was effective to commence the running of the ten day period described in §17A.5, Code of Iowa, 1966, as amended by §5(2) of Senate File 348, 62nd General Assembly. §17A.5 as so amended provides:

"Any agency empowered by law to make rules shall submit a copy of each proposed rule, temporary or permanent, in the style and form prescribed by the Code editor, to the attorney general, and submit a copy of each proposed rule to each member of the departmental rules review committee at least ten (10) days prior to that scheduled meeting of the committee at which consideration is desired and one (1) copy to the Code editor."

This provision of law plainly requires that any submission of a proposed rule, whether temporary or permanent, must be in the style and form required by the code editor. Since the partial submission of September 1, 1967, and the supplemental submission of September 16, 1967, were admittedly not in the style and form required by the code editor, such submissions were insufficient for the purposes of §17A.5.

The evident purpose of the requirement that a copy of each proposed rule be submitted "to each member of the departmental rules review committee at least ten (10) days prior to that scheduled meeting of the committee at which consideration is desired" is to give each member ample time to contemplate and carefully study a proposed rule prior to meeting as a committee to consider and pass upon such rule. Furthermore, from the information you have furnished us we can find no indication that the tax commission requested the rules review committee to meet to consider the proposed rules less than ten days after their receipt by the members of the committee. Certainly the letter dated September 20, 1967, from state tax commission chairman E. A. Burrows, Jr., to you transmitting the proposed rules contained no request that a meeting be scheduled to consider such rules on less than ten days notice. In fact the committee met to consider and did consider the rules only seven days after their receipt by each of the members of such committee. While, it is our opinion that any member of the committee could have insisted upon the lapse of a full ten days between submission and consideration there is no indication that any member did request that consideration be deferred until September 30, 1967.

It is our opinion that the requirement that a copy of each proposed rule be submitted to each member of the departmental rules review committee at least ten days prior to that scheduled meeting of the committee at which the proposed rule is to be considered is directory merely and not mandatory and that under the circumstances here present the requirement was waived. *Wisdom v. Board of Supervisors of Polk County*, 236 Iowa 669, 19 N. W. 2d 602 (1945); *Vale v. Messenger*, 184 Iowa 553, 168 N. W. 281 (1918).

In reply to the first question raised in the antepenultimate paragraph of your letter it is our opinion that only the submittal of September 20, 1967, was sufficient for the purposes of the forty-five and thirty day periods for which the departmental rules review committee and the attorney general respectively may have the proposed rules under consideration.

As previously stated, the only submission of the proposed rules which was valid for the purposes of chapter 17A was the submission of September 20, 1967. Hence, the submittal of September 1, 1967, could not be considered the original submittal nor could the subsequent submittal be considered revisions of the rules pursuant to §17A.9

The first sentence of the last paragraph of your letter of September 26, 1967, erroneously quotes a portion of §17A.8, as amended by S.F. 348. The correct statutory language is as follows:

"All rules, temporary or permanent, shall become effective thirty (30) days after filing with the secretary of state, but another date may be specified not prior to the filing date."

The obvious meaning of these words is that, if so specified, rules may be given an effective date earlier than thirty days after such rules have been filed with the secretary of state provided that in no event may an effective date be specified which is prior to the date of filing in the office of the secretary of state. The rules submitted by the state tax commission contain the following sentence:

"These rules shall become effective as provided in Chapter 17A of the Code after filing in the office of the Secretary of State."

While not entirely free from ambiguity, these words were, in our opinion, effective to make the rules operative immediately after filing the same in the office of the secretary of state.

The tax commission must have had some purpose in mind when it inserted this final sentence in its proposed rules. If it had wanted the rules to become effective thirty days after filing that result could have been achieved by remaining silent. We are reluctant to conclude that the final sentence of the proposed rules was mere surplusage.

Your final question appears to be moot since, as indicated above, it is our opinion that the rules become effective upon filing in the office of the secretary of state without revision in this respect. It is the long established policy of this office to refrain from answering moot or academic questions. Hence, we offer no opinion with respect to your final query.

October 9, 1967

MOTOR VEHICLES — Special Plates — §321.57, Code of Iowa (1966). Dealers or authorized agents may use vehicles with special plates for private or business purposes provided vehicle is in the dealer's inventory and is continuously offered for sale at retail and proper special dealer's plates are displayed. (D. Hendrickson to O'Malley, Polk County State Representative, 10/9/67) #67-10-8.

Hon. Bernard J. O'Malley, State Representative: This will acknowledge your letter of August 15, 1967, in which you request an opinion of this office. Your question is herein set out as presented:

"May any car dealer, its agent or employee, use dealer license plates for the following purposes:

"1. If said dealer was to take vacation trips or week end trips to visit a relative or friend in another county, state, or city, may he place his dealer license plate on said vehicle, if the vehicle is owned by the dealer himself, even though the motor vehicle, whether it be car, camp van, or otherwise, is really being used for personal use of the dealer or one of its employees or agents?

"There no doubt would be a claim that when said van is used in other places, there may be people seeing it who may be interested in purchasing something like it. Keep in mind the fact that the van is, in most cases, out of the immediate vicinity or sale area of the dealer. Does it make any difference whether said vehicle is out of said area?

"2. May the dealer or its employee or agent use the vehicle as a personal car for all driving, whether it be to and from work, pleasure driving, pleasure visits, pleasure vacations, or business trips, outside the county or outside the state and use dealer license plates on the vehicle he is using?"

Questions one and two are grouped together for they both deal with the dealer's personal use of the dealer license plate. The pertinent Code section is 321.57, Code of Iowa (1966):

"Operation under special plates. A dealer owning any vehicle of a type otherwise required to be registered hereunder may operate or move the same upon the highways solely for purposes of transporting, testing, demonstrating or selling the same without registering each such vehicle

display thereon in the manner prescribed in sections 321.37 and 321.38 a special plate or plates issued to such owner as provided in sections 321.58 to 321.62, inclusive.

This portion of the above quoted statute limits the use of the so-called "dealer plates" to vehicles used for the purposes of transporting, testing, demonstrating or selling. It would seem, based upon the above language, that the legislature intended the use of such plates to allow a dealer to make the necessary movements of the vehicle which would enable him to sell the same and not for personal reasons having no connection with the business of selling vehicles.

However Chapter 321.57, 1966 Code of Iowa was amended by the 60th General Assembly by adding the following provision:

"In addition to the foregoing, a new car dealer or a used car dealer may operate or move upon the highways any new or used car owned by him for either *private* or *business purposes* without registering the same providing, (1) such new or used car is in the dealer's inventory and is continuously offered for sale at retail and (2) there is displayed thereon a special plate or plates issued to such dealer as provided in sections 321.58 to 321.62, inclusive." (emphasis added)

Thus, the above quoted statute appears to allow greater use of a vehicle having "dealers plates" as a dealer may move the vehicle over the roadways of Iowa for either personal or business reasons without registering the vehicle. Three conditions must be met, however. First, the vehicle must be in the business inventory of the dealer. Secondly, the vehicle must be for sale at all times at retail price and thirdly, the vehicle must display the so-called "dealers plates."

A question arises, as to what is meant by the term "dealer" as used in the above quoted statute. "Dealer" is defined in section 321.1(38), 1966 Code of Iowa, as follows:

" 'Dealer' means every *person* engaged in the business of buying, selling or exchanging vehicles of a type required to be registered hereunder and who has an established place of business for such purpose in this state." (emphasis added)

In order to determine the true meaning of "dealer," the definition of "person" must be examined, and is as follows in section 321.1(35), 1966 Code of Iowa:

" 'Person' means every natural person, firm, copartnership, association, or corporation. Where the terms 'person' is used in connection with the registration of a motor vehicle, it shall include any corporation, association, copartnership, company, firm, or other aggregation of individuals which owns or controls such motor vehicle as actual owner, or for the purpose of sale or for renting, whether as agent, salesman, or otherwise."

In order to avoid an unreasonable result, it must be concluded that "dealer" as used in the above quoted portion of section 321.57 includes the authorized agents and employees of such dealers.

In view of the foregoing, it is our opinion that dealers or their authorized agents may use vehicles with "dealers plates," for private or business purposes provided the vehicle is in the dealer's inventory and is continuously offered for sale at retail and the proper special dealer's plates are displayed.

October 9, 1967

COUNTIES — Duties of County Attorneys, Chapter 455A: A county attorney does not have any right or duty to intervene in any controversy involving private water rights between private landowners, and Chapter 455A is only applicable when such regulation is within the Iowa Natural Resources Council's jurisdiction established pursuant to §455A.18, 1966 Code of Iowa, for the control, utilization and protection of the water resources of the state. (Seckington to Don Carlos, Adair County Attorney, 10/9/67) #67-10-6

Mr. William W. Don Carlos, Adair County Attorney: Receipt of your letter dated March 31, 1967, in which you requested an opinion of this office regarding your duties as county attorney is acknowledged. You state the following situation:

"A situation has arisen in Adair County whereby I am in need of an informal opinion from your office regarding my duties as County Attorney. This regards the water rights of adjacent landowners.

"It seems that there is a natural spring which originates or at least flows from the land of farmer A. It is not a large flow of water by any means, however, there is a possibility that landowners down stream have depended at least to some extent on the water which comes from this spring to water livestock, particularly farmer B who owns the land directly below farmer A.

"In the early fall of 1966 farmer A came in to see me as private counsel. You see he had in the summer of 1966 constructed a dam to impound a certain amount of this spring water or ground water, as it is legally defined, on his land. Farmer B became somewhat angry, to say the least, and complained vigorously first to farmer A, secondly to the ASCS committee who had determined that there was a need on farmer B's farm for a pond and had advanced part of the money through one of their federal programs; and thirdly, to the township trustees. All complaints have been to no avail and so he has finally contacted me as Adair county attorney.

* * *

"By the way, I went and looked over the situation last fall when everything was at its driest. Farmer B contends that in constructing the pond the spring was sealed and no longer runs on to his land. My observation was that the pond had cut off perhaps some of the water but that the creek below had water in it and of course it has been very dry and the pond is in process of filling.

Farmer B insists that it is my duty as county attorney to intervene and somehow settle this dispute by representing the state in some sort of action to enjoin farmer A from impounding this water. The pond when filled will probably not be larger than 1 to 2 acres, if that large. He also insists that if I cannot do this that I should advise the township trustees to settle this matter of water rights.

"I advise farmer B that it was my opinion that this matter did not come within my realm of duties as county attorney nor did it come wthin realm of duties of township trustees. I advised him that it was my opinion that this was a civil matter and one that should possibly be resolved in hearing with the Iowa Natural Resources Council, but certainly not by action instigated by the county attorney or township trustees. He would not accept my opinion and so I told him that in order to be fair with everyone concerned I would ask for an informal opinion from the Attorney General's office and that if I was wrong I would certainly not take sides and would proceed to carry out my duty."

In the last paragraph of your letter you state that you advised farmer B that the matter in question did not come within your duties as County Attorney and that the Township Trustees did not have any duty to act in the present situation. With this statement we agree. There is nothing in the statutory or common law that allows public officials to intervene in any controversy between private landowners.

This does not mean however that farmer B does not have a remedy through civil action against farmer A, as it is very possible that the facts may show that farmer A has obstructed a water-course and detained water to the detriment of farmer B and that he may be entitled to either injunctive relief or damages. See 93 C.J.S., *Waters*, §15 et. sequa. See also the landmark case of *Willis v. City of Perry*, 92 Iowa 297, 60 N. W. 727.

As to the applicability of Chapter 455A, 1966 Code of Iowa, the Iowa Natural Resources Council has conducted a study to determine jurisdiction pursuant to §455A.18. That section provides in part:

"The Council shall have jurisdiction over the public and private waters in the state and the lands adjacent thereto *necessary* for the purposes of carrying out the provisions of this Chapter."

It is the opinion of this office, in view of the study conducted by the Iowa Natural Resources Council to determine the meaning of the word *necessary* as used in §455A.18, 1966 Code of Iowa, that the Council would at this time decline to exercise jurisdiction under the facts as stated in this request for an opinion. One of the results of their study was a conclusion that impoundments of the size mentioned in your request for opinion are not of such magnitude as would affect the policy of the law as passed by the legislature. The council has decided as a matter of fact that only impoundments of 18-acre feet or more are large enough to come within the meaning of "necessary" as used in §455A.18, above, and they therefore would not take action in matters of this type. It would appear that farmer B's remedy, if any, would be in a civil action.

October 9, 1967

COUNTIES: AMBULANCES. 1. There is no authority in S.F. 51 for a delegation of contract power from board of supervisors to township trustees. 2. A county may be divided into service areas with ambulance services provided by the county from several sources and paid from the general fund. (Nolan to McDonald, Kossuth County Attorney, 10/9/67) #67-10-3.

Mr. Walter B. MacDonald, Kossuth County Attorney: This is in reply to your two letters of July 7 and July 18, 1967, requesting an opinion on several questions relating to amended §332.3 of the 1966 Code of Iowa.

The first question was whether under the new authority given to the county boards of supervisors the township trustees may enter into an ambulance agreement with a town without having an election.

I find no authority for such an agreement. The power vested in the board of supervisors by Senate File 51 enacted by the 62nd G. A. cannot be delegated to the trustees of a given township. The authority which is available to the township trustees under §359.42 to enter into agree-

ments with cities or towns for furnishing services for the extinguishing of fires in my opinion is not available for the establishment of a township ambulance service as opposed to a county ambulance service.

Your next question asks whether it is possible for the county board of supervisors to divide the county into districts so that if one area is being serviced by a "private" ambulance that this area may then be relieved of taxation for the purpose of maintaining the ambulance that the county is using. You stated:

"In essence, our situation is that Kossuth County and the city of Algona have entered into a joint radio-ambulance agreement whereby the county pays the city so much per month and the city maintains ambulance service throughout the county. However, there are two of our funeral directors in this county who are still maintaining ambulance service and we are asking your opinion as to whether these areas . . . serviced by the "private" ambulance must still be taxed as the county payments are being made out of the county general fund.

"The new law, in addition to giving the county board the authority to get into the ambulance business also provides that: 'There shall be a sufficient charge assessed to the user of this service to substantially cover the cost of operation, maintenance and depreciation of said Ambulance.'

"It is my interpretation that this section is merely intended to prevent the county from getting into direct competition with "private" ambulance service."

Since you state that the agreement between the county board of supervisors and the city of Algona provides for radio-ambulance service throughout the county such service would be available even in the areas where private ambulance service is also available, and therefore such areas serviced by a private ambulance would still be taxed for the county ambulance payment made out of the county general fund. However had the contract with the city of Algona not covered service to the entire county, there appears to be nothing in Senate File 51 which would have prohibited additional contracts for such service to other parts of the county to be furnished from other sources and all county payments to be made from the county general fund.

With reference to the proper interpretation of "There shall be a sufficient charge assessed to the user of this service to substantially cover the cost of operation, maintenance and depreciation of said Ambulance," it is my opinion that this sentence refers back to the previous sentence which authorizes the county to purchase, lease, equip, maintain and operate an ambulance or ambulances to provide the necessary and sufficient ambulance service.

I am enclosing copies of two opinions on this general subject which have been issued by this office recently.

October 11, 1967

STATE BOARD OF DENTISTRY. The money coming into the state dental examining board under the provisions of §153.11, Code of 1966, which statute was repealed and reenacted by H.F. 218, 62nd G. A., is available as appropriated money to the state board of dentistry as established by H.F. 218. The appropriation made to the state board of

dental examiners by S.F. 853 and H.F. 759, 62nd G. A., is not available to the state board of dentistry established by H.F. 218, 62nd G. A. (Turner to Selden, Comptroller, 10/11/67) #S67-10-1

Mr. Marvin R. Selden, Jr., State Comptroller: Reference is herein made to yours of August 29, 1967, in which you submitted the following:

"Chapter 147, Code 1966, relates to the 'General Provisions Regulating Practice Professions' which includes dentistry and dental hygiene. Chapter 153, Code 1966, relates to the 'Practice of Dentistry.'

"Under Chapter 147 reference is made throughout the various sections pertaining to the examining boards under the department of health (of which the board of dental examiners was one). Section 147.114 and 147.115 refer to hiring and paying of an inspector and the financing of this expense by an additional four dollar renewal fee placed in a special fund created for same called, 'State Board of Dental Examiners Fund.'

"By way of background information the following is submitted:

"1. Section 153.11, Code 1966, states: 'Every license to practice dentistry or dental hygiene shall expire on the thirtieth day of June. . . . Application for renewal of such license shall be made in writing to the department at least sixty days prior to the expiration. . . .'

"2. Section 147.115, Code 1966, states in part '. . . The funds derived from the additional renewal fee collected under this section shall be placed in a special fund by the treasurer of the state and the state comptroller to be known as the 'State Board of Dental Examiners Fund,' to be used by the examining board to assist in administering and enforcing the laws relating to the practice of dentistry, and no part of such expense shall be paid into the general fund of the state. . . .'

"3. In the past the major portion of the renewal fees applicable to the subsequent fiscal year have been collected by the health department and deposited to the credit of the above mentioned special fund prior to June 30th; therefore, the comptroller has been deducting these receipts from the June 30th balance in arriving at the amount to transfer to the general fund at the end of any particular fiscal year, thus making receipts available for the year intended, otherwise, there would only be a period of 60 days in which there were basically any funds to operate from. The other alternative being for the department to hold up depositing funds until after June 30th.

"4. In the past the examining board, through the department of health, has received an appropriation from the general fund from which the board members have been paid as well as paying for their supplies per Section 147.26, Code 1966.

"5. The health department proposed consolidating its operations for the 62nd biennium and requested that appropriations made in the past for the individual examining boards be combined in its overall licensing and certification division budget, which took place in the departmental appropriation bill — Senate File 853, Section 19(2).

"6. Also during the 62nd General Assembly certain 'trust' or 'special' accounts were placed under' budgetary control through authorized expenditure ceilings. (See House Files 759, 760 and 761.)

"7. House File 759, Section 7, pertained to the 'State Board of Dental Examiners Fund' under Section 147.115, Code 1966.

"The 62nd General Assembly passed House File 218 which does the following:

"1. Creates a 'State Board of Dentistry' (Section 1).

"2. Repeals Chapter 153, Code 1966, and all references to practice of dentistry throughout Chapter 147, Code 1966 — more particularly all of Section 147.114 and paragraph one of Section 147.115 which creates the 'State Board of Dental Examiners Fund' (Section 36).

"3. Creates a new fund for all moneys received by the new board in the state treasurer's office called 'Board of Dentistry Fund' (Section 4).

"4. Section 12 states: 'The state board of dentistry and all persons employed to administer this Act shall be included within the state department of health. The funds to administer this Act shall be included in the budget of the department of health and included in such department's appropriation, except that such funds shall be appropriated from the board of dentistry fund.

"5. Section 11 states: 'On or before the thirtieth day of April of each year hereafter, excepting the year in which he is originally licensed, each registered dentist shall pay to the board such fee. . . .

"Our records indicate that House File 218 was passed prior to June 30, 1967, but was not received by the Governor until after June 30, 1967. There was no stated effective date in the bill, nor was there a publication clause, therefore, from information received from your office this would become effective August 15, 1967.

"The problem involved is basically does the new 'State Board of Dentistry' have any funds from which to operate during this biennium? As the old special fund is eliminated under 147.115, does this close out to the general fund August 15, 1967, or can the portion applicable to fiscal year 1967-1968 be transferred over to and made available to the new 'Board of Dentistry Fund'? Can and does House File 759, Section 7 apply to the new dentistry fund? Can and does the portion of the appropriation made to the health department applicable to the dental board in Senate File 853 apply to the new board with reimbursement from special fund to take place at such time as sufficient funds are available in that account? Or are there any other alternatives which can be applied to the situation?

"In order to facilitate possible adjustments to be made to provide for the enforcement of House File 218, your prompt attention will be appreciated by the health department, state board of dentistry, and our office."

Contrary to the statement contained in your letter H.F. 218 was signed by the governor on June 30, 1967 and accordingly such act became effective on July 1, 1967, rather than, as you indicated, on August 15, 1967. We also advise:

1. Insofar as to whether the state board of dentistry may have funds from which to operate during the biennium beginning July 1, 1967, I am of the opinion that such funds are available. Section 153.11, Code of 1966, provides funds in the following language:

"Every license to practice dentistry or dental hygiene shall expire on the thirtieth day of June following the date of issuance of such license. Application for renewal of such license shall be made in writing to the department at least sixty days prior to the expiration of such license, accompanied by the legal fee and the affidavit of the applicant, upon a form to be prescribed by said department, in which affidavit the applicant shall state in substance that he has not during the term of the license which he then holds or the last renewal thereof violated any of the provisions of this title or committed any of the acts of unprofessional conduct, naming them as defined in this title."

It is true that this statute was repealed by House File 218, 62nd G. A. It was at the same time and in the same bill reenacted in almost exactly

the same terms by the foregoing numbered bill and appears therein as Section 9 thereof.

In this situation the pertinent rule is stated in 50 Am. Jur. Title Statutes, Section 533, in terms as follows:

"There is a slight diversity of opinion as to the effect of a repealing act on so much of the repealed act as is re-enacted in the former. In a few jurisdictions the rule has been laid down that the simultaneous repeal and re-enactment of a statute operate as a repeal and interruption of the former statute, and that rights and liabilities thereunder are not preserved and cannot be enforced. The prevailing view, however, is that where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmance of the old law, and a neutralization of the repeal, so that the provisions of the repealed Act which are thus re-enacted continue in force without interruption, and all rights and liabilities incurred thereunder are preserved and may be enforced. Pending proceedings not fully consummated do not fall with the repeal of laws under which they are begun, where those laws are substantially re-enacted by the repealing laws themselves. In such cases, the proceedings may be continued and concluded under the new law, subject to such modifications as the new statutes provide. These rules may be applied where the re-enactment and repeal are by successive acts passed on the same day."

The foregoing rule is the subject of numerous citations, including in the supplement to the foregoing numbered section the following comment:

"Where a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment, whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect. In many jurisdictions a statute or the constitution contains express provisions concerning the effect of a simultaneous repeal and re-enactment of a statute, and these provisions almost always adopt the common-law rule. The general rules concerning the continuing operation of a statute, which has been simultaneously repealed and re-enacted have been applied in a wide variety of cases."

The foregoing rule was followed and applied in *Pingel v. Coleman Co.*, 250 F. Supp. 521 (D.C. Iowa, 1965).

Under the foregoing interpretation money coming into the hands of the dental examiners prior to June 30, 1967, is available to the state board of dentistry created by H.F. 218, 62nd G. A. during the biennium beginning July 1, 1967.

2. In connection with the foregoing provisions it appears that the dentistry examining board, which existed under the provisions of §147.13, Code of 1966, was by the provisions of H.F. 218, 62nd G. A., which became effective on July 1, 1967, no longer applicable to the practice of dentistry.

It appears that S.F. 853, Sec. 19(2), 62nd G. A. appropriated from the *general fund* to the dental examining board a proportion thereof for the biennium beginning July 1, 1967, which act became effective on July 1, 1967, but which appropriation is inapplicable because the examining board went out of existence after June 30, 1967, by the terms of H.F. 218. Furthermore, H.F. 218, the special act creating the new state board of dentistry says in §12:

"The funds to administer this Act shall be included in the budget of the department of health and included in such department's appropriation, *except that such funds shall be appropriated from the board of dentistry fund.*" (Emphasis added.)

Where there is conflict or ambiguity between specific and general statutes, provisions of the specific statute (in this case H.F. 218) control, and that is true whether the special statute was adopted before or after the general statute (in this case S.F. 853). *City of Vinton v. Engledow*, 1966, ... Iowa....., 140 N. W. 2d 857.

It further appears that under the provisions of H.F. 759, Section 7, 62nd G. A., the state board of dentistry examiners was authorized to expend *from the fees* received under §147.115 of the 1966 Code for the biennium beginning July 1, 1967, a sum not to exceed $6,000.00 for salaries, support, maintenance, etc. However, such appropriation of $6,000.00 was inapplicable because the appropriation was made to the dentistry examining board which passed out of existence on June 30, 1967. This appears to make no difference if §12 of H.F. 218, itself, appropriates the fees received.

It therefore appears from the foregoing that provisions for express appropriations to the dentistry examining board were not effective to provide money for the new state board of dentistry. As far as other money is available to the state board of dentistry, H.F. 218, Section 12, 62nd G. A., provided that funds to administer that act should be included in the budget of the department of health and included in such department's appropriation, except such funds shall be appropriated from the board of dentistry fund. Such board of dentistry fund will therefor include the money derived from the renewal of licenses arising out of the provisions of H.F. 218, Section 9, previously exhibited herein as §153.11, Code of 1966. In speaking of the state board of dentistry fund Section 4 of H.F. 218 provided:

"Such fund shall be continued from year to year and the treasurer shall keep a separate account thereof showing receipts and disbursements and any remainder in said fund in excess of $25,000.00 at the end of each fiscal year shall be paid into the general fund of the state."

The foregoing quotation from §4, together with the provisions of §12, H.F. 218 constitute an appropriation of the money derived out of the provisions of H.F. 218, Section 9.

In addressing itself to the meaning of appropriation within Section 24 of Article III of the State Constitution, which provides, "No money shall be drawn from the treasury but in consequence of appropriations made by law." The attorney general in an opinion appearing in the Report for 1936, at page 685 stated:

"The word "appropriations," as contained in Section 24 of Article III of the state constitution, is not limited to the specific appropriations of the General Assembly which are grouped together and designated as the "appropriation acts." The Legislature makes more appropriations than those that are specifically contained and grouped together in the so-called "appropriation acts."

"This rule of law was first determined by the Supreme Court of Iowa in the case of *Prime vs. McCarthy*, 92 Iowa 569, 61 N. W. 220 (1894). In

this case the question raised was as to the authority of the State Treasurer to pay the expenses incurred by the national guard that was called into service by the Governor to prevent the invasion of "Kelly's Army." A general statute authorized the Governor to call out the guard on such occasions and specifically provided for the per diem pay of the soldiers while on duty. It did not provide for their subsistence. There was no appropriation act to specifically cover and pay for such an expense. The Supreme Court, in this case, held that the statutes authorizing the auditing and certifying of such expenses by the Executive Council, and the general law authorizing the Governor to call out the guard, constituted an appropriation within the meaning of the above constitutional provision.

"In the year 1921, the Executive Council desired to pay for the expense of the decoration of the statehouse during the Imperial Council of Shrine convention, which was held in the city of Des Moines. The Attorney General ruled on May 17, 1921, that this expense could not be paid for the reason that there was no law authorizing the Executive Council to incur such an expense, and that as a result thereof, there was no appropriation for the same.

"However, on July 6, 1921, the Attorney General ruled that Section 3 of Chapter 264 of the Laws of the 39th General Assembly was sufficient to constitute an appropriation even though there was no specific appropriation provided for in the so-called "appropriation acts." Section 3 of the above act of the 39th General Assembly provided:

"'Any county or district fair or agricultural society upon filing with the secretary of the State Board of Agriculture a report as herein provided for, shall be entitled to receive from the State Treasury a sum equal to eighty per cent of the first one thousand dollars, etc.'

"The Attorney General ruled that this law, which was of a general nature, constituted an appropriation within the dominion of Section 24 of Article III of the state constitution."

See also the cases of *Graham v. Worthington*, ... Iowa ....., 146 N. W. 2d 626 (1966) and *Grout v. Kendall*, 195 Iowa 467, 192 N. W. 529 (1923).

In view of the foregoing I am of the opinion that the only money available to the State Board of Dentistry is the money arising out of Section 9 of H.F. 218, 62nd G. A. and that the legislature contemplating that only such fees be appropriated for the use of this Board.

October 11, 1967

MUNICIPAL HOSPITALS: Senate File 72, 62nd General Assembly, and Chapter 380, 1966 Code of Iowa. Chapter 380.1 as amended by S.F. 72, 62nd G. A., applies to all municipal hospitals whether organized prior to or subsequent to the passing of the bill. (Sell to Vanderbur, Story County Attorney, 10/11/67). #67-10-15

Mr. Charles E. Vanderbur, Story County Attorney: This is in reply to your letter dated September 12, 1967, in which you submitted the following question concerning Senate File 72, 62nd G. A.:

"Can a municipal hospital organized 50 years prior to the passing of this bill continue to operate under an appointive board of trustees or must a board of trustees now be elected to govern the operations of such a hospital? Put another way, does this section of the code as amended apply only to municipal hospitals organized subsequent to its passage or does it apply to all municipal hospitals thereby making it necessary for all of them whether organized prior to or subsequent to the passing of the bill to have an elective board of trustees?"

Chapter 380.1 as amended by Senate File 72, 62nd G. A. reads as follows:

"If an institution as provided for in this Chapter is established pursuant to section thee hundred sixty-eight point twenty-seven (368.27) of the Code, cities or towns shall by ordinance provide for the election at a general, city, town, or special election, of three a board of trustees elected pursuant to this section and section three hundred eighty point two (380.2) of the Code, shall serve as the sole and only board of trustees for any and all institutions established by a city or town as provided for in this Chapter."

Prior to the amendment of the statute, this problem was similarly dealt with in an opinion from this office (see O.A.G. December 14, 1966). In that opinion, a statutory construction problem caused by the legislature's use of the word "may" in §380.1 was resolved by construing "may" in a mandatory sense. This meant that a city council was without authority to appoint hospital trustees except for the limited appointive power provided by §380.2. With the enactment of Senate File 72, the word "may" was replaced by the word "shall," thereby, further strengthening the proposition set forth in O.A.G. December 1966, i.e., that it was the intent of the legislature that only an elected board of trustees shall have the authority to mange and control a municipal hospital.

Ordinarily, the word "shall" in a statute is presumed to be used in a mandatory sense unless the character of the legislation justifies a different meaning. *Consolidated Freightways Corp. of Del. v. Nicholas*, 258 Iowa 115, 137 N. W. 2d 900 (1965); *State v. Hanson*, 210 Iowa 773, 231 N. W. 428 (1930); *Vale v. Messenger*, 184 Iowa 553, 168 N. W. 281, (1918). The language of Chapter 380 does not indicate a legislative intent to mitigate the mandatory effect of this word.

Since the statute as amended seems to clearly provide for a mandatory election, I am of the opinion all municipal hospitals must have elected trustees including those organized prior to the passage of the bill. Section 380.2 as amended provides that cities or towns "maintaining" an institution as provided for in this Chapter which have a board of trustees consisting of three members may increase that number to five. The use of the word "maintaining" indicated that the legislature intended that the amendment apply to those institutions presently existing. It may also be noted that Senate File 72 does not contain any specific language exempting previously organized hospitals from the application of the act.

To construe Senate File 72 as not including previously operated and organized hospitals would result in a strained construction of the act and defeat the intended effect of Chapter 380. Therefore, I believe, with reference to the leading idea or purpose of the act, that Chapter 380 applies to all municipal hospitals, notwithstanding the fact they were organized prior to the passage of the bill.

October 11, 1967

LIQUOR, BEER AND CIGARETTES — **Powers and Duties of the Liquor Control Commission over beer** — Chapter 124, Code of Iowa, 1966. The effect of conflict between House File 672 and Senate File 743 results in the Iowa Liquor Control Commission and not the Department of Revenue assuming the power and duties formerly held by the state tax

commission over beer. Authority to prescribe the form of beer permit bonds rests with the Liquor Control Commission. All license fees and taxes collected shall accrue to the state general fund except as required under §124.5. Inspection consent under Section 124.41 may be given orally, in writing or implied. (Claerhout to Carpenter, Sec., State Beer Permit Board, 10/11/67). #67-10-13

Mrs. Virginia Carpenter, Secretary, State Beer Permits, Iowa Liquor Control Commission: This is in answer to your letter of September 5, 1967, wherein you have requested an opinion regarding certain amendments to Chapter 124, Code of Iowa 1966.

All ten of your questions fall within a general category of inquiry which may be stated as follows. When two acts of the Iowa General Assembly conflict, which should be recognized and followed. Specifically, House File 672, 62nd G. A. amended those parts of Chapter 124 relating to the State Tax Commission so that the Iowa Liquor Control Commission would be referred to in its place. Senate File 743, 62nd G. A. also amended those parts of Chapter 124 relating to the State Tax Commission but unlike the House File, replaced the Tax Commission with the Department of Revenue. Therefore, the question arises did the Iowa General Assembly intend the Department of Revenue or the Liquor Control Commission to be the authority to perform those Beer Permit functions previously within the power of the State Tax Commission?

Your other questions appear to be:

1. What is the result of the Legislature's failure to strike "state tax commission" from Section 124.6, Code of Iowa 1966, where the remainder of the Chapter has been amended by replacing the State Tax Commission with the Liquor Control Commission according to House File 672, 62nd G. A.?

2. Was it the intent of the legislature to have the beer permittee give the Liquor Control Commission [or Department of Revenue] a bond rather than the local authorities who actually issue beer permits according to Sections 124.9 and 124.10, Code of Iowa, 1966?

3. Should the fees collected by the commission [or Department of Revenue] as provided for under Section 124.5, "be placed in a special fund" or "accrue to the state general fund" according to Section 124.33?

4. Is the "consent" required of a beer permittee as provided in Section 16 of H.F. 672, 62nd G. A., to be oral or in writing?

In response to your general question regarding the conflict between S.F. #743 and H.F. #672, I am of the opinion that the Liquor Control Commission and not the Department of Revenue was intended by the Legislature to have the responsibilities and duties provided by Chapter 124, Code of Iowa, 1966.

House File 672, 62nd G. A., entitled "AN ACT RELATING TO THE POWERS AND DUTIES OF THE LIQUOR CONTROL COMMISSION OVER BEER," passed both houses on June 27, 1967, and was approved by the Governor on June 29, 1967. Therefore, it became effective July 1, 1967, by the provision of Article 3, §26, Constitution of Iowa. Senate File 743, 62nd G. A., entitled "CREATING A DEPARTMENT OF REVENUE IN LIEU OF THE STATE TAX COMMISSION, TO BE HEADED BY A DIRECTOR OF REVENUE," passed both houses on

July 1, 1967, and was approved by the Governor on July 24, 1967. According to its own Sections 322 and 323, its effective date will be January 1, 1968.

House File #672 is limited in its scope to the transferral of rights and duties formerly in the State Tax Commission over beer permits to the Liquor Control Commission. The scope of the Senate File is broad, treating a number of Chapters other than one dealing with beer permits. The only irreconcilable conflict between the two statutes amending Chapter 124, appears to be the several instances where the State Tax Commission is replaced by either the Liquor Control Commission or the Department of Revenue.

Generally, where irreconcilable conflict exists between two statutes, the later one is said to control. *State v. Blackburn*, 1946, 237 Iowa 1019, 22 N. W. 2d 821. However, when possible, conflicting statutes should be harmoniously construed. *Hardwick v. Bublitz*, 1961, 253 Iowa 49, 111 N. W. 2d 309. It is obvious upon reading the two instant amendments that the Senate File intended to abolish the State Tax Commission and create the Department of Revenue, while the House File intended to delegate authority over beer permits to the Liquor Control Commission. Where conflict arises between a special statute such as the House File and a general statute such as the Senate File, the provisions of the special statute prevail whether it was adopted before or after the general one. *City of Vinton v. Engledow*, 1966, ... Iowa....., 140 N. W. 2d 857. This rule is based on the theory that the specific Act is an exception to the general statute. *Smith v. Newell*, 1962, 254 Iowa 496, 117 N. W. 2d 883. The application of this rule and theory clearly accomplishes a harmony between House File 672 and Senate File 743. To reach an opposite conclusion would destroy the effectiveness of the House File. Furthermore, it would thrust State Tax Commission duties regarding beer permits upon the Department of Revenue, almost six months after those duties ceased to exist in that commission. I am of the opinion that those places where the State Tax Commission has been striken in H. F. #672 and S.F. #743, the Liquor Control Commission and not the Department of Revenue was intended to be inserted in its place, as accomplished by H.F. #672.

In answer to the more specific question number one above, I am of the opinion that the failure to strike "state tax commission" from Section 124.6, has no effect upon the statute. The sentence as amended reads:

"No refund shall be made to any permit holder, upon the surrender of his permit, if there is at the time of said surrender a complaint filed with the state tax commission, liquor control board or council charging him with a violation of the provisions of this chapter."

Because the definition of "commission" according to Section 124.2(3) means the Iowa Liquor Control Commission and the duties and powers formerly in the state permit board now rest with that commission by Section 124.4, it is my opinion that the words "state tax" are mere surplusage where not striken by H.F. #672. The State Tax Commission lost its authority to have a complaint filed with it under Section 124.6 when the House File became effective July 1, 1967. Therefore, it is my opinion that although the "state tax" was not striken and must remain in the

above quoted section, there is no ambiguity or confusion which will alter its meaning or effect.

Your second specific question seeks an answer to what "[f]urnishes a bond to the commission . . ." means in Section 124.9(3) and 124.10(3) of the amended beer laws. In each instance it is noted that the section provides the steps which an applicant must take to have a permit issued to him by "the authority so empowered in this chapter."

According to Section 124.2(7) a permit is authorization issued by the "department of revenue, the liquor control commission, the city or town council of any city or town or the board of supervisors of any county." Section 124.5 provides cities and towns with power to issue "B" and "C" permits within their limits and boards of supervisors to issue "B" and "C" permits within their respective counties. Section 124.5 also requires an applicant for "B" or "C" permit to submit three dollars and certification of the local issuance to the commission for a state permit. It is clear that the applications required by Sections 124.9 and 124.10 are submitted primarily to the local authorities who issue a permit before the three dollar fee and certification are sent to the commission to obtain a state permit.

Section 124.40 provides for a forfeiture of the Class "B" bond after revocation or suspension upon citizens' complaint ". . . and the bond of the permit holder provided for in Section 124.9, shall be forfeited if the permit is revoked and its principal or penal sum shall become immediately due and payable to such city, town, or county, as the case may be."

Because the authority rests with the commission to prescribe the form of the bond and furnish the form for the applicants, it would appear to give the commission the same latitude to make the local authorities the payee on the bond as was accomplished under the Code secions prior to amendment. Before H.F. #672 went into effect Sections 124.9(3) and 124.10(3) began: "Furnishes a bond in the form prescribed and to be furnished by the state tax commission. . . ." Therefore, it is my opinion that Iowa Liquor Control Commission is required to provide bond forms to applicants for "B" and "C" beer permits and such bond must be furnished to the commission upon application for a state beer permit. However, by retaining the authority to prescribe the form for the bond, the Commission also retains the authority to make the bond payable to the city, town, or county issuing authority.

Question number three above asks whether the fees collected by the commission should be placed in a special fund according to Section 124.5 or accrue to the state general fund according to Section 124.33. The pertinent part of Section 124.5 states:

"Such applicant [for "B" or "C" permit] shall deposit with said application a fee of three dollars which shall be forwarded to the commission together with the certification to the commission of the issuance of such class "B" or "C" permit. Such fees collected shall be placed in a special fund by the commission for the purpose of enforcing the provisions of this chapter."

Section 124.33 states in part:

"All license fees and taxes collected by the department of revenue and the liquor control commission shall accrue to the state general fund."

The two Sections are obviously in conflict because the "B" and "C" permit fees cannot be in both a special fund and the state general fund at once. Therefore, the rule of construction must be used which determines the result of a conflict between a specific statute and a general one. The word "all" usually does not admit an exception, addition or exclusion. However, where a general provision of a statute and a special provision conflict, the general gives way to the special on the basis of exception or qualification to the general provision. *State v. Flack*, 1960, 251 Iowa 529, 101 N. W. 2d 535. Because of that rule I am of the opinion that "all license fees and taxes collected by . . . the liquor control commission shall accrue to the state general fund" except the fees collected for "B" and "C" permits under Section 124.5 which "shall be placed in a special fund by the commission for the purpose of enforcing the provisions of this chapter." Thus, fees collected by the Commission for beer permits according to Sections of Chapter 124 other than Section 124.5 (such as the special class "B" train permit fee provided for by Section 124.24) would accrue to the state general fund as required by Section 124.33.

Question number four above asks whether the consent required in Section 16 of H.F. #672, 62nd G. A., now Section 124.41, is to be oral or in writing. That Section states:

"As a condition for the issuance or retention of a beer permit, the permittee shall give consent for members of the fire, police, and health departments and the building inspector of cities and towns, the commission and its agents, the county sheriff, deputy sheriff and state agents, and county health officer to enter upon premises without a warrant to inspect for violations of the provisions of title six (VI) of the Code, or the provisions of ordinances and regulations that cities and towns and boards of supervisors may adopt."

Such a condition precedent to the granting of a license has been tested in other states. The general concurrence of decisions is that an inspection of the licensed premises without a warrant is valid where the owners consent is written into the license application, *Fischer v. State*, 1950, 74 A. 2d 34, 195 Md. 477; *State v. Ward*, 1951, 239 S. W. 2d 313, 361 Mo. 1236; or where consent is implied by acceptance of the license, *Oklahoma Alcoholic Beverage Con. Bd. v. McCulley*, 1963, 377 P. 2d 568, ... Okla. ..... ; *State v. Board of Liquor Control*, 1953, 131 N. E. 2d 245, app. dismissed, 162 Ohio St. 145, 120 N. E. 2d 725.

It is my opinion that consent to allow the licensed premises to be inspected for violations of title VI of the Code may be expressed by acceptance of the beer permit by the permittee or by a written provision incorporated into the permit application. However, a review of the above decisions prompts me to advise you that written consent or acknowledgement of Section 124.41 by the permittee on his application would present a more substantial evidentiary basis than oral or implied consent should that consent ever be subject to judicial scrutiny. Therefore it is my recommendation that written consent be incorporated into beer permit applications, to conform with the requirement of Section 124.41.

October 11, 1967

TAXATION: Sales Tax on self-service coin-operated car washes. Section 25, House File 702, Acts of the 62nd General Assembly (1967). Those engaged in the business of owning and operating self-service coin

operated car washes are rendering or performing a "car wash" service since they are making available to the public the machinery and equipment necessary to the washing of a car, and they are required to remit to the State 3% of the gross receipts derived from the performing of such taxable service. (Griger to McCray, State Representative — 10-11-67) #67-10-14.

Hon. Paul B. McCray, State Representative: This is to acknowledge receipt on October 3, 1967, of your letter in which you requested an opinion as to whether the owner of a self-service coin operated car wash is rendering a service subject to the tax imposed by House File 702, Acts of the Sixty-second General Assembly (1967).

House File 702, Acts of the sixty-second General Assembly (1967) provides in pertinent part:

"Sec. 25. Section four hundred twenty-two point forty-three (422.43), Code of Iowa, is amended by adding thereto the following:

"The following enumerated services shall be subject to the tax herein imposed on gross taxable services:

". . . car wash and wax; . . ."

The Iowa State Tax Commission has promulgated the following rule concerning "car wash and wax":

"5.10 (Ch. 348, 62nd G. A.) *Car Wash and Wax.* Persons engaged in the business of washing or waxing cars are rendering, furnishing, or performing a service the gross receipts from which are subject to tax. The gross receipts from such service shall be taxable whether it is performed by hand, machine, or coin operated devices. 'Cars' are defined as any motor vehicle as defined in Chapter 321 of the Code."

The State Tax Commission may prescribe rules necessary and advisable for the detailed administration of the sales and use tax laws, so long as such rules do not alter, add to, or detract from the meaning of the words in the statute, and so long as such rules are not inconsistent therewith. *Peoples' Gas and Electric Co. vs. State Tax Commission,* 238 Iowa 1369, 28 N. W. 2d 799 (1947); *Bruce Motor Freight Co. vs. Lauterbach,* 247 Iowa 956, 77 N. W. 2d 613 (1956).

Although there may be some difficulty in the collection of the tax, such difficulty does not per se justify avoidance of tax statutes and administrative rules consistent therewith. *Randolph Foods vs. State Tax Commission,* .....Iowa....., 137 N. W. 2d 307 (1965).

We are pressed with the argument that the owner of a self-service coin operated car wash is not performing a service. This argument confronted the Utah Supreme Court in *Francom vs. Utah State Tax Commission,* 11 Utah 2d 164, 356 P. 2d 285 (1960) in regard to self-service coin operated laundries. The plaintiffs owned and operated establishments which furnished the use of automatic coin operated washing machines and dryers to the general public. All the manual labor involved was performed by the customer. The Utah Sales Tax statute levied the tax as follows:

"(2). A tax equivalent to two and one-half per cent of the amount paid or charged for laundry and dry cleaning services."

In rejecting plaintiffs' argument that the sales tax statute did not apply to self-service coin operated laundries, the Court stated at 356 P. 2d 286:

"Regardless of the fact that the actual manual operation or labor is performed by the customer, we are of the opinion that the plaintiffs are performing a 'laundry service' within the meaning of the statute and thus the sales tax is applicable. The mere fact that the plaintiffs have no attendant at the establishment does not mean that the plaintiffs are not performing a 'service.' *By making available to the public the machines necessary to the washing and drying of articles, they are performing a 'laundry service.'* " (Emphasis supplied)

Finally, it should be noted that Section 20 of House File 702, Acts of the Sixty-second General Assembly (1967) provides that the rate of tax is 3% upon the *gross receipts* from the rendering, furnishing, or performing of the enumerated services listed in Section 25 of the statute.

It is the opinion of this office that those engaged in the business of owning and operating self-service coin operated car washes are performing a "car wash" service since they are making available to the public the machinery and equipment necessary to the washing of a car, and they are required to remit to the State of Iowa 3% of the gross receipts derived from the performing of such taxable service.

October 12, 1967

STATE OFFICERS AND DEPARTMENTS — General contingent fund, allocations from Article III, §§1 and 24, Constitution of Iowa, H.F. 786, §5, 62nd G. A., S.F. 853, §39, 62nd G. A. — Where legislature has appropriated not more than $150,000 for the replacement of one aircraft to be used for administrative flights of the governor, in the absence of a showing of a contingency, the executive council, upon the recommendation of the comptroller and with the approval of the budget and financial control committee may not allocate funds from the general contingent fund in order to purchase an aircraft costing more than $150,000.00. (Turner to Smith, State Auditor, 10/13/67) #S-67-10-2.

The Hon. Lloyd R. Smith, Auditor of the State of Iowa: By your letter of this date you state:

"I request an opinion of the Attorney General as to whether the Executive Council, with the approval of the Budget and Financial Control Committee, may allocate and expend from the general contingent fund of the state any sum which would supplement the specific appropriation of $150,000.00 as provided in Section 39 of Senate File 853, 62nd General Assembly for the replacement of an aircraft to be assigned to the military department for the support of the administrative flights of the Governor. I voted for this but after later examining SF853 and HF786, I have serious doubts that such action was legal."

S.F. 853 of the 62nd General Assembly, an act to appropriate from the general fund of the State of Iowa for the biennium beginning July 1, 1967, and ending June 30, 1969, funds for various departments and various divisions thereof of the State of Iowa, for the purposes provided by law, provides in Sec. 39 at page 28 of the enrolled bill, an appropriation for the Department of Public Defense in part as follows:

"For support, maintenance, purchase of state owned aircraft, and

miscellaneous purposes including *not more than* one hundred fifty thousand dollars ($150,000.00) for the replacement of one aircraft *which shall be the only aircraft* to be assigned to the military department for the support of administrative flights of the governor . . . $670,720.00." (Emphasis supplied)

H.F. 786 of said General Assembly is an act to appropriate from the general fund of the State of Iowa for the biennium beginning July 1, 1967, and ending June 30, 1969, funds (among other things) "to create the general contingent fund of the state specifying the purposes for which the appropriation may be used." Section 5 thereof provides as follows:

"Sec. 5. The general contingent fund of the state for the biennium beginning July 1, 1967 and ending June 30, 1969 is hereby created and said fund shall consist of the sum of one million seven hundred thousand (1,700,000) dollars, hereby appropriated thereto from the general fund of the state. The contingent fund shall be administered by the executive council and *allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. The executive council shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law.*

"Before any of the funds appropriated by this Act shall be allocated, a written recommendation shall be obtained from the state comptroller and the executive council and they shall determine that the proposed allocation shall be for the best interest of the state. Any allocation in excess of thirty-five thousand dollars ($35,000.00) shall first be approved by the budget and financial control committee." (Emphasis added)

It is unnecessary to this opinion to attempt to determine what constitutes "contingencies arising during the biennium which are legally payable from the funds of the state" except to say that where a specific appropriation is made by the legislature for "*not more than* one hundred fifty thousand dollars ($150,000.00) for the replacement of one aircraft which will be the only aircraft to be assigned to the military department for the support of administrative flights of the governor," replacement of one aircraft obviously does not constitute a contingency, but rather was specifically contemplated and limited by the legislature. Certainly this is true in the absence of any evidence that the price of airplanes has unexpectedly risen, the value of the airplane to be replaced has unexpectedly declined, or some other contingency has occurred since the enactment of these laws. Even then, the Executive Council (and the budget and financial control committee, if the allocation exceeded $35,000) would have to find, as a fact, that such occurrence did constitute a contingency. Perhaps such an unexpected rise in price, or decline in value, would not be a contingency within the proper exercise of their discretion to make such a determination.

Of course, only the legislature can make an appropriation and neither the Executive Council nor the Budget and Financial Control Committee of the legislature may exercise this power.

Article III, §24, Constitution of Iowa provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

While the legislature *has* appropriated $1,700,000 for a contingency

fund, expenditure therefrom by the Executive Council, even with the approval of the Budget and Financial Control Committee, in absence of a contingency, constitutes a violation of the aforesaid absolute prohibition of the people who created Iowa's government. The legislature cannot do indirectly what it is prohibited from doing directly. Moreover, the legislature could not, without adequate guidelines, delegate to anyone the power to expend state funds for an airplane or any other purpose. Article III, §1 of our Constitution regarding the distribution of power and the legislative authority reposes in the General Assembly this exclusive prerogative. For an excellent discussion of this problem, see the article entitled "The Executive Council and Power to Allot Appropriations," 1929, 14 Iowa Law Review 369, and the authorities cited therein.

But the legislature has not delegated its legislative power in this instance. Quite aside from the constitutional issues, the law's specific limitation of *"not more than* $150,000 for the replacement of one aircraft" makes supplementation from the contingency fund of the appropriation in that amount for that purpose clearly, plainly and palpably illegal. If it were not illegal, and if no constitutional restraints existed, no reason appears why the council should not be persuaded to expend a million dollars for the purchase of a jet airplane. Such might well be deemed more appropriate for the transportation of the highest government official of the state in which the council clearly does have the greatest pride. But the Executive Council does not make the policy of this State.

October 13, 1967

STATE OFFICERS AND DEPARTMENTS — Allocations from general contingent fund, multiple handicapped blind children — Art. III, §31, Constitution of Iowa, H.F. 786, §5; S.F. 853, §56, 62nd G. A.; Ch. 232, Code of Iowa, 1966, as amended by H.F. 152, 62nd G. A. Executive council may allocate amount from contingent fund to Iowa commission for the blind to supplement appropriation made to such association for training and education of multiple handicapped blind children where original appropriation request contemplated that a certain number of multiple handicapped blind children would require such training and education and it is subsequently discovered that there is a greater number requiring such assistance. (Turner to Robinson, Sec., Executive Council, 10/13/67) #S-67-10-3.

Mr. Stephen C. Robinson, Secretary, Executive Council: Reference is made to your letter of October 10, 1967, in which you request an opinion of this office as to whether or not the executive council may make an allocation of funds from the contingent fund created by House File 786, 62nd G. A. to or for the benefit of a specifically named individual.

The factual situation which gives rise to your request may be summarized as follows. A child, now fourteen, is both deaf and blind. Until the end of the last school year she attended the Iowa Braille and Sight Saving School, an institution under the control of the board of regents. However, because of the steady deterioration of what little hearing the girl has, officials of the Iowa Braille and Sight Saving School have advised that that school can be of no further help to her. In addition we are informed that there is no other institution in the state of Iowa which can give training to this multiple handicapped child. However, the Wash-

ington state school for the blind has a department for the education of deaf-blind children and will accept the girl in question provided arrangements are made to pay the $5,000.00 annual charge for her care and education.

By Senate File 853, §56, the 62nd general assembly appropriated to the Iowa commission for the blind, for each year of the biennium $5,000.00 "for the training and education of multiple handicapped blind children." We are advised that at the time this appropriation was requested the Iowa commission for the blind was unaware of the existence of the girl in question and, as a result, requested no funds for her training and education. We are further informed that the appropriation described above was made to provide for the training and education of another blind-deaf child. Thus, the Iowa commission for the blind has an appropriation which is insufficient to provide for the training and education of more than one multiply handicapped child.

Section 5 of House File 786, 62nd G. A. provides:

"Sec. 5. The general contingent fund of the state for the biennium beginning July 1, 1967 and ending June 30, 1969 is hereby created and said fund shall consist of the sum of one million seven hundred thousand (1,700,000) dollars, hereby appropriated thereto from the general fund of the state. The contingent fund shall be administered by the executive council and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. The executive council shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law.

"Before any of the funds appropriated by this Act shall be allocated, a written recommendation shall be obtained from the state comptroller and the executive council and they shall determine that the proposed allocation shall be for the best interest of the state. Any allocation in excess of thirty-five thousand dollars ($35,000.00) shall first be approved by the budget and financial control committee.

"Any balance in the contingent fund as of June 30, 1969 shall revert to the general fund of the state as of June 30, 1969."

Article III, §31, Constitution of Iowa, would appear to be dispositive of the precise question you have asked. The relevant portion of such §31 reads as follows:

". . . no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

It has been said that an act cannot be said to be for a private purpose where some principle of public policy is involved and that this provision forbidding appropriation of public money for private purposes as distinguished from public purpose is not to be narrowly construed. *Dickinson v. Porter*, 240 Iowa 393, 35 N. W. 2d 66, (1949), appeal dismissed 70 Sup. Ct. 88, 338 U. S. 843. Nevertheless, it is our opinion that this constitutional provision would prohibit the executive council from allocating contingent funds directly to or for the benefit of any specifically named individual. This is not to say, however, that such council could not under H.F. 786 allocate additional funds to the Iowa commission for the blind which in turn could then use such funds for the training and education

of this blind-deaf child provided, of course, that all of the requirements of H.F. 786 were satisfied. An allocation from the contingent fund of an additional $5,000.00 for each year of the biennium "for the training and education of multiple handicapped blind children" would be no more an appropriation of public money for a private purpose than was the original appropriation contained in §56, S.F. 853. In each case one particular person will in fact benefit, but the Iowa commission for the blind is not obliged to spend either the original appropriation or this supplemental allocation on anyone in particular. The only requirement is that the funds be spent "for the training and education of multiple handicapped blind children." It can hardly be gainsaid that this is a public purpose.

It is also to be observed that Article III, §31 prohibits only *appropriations* of public money for private purposes. It is questionable whether an allocation by the executive council under H.F. 786 is an "appropriation." The "appropriation" occurred when the legislature enacted H.F. 786. What we are here concerned with is the disbursement of funds already appropriated. It is arguable that Article III, §31, has no application under such circumstances.

Webster's Third New International Dictionary of the English Language Unabridged 1966 ed., G. & C. Merriam Company, contains the following definitions of "contingency" and "contingent" as follows:

"contingency . . . 2 . . . b: a possible future event or condition or an unforeseen occurrence that may necessitate special measures [a reserve fund for contingencies]."

"contingent . . . 3 . . . b: intended for use in exigent circumstances not completely foreseen."

It cannot be denied that the circumstances here involved were unforeseen. At the time the legislature enacted §53, S.F. 853 it thought there was one deaf-blind child who would require training and education. It did not forsee that there might be more than one who would require such training. Thus, the subsequent discovery that there was an additional blind-deaf child was a contingency which would justify the executive council in allocating a portion of the contingent fund to the Iowa commission for the blind.

There is one obstacle remaining. §5, H.F. 786 requires that before any funds appropriated by such act can be allocated a written recommendation must be obtained from the state comptroller and the executive council and they must determine that the proposed allocation would be in the best interest of the state. In this case the comptroller, by his letter to you of September 29, 1967, has recommended disapproval of the request and stated his reasons therefor. Thus, unless the comptroller changes his recommendation, no funds can be allocated under H.F. 786, §5.

Another possible, though more cumbersome, avenue may be available under chapter 232, Code of Iowa, 1966, as amended by H.F. 152, 62nd G. A. §232.2(14)(b) provides:

" 'Dependent child' means a child:

* * *

"b. Who is in need of special care and treatment required by his physical or mental condition which the parents, guardian, or other custodian is unable to provide."

There seems little doubt that the child in question falls within this definition. Proceedings under §232.3 et seq. could be instituted to place the child in the custody of the court and the court could then place the child in the Washington state school for the blind under §232.33(5) which provides:

"If the court finds that the child is neglected or dependent, the court shall enter an order making any one or more of the following dispositions of the case:

* * *

"5. Commit to or place the child in any private institution or hospital for the care and training of children or any public institution for the care and training of children other than an institution under the jurisdiction of the state board of control."

The costs of such child's care under §232.51 would ultimately be charged to the county of the child's legal settlement pursuant to §232.53 unless because of the amendment to such §232.53 accomplished by H.F. 152 the county might be able to recover the costs of caring for such child from the general fund of the state. For such state reimbursement to be available it would be necessary for the child to meet the qualifications for admission to the Annie Wittenmyer Home prescribed in §244.3. In this connection see an opinion of this office OAG 10/9/67, Williams to Gering, a copy of which is attached.

October 19, 1967

TAXATION: Motor Vehicle Fuel Tax — §§324.3(4), 324.35, Code of Iowa, 1966. Area vocational schools and community college districts are not exempt from motor fuel tax. (Martin to Fullmer, Director, Motor Vehicle Fuel Tax Division, 10/19/67) #67-10-16.

Mr. Wayne J. Fullmer, Director, Motor Vehicle Fuel Tax Division: I have your letter of July 12, 1967, in which you inquire of this office as follows: Are area vocational schools and area community colleges eligible for exemption from Motor Vehicle Fuel Taxes?

Section 324.3(4), Code of Iowa, 1966, provides for an exemption from motor fuel tax as follows:

". . . [N]o tax shall be imposed, or collected under this division with respect to the following:

". . . 4. Motor fuel sold to the State of Iowa or any of its agencies, but this exemption shall not apply to political subdivisions of this state."

Section 324.35, Code of Iowa, 1966, also provides for exemption in the case of special fuel tax as follows:

"No tax is imposed under this division on special fuel used by the state of Iowa or any of its agencies but this exemption shall not apply to political subdivisions of this state."

The issue presented by your question and the statutes is whether area vocational school and community college districts, organized under Chap-

ter 280A, 1966 Code of Iowa, qualify for the exemption afforded to the state or one of its agencies.

Cities, counties, school districts, towns, hospitals, park commissions and townships have been held to be among the "political subdivisions of the state," or, "subdivisions of the state" by the following authorities:

Cities; *Graham v. Worthington,* .....Iowa....., 146 N. W. 2d 626, 633 (1966)

Opinion of the Attorney General, June 29, 1966, Clark to Simpson

58 O.A.G. 22.76

40 O.A.G. 553

Counties; *Hewitt v. Keller,* 223 Iowa 1372, 275 N. W. 94, 97 (1937)

Dayton v. Bechly, 213 Iowa 1305, 1307, 241 N. W. 416 (1932)

Herrick v. Cherokee County, 199 Iowa 510, 513, 202 N. W. 252, 253 (1925)

McSurely v. McGrew, 140 Iowa 163, 168, 132 Am. St. Rep. 248, 118 N. W. 415, 418 (1908)

(these cases denominated counties as "subdivisions of the state")

Opinion of the Attorney General, June 29, 1966, Clark to Simpson

58 O.A.G. 22.76

School Districts; *Graham v. Worthington,* .....Iowa....., 146 N. W. 2d 626, 633 (1966)

Towns; 58 O.A.G. 22.76

Hospitals; 58 O.A.G. 22.76

Park Commissions; 58 O.A.G. 22.76

Townships; *Appeal of Trustees of Iowa Colleges,* 185 Iowa 434, 437, 170 N. W. 813 (1919)

(holds a township to be a legal subdivision of a county)

We can find no reason to distinguish an area vocational school and community college district from the above list. On the contrary, there is reason to include it. The area vocational school and community college districts bear many of the attributes of the political subdivisions (See Opinions of the Attorney General, March 13, 1967, Turner to Hill) and few, if any, of the characteristics of the state or one of its agencies.

We, therefore, are of the opinion that area vocational school and community college districts are required to pay motor vehicle fuel taxes and are not entitled to a refund for taxes paid.

October 19, 1967

Mr. Walter L. Saur, Fayette County Attorney: This is to acknowledge receipt of your letter of October 6, 1967, in which you requested an opinion as to whether, for purposes of the personal property tax credit created by House File 686, Acts of 62nd General Assembly (1967), separate personal property listing forms are necessary where the property is owned jointly.

Section 43 of House File 686 provides in pertinent part:

"No taxpayer in the state shall be allowed a credit on personal property tax in excess of two thousand five hundred (2,500) dollars assessed valuation . . ."

Section 44 of House File 686 provides:

"If personal property is owned jointly, the owners may not respectively take a tax credit on such property in excess of the proportionate ownership in said property and said proportionate ownership shall be determined by dividing the total assessed value of the property by the number of owners unless they show their actual interest and ownership on the personal property listing form provided by the assessor. Any such proportionate credit may be applied only to the extent that the owner's total respective credit of two thousand five hundred (2,500) dollars of assessed valuation is not used and in no event is an additional credit to be allowed for property held as hereinabove described in this section."

Section 428.4, Code of Iowa, 1966, provides in part:

"Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January . . ."

Section 429.4, Code of Iowa, 1966, provides in part:

"In making up the amount of moneys and credits, corporation shares or stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars."

In 1950 O.A.G. 125, the Attorney General, in construing Section 429.4, ruled that where a husband and wife are joint owners of moneys and credits they may file a joint return and each claim the deduction. If the amount so held is in excess of $10,000 each must file a separate return. We see no reason why this reasoning cannot apply to the utilization of personal property listing forms where the property is owned jointly.

It is the opinion of this office that where personal property is owned jointly, the owners thereof may use one personal property listing form if the property so held does not exceed the assessed valuation applicable to the credit each joint owner would be entitled to. Where the jointly owned property exceeds such assessed valuation, a separate personal property listing form must be utilized by each joint owner.

October 23, 1967

TAXATION: Drainage taxes. §§455.57, 455.62, 455.64. Where a drainage tax levied under Section 455.57 is not paid, it shall bear interest not to exceed five percent per annum from the date of assessment and levy. If the taxpayer does not pay the tax and does not sign a waiver agreement under Section 455.64, one half of the tax becomes delinquent on April 1 and the second half become delinquent on October 1 succeeding the levy. These delinquent amounts are subject to the ¾ of 1% per month penalty as are other property taxes, in addition to the interest rate not to exceed five percent per annum. If the taxpayer does not pay the tax, but does sign a waiver under Section 455.64(2) there is no penalty when the installment payments of the tax become delinquent. (Griger to Blum, Franklin County Atty) (#67-10-18)

Mr. Lee B. Blum, Franklin County Attorney: This is to acknowledge receipt of your letter of September 13, 1967, in which you requested an opinion as follows:

"1. If a drainage tax levied under Section 455.37 is not paid, does it accrue 5% interest from the date of the levy until paid, in addition to any other sanctions imposed for delayed payment?

"2. If taxpayer does not pay the tax within 20 days after levy, and does not sign a waiver and agree to installment payments under Section 455.64; (a) Is the entire tax due January 1 of the following year? (b) Is it divisible into two equal installments that become delinquent on April 1 and October 1 respectively? (c) Are the delinquent amounts subject to penalty at ¾ of 1% per month as other taxes? and (d) If delinquent amounts are subject to ¾ of 1% per month penalty, is this in addition to the 5% interest?

"3. If taxpayer does not pay the tax within 20 days after levy and does sign a waiver per Section 455.64, subparagraph 2 (10 to 20 installments):

(a) If the installment amount due in March of each year is not paid on time, is it subject to ¾ of 1% per month penalty in addition to the 5% interest?

(b) If the installment amount due in September of each year is not paid on time, is it subject to ¾ of 1% penalty per month in addition to the 5% interest?

Section 455.57, Code of Iowa, 1966, provides:

"Levy — interest. When the board has finally determined the matter of assessments of benefits and apportionment, it shall levy such assessments as fixed by it upon the lands within such district, and all assessments shall be levied at that time as a tax and shall bear interest at not to exceed five percent per annum from that date, payable annually, except as hereinafter provided as to cash payments thereof within a specified time."

In answer to your first question, if a drainage tax levied under Section 455.57, is not paid, it shall bear interest not to exceed five percent per annum from the date of the assessment and levy, in addition to any other sanctions imposed by Iowa statutes for delayed payment of the tax. *Rystad vs. Drainage District,* 170 Iowa 178, 152 N. W. 364 (1915).

In order to answer your second series of questions, Section 455.62, Code of Iowa, 1966, would be applicable. This statute provides:

"Assessments — maturity and collection. All drainage or levy tax assessments shall become due and payable at the same time as other taxes, and shall be collected in the same manner with the same penalties for delinquency and the same manner of enforcing collection by tax sales."

Chapter 445, Code of Iowa, 1966, provides for the collection of taxes and the following Sections of Chapter 445 would be applicable:

Section 445.36 provides:

"Payment — installments. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

Section 445.37 provides:

"When delinquent. In all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due."

Section 445.39 provides:

"Interest as penalty. If the first installment of taxes shall not be paid by April 1, said installment shall become due and draw interest as a penalty, of three-fourths of one percent per month until paid, from the first day of April following the levy; and if the last half shall not be paid by October 1 following such levy, then a like interest shall be charged from the date such last half became delinquent."

From an examination of Section 455.62, and the above mentioned sections of Chapter 445, it is apparent that the entire tax is not delinquent on January 1 of the year following the levy of the drainage tax. One half of the tax would become delinquent if not paid before the first day of April succeeding the levy. Accordingly the drainage tax is divisible, where Section 455.62 is applicable, into two equal installments that come delinquent on April 1 and October 1 respectively of the year succeeding the levy. These taxes, if delinquent, are subject to the penalty of ¾ of 1% per month until paid. Also, the interest rate not to exceed 5%, pursuant to Section 455.57 is applicable and the penalty of ¾ of 1% per month is in addition to such interest.

In order to answer your third series of questions, it is necessary to examine the whole of Section 455.64, Code of Iowa, 1966. This statute provides as follows:

"Installment payments — waiver. If the owner of any premises against which a levy exceeding twenty dollars has been made and certified shall, within thirty days from the date of such levy, agree in writing indorsed upon any improvement certificate referred to in section 455.77, or in a separate agreement, that in consideration of having a right to pay his assessment in installments, he will not make any objections as to the legality of his assessment for benefit, or the levy of the taxes against his property, then such owner shall have the following options:

"1. To pay one-third of the amount of such assessment at the time of filing such agreement; one-third within twenty days after the engineer in charge shall certify to the auditor that the improvement is one-half completed; and the remaining one-third within twenty days after the improvement has been completed and accepted by the board. All such installments shall be without interest if paid at said times, otherwise said assessment shall bear interest from the date of the levy at the rate of not to exceed five percent per annum, payable annually, and be collected as other taxes on real estate, with like penalty for delinquency.

"2. To pay such assessments in not less than ten nor more than twenty equal installments, the number to be fixed by the board and interest at the rate fixed by the board, not exceeding five percent per annum. One such installment shall be payable at the March semiannual taxpaying date in each year; provided, however, that the county treasurer shall, at the March semiannual taxpaying date, require only the payment of a sufficient portion of the assessments to meet the interest and the amount maturing on bonds or certificates prior to the regular time for the payment of the second installment of taxes and the balance shall be collected with such second installment and without penalty.

"The provisions of this section and of sections 445.65 and 445.68, inclusive, may within the discretion of the board, also be made applicable to repairs and improvements made under the provisions of section 455.135."

Furthermore, this statute when compared with Section 455.62 clearly indicates that the legislature provided for three (3) distinct methods of paying the drainage tax. A careful reading of Section 455.64(2) shows that there is no mention of penalty for delinquency unlike Sections 455.62 and 455.64(1) which expressly provide for such penalty.

A statute authorizing special assessments upon private property for the cost of public improvements is generally drastic in nature and burdensome in operation, and the Courts will be slow to imply burdens or penalties which are not clearly necessary. *Fitchpatrick vs. Fowler*, 157 Iowa 215, 138 N. W. 392 (1912). Therefore, if the taxpayer does not pay the drainage tax within 20 days after the levy, but does sign a waiver pursuant to Section 455.64(2), there is no penalty when the installment payments of the tax became delinquent, in addition to the interest rate not to exceed five percent per annum as fixed by the board of supervisors.

October 24, 1967

CITIES & TOWNS — MUNICIPAL TRANSIT SYSTEM. Ch. 386B, Code of Iowa, does not contain provisions authorizing a municipal transit authority to acquire and operate busses or other vehicles to transport passengers under an exclusive use contract or charter. A municipality cannot authorize by franchise or otherwise some person to conduct the contract or charter operations which it cannot perform itself. (Turner to Faches, Linn County Attorney, 10/24/67) #S-67-10-4.

Mr. William G. Faches, Linn County Attorney: This is in reply to your letter of August 10, 1967, in which an Attorney General's opinion is requested on the following question:

"Does authority exist under 386B for a municipal transit system operated by authority of said Chapter to acquire and operate buses solely for charter work, including the transportation of parochial and public school children on a contract basis?"

Your letter also states the following:

"It has been brought to our attention that Chapter 386B of the 1966 Code of Iowa does not make any reference to a municipal transit system acquiring vehicles solely for charter work, and including within its operations the transportation of parochial and public school children on a contract basis to their appropriate schools."

The provisions of Chapter 386B, in my opinion do not authorize a municipal transit authority to acquire and operate buses or other vehicles for the specific purpose of transporting passengers under an exclusive use contract or charter.

Section 386B.2 provides that the municipal corporation shall have the power to:

". . . equip, enlarge, extend, improve, maintain and operate a *transit system* operating or to be operated either within or without the corporate limits of such municipal corporation and either within or without the

territorial limits of this state, including all or any part of the plant, equipment, vehicles, property, contracts and agreements of every kind and nature, . . ." [Emphasized]

There is no indication in this language that the legislature intended to create authority for a city to purchase vehicles solely to transport school children on a contract basis or to engage in charter operations.

Section 325.6, Code of Iowa, prohibits any motor carrier from operating as a charter carrier in this state unless possessed of a certificate of convenience and necessity to engage in the business of a charter carrier. A municipal transit system not having such permit is not eligible to obtain such permit under the present law because of the provision in §325.1:

". . . The term 'charter carrier' shall not be construed to include . . . a municipality with a population of more than fifteen thousand people as shown by the last federal decennial census, engaged in the business of carrying or transporting passengers for hire, provided however, that municipality or the person, firm or corporation having a license, contract or franchise with an Iowa municipality comply with sections 325.26, 325.28, 325.29, 325.31 and 325.35, or school bus operators when engaged in transportation involving any school activity or regular route common carriers of passengers."

However, this exemption does not confer any authority. The authority of the municipality to do or not to do any particular act in this case is governed by Chapter 386B which prescribes the total authority for a municipal transit system.

The rule has been very commonly announced that municipal powers are limited to those expressly or impliedly authorized or necessarily incidental to the objectives of the corporation. An implied power stems from a granted power. The rule in this state is that in addition to those matters necessarily incident to the powers expressly granted are "matters that are naturally and fairly incident, involved or included in the area of the express power." *Richardson v. City of Jefferson*, 257 Iowa 709, 134 N. W. 2d 528 (1965).

In a case such as this it is necessary that the test of public interest be met inasmuch as it is a misappropriation of taxes for a city to provide valuable corporation property for the benefit of a private enterprise. *Gritton v. City of Des Moines*, 247 Iowa 326, 73 N. W 2d 813 (1955).

It has been urged that the use of the term "transportation of passengers for hire" in chapter 386B should be liberally construed to permit the acquisition and operation of sixteen yellow school buses solely for contract and charter work. We believe this term was selected to designate and classify the municipal transit system as a common carrier.

It appears that Chapter 386B does authorize the Regional Transit Authority to run scheduled buses outside the city limits over specified routes to pick up passengers including school children, at regular and special fares, who cannot for one reason or another ride the school buses of the Cedar Rapids Community School District. The transit system cannot provide this service as a contract carrier to those individuals only who agree to hire the service on given terms because as a common carrier its service must be available to all the public.

We have reviewed the opinion of the attorney general dated July 31, 1963, which states that transit buses not equipped according to §231.373 cannot operate outside the corporation limit of a city and we believe

this to be the correct view of the law as applied to buses used exclusively in the transportation of school pupils, however a close reading of this same opinion also reveals that:

"Under §285.5(8) it is not necessary for the common carrier who operates a conventional transit bus to meet the same requirements as those school-owned buses as to construction and equipment, provided the transit buses are not used exclusively in the transportation of pupils."

Therefore this 1963 opinion does not necessarily preclude carrying school children as passengers on transit buses where the routes are established by the Transit Board of Trustees under §386B.8 and not determined by the school district under its Chapter 285 authority.

We wish to restate the opinion that authority contained in Chapter 386B, Code of Iowa, is to be construed so as to encourage and foster the continuance of municipally owned transit systems as they are usually understood in cities and towns. But such construction cannot authorize a municipality to operate as a contract carrier for private transportation because in so doing it would be performing a private service and not a public one. Section 327.1, Code of Iowa, 1966, defines a "contract carrier" as any person who does not hold out to the general public to serve it indiscriminately." This is not a proper role for a municipal transit system.

Further the transit system cannot carry on a charter operation, either directly or indirectly because there is no provision of law under which the municipality is eligible to hold the required certificate of convenience and necessity and no common carrier is permitted to engage in charter business without such a permit.

It necessarily follows that a municipality cannot authorize, by franchise or otherwise, some person to conduct the contract or charter operations which it cannot perform itself

October 24, 1967

MEMORIAL HALL. Chapter 37, Code of 1966. There is no power vested in the memorial hall commission established by Chapter 37, Code of 1966, to lease as lessor any part of a memorial building to private business. (Strauss to Myers, Marion County Attorney, 10/24/67) #67-10-20

Mr. Pat Myers, Marion County Attorney: Reference is herein made to yours of the 13th ult. in which you submitted the following:

"I would like to receive an opinion on the following question:

"Under Section 37.9 of the 1966 Code of Iowa, there shall be appointed a commission of five (5) members to manage and control a memorial building. Section 37.18 of the 1966 Code of Iowa enumerates certain items which the building shall be available for. My question is, may the commissioners who have been appointed to manage this memorial building lease a portion of the building to a private business, assuming there are sections of the building that still remain for the use of veterans groups?

"Along with this opinion, I would like to receive a copy of a 1936 opinion of the Attorney General, Page 434 and a copy of a 1930 Attorney General's opinion, Page 231."

In reply I advise that the uses available for such memorial building are set forth in §37.18, Code of 1966, as amended by Senate File 6, 62nd General Assembly, providing as follows:

"37.18 Name — uses. Any such memorial hall or building shall be given an appropriate name and shall be available so far as practical for the following purposes:

"1. The special accommodations of soldiers, sailors, marines, nurses, and other persons who have been in the military or naval service of the United States.

"2. For military headquarters, memorial rooms, library, assembly hall, gymnasium, natatorium, club room, and rest room.

"3. County, town, or city hall, offices for any county or municipal purpose, community house, recreation center, memorial hospital, and municipal coliseum or auditorium.

"4. Similar and appropriate purposes in general community and neighborhood uses, under the control and regulation of the custodians thereof.

"5. Athletic contests, sports and entertainment spectaculars, expositions, meetings, conventions and all food and beverage services incident thereto."

"Section 1. Section thirty-seven point eighteen (37.18), Code 1966, is amended by adding thereto the following:

"The term memorial hall or memorial building as in this chapter provided shall also mean and include such parking grounds, ramps, buildings or facilities as the commission may build, acquire by purchase or lease or gift to be used for purposes not inconsistent with the uses as set out in this section."

I find no authority express or implied vested in the memorial hall commission to lease as lessor any part of the memorial building to private business. See a like conclusion in 1964 O.A.G. 87, 88.

October 27, 1967

LIQUOR, BEER AND CIGARETTES — Licensee, membership on city council; prior opinion withdrawn — Chapter 124, Code of Iowa, 1966. The holder of a beer license is not ineligible for membership on a city council nor is a member of a city council disqualified from obtaining and keeping a beer license. A prior contrary opinion of this office dated October 23, 1967, is withdrawn. (Turner to Skiver, Osceola County Attorney, 10-27-67) #67-10-19

Mr. Donald E. Skiver, Osceola County Attorney: On October 23, 1967, we issued an opinion holding that because a city or town council and its members are directly chargeable with the administration of the sale of beer in the state of Iowa, a conflict of interest would prevent a permit holder from occupying a seat on the city council. After further consideration, we have concluded that that opinion, a copy of which is hereto attached, is erroneous and, accordingly, the same is now withdrawn.

The opinion we withdraw was based, primarily, on a correct opinion of the Attorney General, dated October 28, 1963, (1964 O.A.G. 280) holding that a member of a city or town council or board of supervisors is directly chargeable with administration of the liquor law, and as such cannot hold a liquor license. That was because §123.27(4), Code of Iowa,

1966, in prescribing the qualifications for the holding of a liquor permit, specifically provides that such a permit can be issued only to a person who "is not chargeable directly or indirectly with the administration or enforcement of the alcoholic beverages laws of the state of Iowa" and because §123.32(d) of said Code provides for the suspension or cancellation of a liquor control license on the happening of "an event which would have resulted in disqualification from receiving such license when originally issued." Thus, with reference to liquor licenses, the law expressly provides that a person chargeable directly or indirectly with the administration or enforcement of the alcoholic beverages laws is not qualified or eligible to be such a license holder and, of course, a city or town councilman or member of the county board of supervisors, is chargeable directly with the administration and enforcement of such alcoholic beverage laws.

But there is no such specific provision or prohibition against the issuance of any class of beer permit to a person charged with the administration of the laws relating to the sale of beer and malt liquors. At least, this is true insofar as a member of a city or town council, or county board of supervisors, is concerned. Chapter 124, Code of Iowa, 1966. Nor do we find any specific prohibition or eligibility requirement which would disqualify a councilman from holding office on account of being the holder of any kind of a license or permit, liquor or otherwise. §363.23 and Chapter 368A, Code of Iowa, 1966.

"Statutory or charter provisions prescribing the qualifications for members in a municipal council are to be strictly construed, and a person elected or appointed to membership therein should not be prevented from taking office unless he is clearly ineligible." 62 C.J.S. 735, Municipal Corporations, §390.

Indications are that the Iowa Supreme Court considers Chapters 123 and 124, Code of Iowa, 1966, relating to liquor and beer, in pari materia and construes them together. *State v. Dahnke*, 1953, 244 Iowa 599, 57 N. W. 2d 553. Since the aforementioned section of the liquor law specifically disqualifies a councilman from obtaining a liquor license, and Chapter 123 does not specifically prohibit a councilman from obtaining a beer permit, it may be implied that a beer permit may be issued to a councilman. *Expressio unius est exclusio alterius.*

A license is not a contract (*State ex rel Zutravu v. O'Brien*, 130 Ohio State 23, 196 N. E. 664) within the prohibition of §368A.22, Code of Iowa, 1966, which prohibits a councilman from having an interest, direct or indirect, in a contract of a municipality or from deriving any profit or other benefit therefrom.

While it may be true that a member of a city council, or other board, has a conflict of interest with respect to the issuance, suspension or revocation of his own license by that body, and should for that reason refrain or be disqualified from voting thereon or otherwise participating in the administration thereof, such a conflict in absence of an express statutory provision does not of itself disqualify him from occupying the office. If a conflict of interest, alone, could prevent a person from holding public office, no office could ever be filled. If such were the case, no cigarette

vendor, plumber, electrician or other licensee of the city would serve upon the city council. Yet, it is a matter of common knowledge that many grocers, druggists, cafe and service station operators, and other business and professional men licensed by the city to sell cigarettes or practice their professions have served their cities as members of the council. The same is true of grocers and tavern operators licensed to sell beer by the city. Only the legislature can abridge this practice. It has not done so.

October 31, 1967

COUNTIES AND COUNTY OFFICERS: Compatibility of offices; county assessor and county civil defense director; chapters 29C and 441, Code of Iowa, 1966. The offices of county assessor and county civil defense director are not ipso facto incompatible but a situation of incompatibility could exist if the duties of the two offices were so extensive that one person would be physically unable to be engaged in both at the same time. (Haesemeyer to McGrath, Van Buren County Attorney, 10-31-67) #67-10-21

Mr. James W. McGrath, Van Buren County Attorney: You have requested an opinion of this office as to whether or not a county assessor may hold the office of county civil defense director.

§441.1, Code of Iowa, 1966, creates the office of assessor in every county in the state and in every city having a population in excess of 125,000. §§441.2-441.6 prescribe the requirements for the appointment of such assessors. The duties of the assessor are spelled out in §441.17 and it is to be observed that subsection 1 of such §441.17 provides that the assessor shall:

"Devote his entire time to the duties of his office and shall not engage in any occupation or business interfering or inconsistent with such duties."

From the foregoing it is clear that the legislature contemplated that the office of assessor was to be a full time position and that the incumbent of such office would not engage in other pursuits which would interfere or be inconsistent with his post as assessor. However, it is equally apparent that it was also expected that an assessor could engage in another occupation or business so long as the same was not in conflict with his duties as assessor or would not prevent him from devoting his full time thereto. Otherwise, the expression in §441.17(1) ". . . and shall not engage in any occupation or business interfering or inconsistent with such duties," becomes mere surplusage which could have better been written ". . . and shall not engage in any other occupation or business." It is well settled that a statute is not to be construed so as to make parts of it surplusage unless no other construction is reasonably possible. *Smith v. Day & Zimmerman,* 65 F. Supp. 209 (D. C. Iowa, ...); *Board of Directors of Menlo Consolidated School District v. Blakesley,* 36 N. W. 2d 751, 240 Iowa 910 (.....). Hence it is our opinion that the prohibition contained in §441.17(1) against an assessor engaging in a business or occupation which would interfere or be inconsistent with his duties as assessor, impliedly permits an assessor to engage in other occupations which do not interfere or conflict.

The law relating to civil defense is contained in chapter 29C. §29C.7 provides for the appointment of city, county and town directors of civil defense, the payment of his salary and expenses as well as those of his staff and generally describes the functions of a director of civil defense. It is to be observed that chapter 29C contains no prohibition as to who may be appointed as director of civil defense nor does it set out any qualifications for the office. It does state, however, that the director is to be subject to the direction and control of a joint administration which is composed of a member of the county board of supervisors, the mayor or his representative of the city or town governments within the county and the sheriff.

Where the holding of dual offices is involved it is necessary also to review the common law to determine if there is incompatibility. The case of *Bryan v. Cattell*, 15 Iowa 538 (1864), describes the doctrine of incompatibility in the following terms:

"The doctrine of the incompatibility of public offices is imbedded in the common law and is of great antiquity. It rests on the view that office holders are inherently subject to regulations and conditions. While a private person may accept as many employments as he can procure, it has always been held that the holding of a public office may render it improper for the holder to accept another public office. The correctness and propriety of this rule are so well established as to be assumed without discussion in practically every case in which the matter of common law incompatibility arises."

Where a conflict is found to exist between two offices the result may be somewhat harsh. As pointed out by the Iowa Supreme Court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965)

"If a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N. W. 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

After noting that the application of the common law rule quoted above may result in the first of two incompatible offices becoming vacant, the court in *State v. White*, supra, offered certain guidelines for testing whether two offices or employments are incombatible:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

For the most part we do not consider that the application of the foregoing tests or criteria to the case before us would result in a finding of incompatibility or conflict of interest. However, if the duties of civil defense director and county assessor are so extensive and demanding that one person would be physically unable to be engaged in both at the same time we are of the opinion that a situation of incompatibility would exist and that the holding of the office of civil defense director would be an occupation which would interfere or be in conflict with the office of assessor prohibited by §441.17(1). Furthermore, unless the duties of civil defense director could be performed at night and on weekends the requirement of §441.17(1) that the assessor "devote his entire time to the duties of his office" would be violated.

November 2, 1967

TAXATION: Sales Tax; Sales of Food for Church Purposes: §§422.45, 422.45(3), Code of Iowa, 1966 and H.F. 702, Acts of 62nd G. A. (1967). No Sales tax need be collected by the Ladies Society of Local Churches from sales of food where the entire proceeds therefrom are expended for religious purposes. (Griger to Stephens, State Senator) 11/2/67. #67-11-3

Hon. Richard L. Stephens, State Senator: This is to acknowledge receipt of your letter of October 19, 1967, in which you requested an opinion as follows:

"The Ladies Society of local Churches hold bake sales and serve lunches at local farm sales.

"Are they required, under the new tax law, to collect sales and service tax with these receipts which are used entirely for furtherance of the work of the Church?"

Prior to the enactment of House File 702, Acts of the 62nd General Assembly, Section 422.45(3), Code of Iowa, 1966, exempted from the sales tax the following in pertinent part:

". . . the gross receipts from educational, religious, or charitable activities, where the entire *net* proceeds therefrom are expended for educational, religious, or charitable purposes." (Emphasis supplied)

Section 22(2) of House File 702, Acts of the 62nd General Assembly (1967) amended Section 422.45(3) as follows:

"2. Subsection three (3) is hereby stricken and the following inserted in lieu thereof:

"3. The gross receipts from sales of educational, religious, or charitable activities, where the *entire proceeds* therefrom are expended for educational, religious, or charitable purposes." (Emphasis supplied)

A statute should not be construed as to render parts of its surplusage or superfluous unless no other construction is reasonably possible. *Menlo Consol. School District of Menlo vs. Blakesley*, 240 Iowa 910, 36 N. W. 2d 751 (1949). Thus, the deletion by the legislature of the word "net" from section 422.45 should be given effect. However, you apparently state that the gross receipts from the sales in question are expended entirely for church purposes. Therefore, it seems to us, that if the gross receipts

are so expended, the instant situation comes within the ruling of the Attorney General in 1938 O.A.G. 546, a copy of which is enclosed. Thus, no sales tax need be collected by the Ladies Society of Local Churches from the sales in question where the entire proceeds therefrom are expended for religious purposes.

November 2, 1967

CONSERVATION; Land Acquisition — §111A.4, Chapter 147, Acts of the 62nd General Assembly. The effect of Chapter 147, Acts of the 62nd G. A., is to modify subsection 2 of §111A.4 and the County Conservation Boards need not have State Conservation Commission approval for acquisition and development programs evaluated at $2,500.00 or less. (Seckington to Speaker, 11/2/67) #67-11-5

Mr. E. B. Speaker, Director, State Conservation Commission: This is to acknowledge your letter of August 31, 1967, wherein you request an opinion upon the following:

"The members of the 62nd General Assembly passed Senate File 366 and it was signed by Governor Hughes and became law July 1, 1967. The bill is as follows:

"Section 1. Section one hundred eleven A point four (111A.4), Code 1966, is hereby amended by adding to subsection three (3) the following:

"Approval of the state conservation commission shall not be necessary unless the cost of the proposed acquisition or development program exceeds twenty-five hundred (2,500) dollars."

"The last sentence in Section 111A.4(2) of the Code, entitled 'Powers and Duties' states the following:

'In acquiring or accepting land, due consideration shall be given to its scenic, historic, archaeologic, recreational or other special features, and no land shall be acquired or accepted which in the opinion of the board and the state conservation commission is of low value from the standpoint of its proposed use.'

"There seems to be some discrepancies between these two quoted Sections of Chapter 111A of the Iowa Code, for the new bill just enacted states that projects for proposed acquisition or development costing $2,500.00 or less do not have to be submitted to the State Conservation Commission for their consideration and approval. On the other hand, the above mentioned Section of 111A.4(2) states that the members of the County Conservation Board and the members of the State Conservation Commission must determine whether any and all projects have a definite value from the standpoint of their proposed use. This has caused considerable confusion for the personnel in the Coordinator's office of County Conservation Activities, for now they do not know how to advise and consult the County Conservation Boards concerning this matter.

"We are requesting an opinion from you as to whether the new bill supersedes the old Section of the Code and an opinion on how the State Conservation Commission personnel should proceed on this matter in fulfilling their responsibility under this Chapter as specified."

There is little question that the Legislature may amend a public law enacted in the interest of the general public, *Verry v. Trenbeath*, 148 N. W. 2d 567 (N. D. 1967), *Railway Express Agency v. Illinois Commerce Commission*, 374 Ill. 151, 28 N. E. 2d 116 (1940), if the proposed amendment is germane to the original statute as enacted, *Wayne County*

v. Steele, 121 Neb. 438, 237 N. W. 228 (1931), Senate File 366, entitled "An Act Relating to County Boards of Conservation," obviously being germane or closely allied, appropriate, and relevant to §111A.4 of the 1966 Code of Iowa. See *Redman v. Davis*, 115 Colo. 415, 174 P. 2d 945 (1946).

The language of the above amendment is clearly a limitation as to §111A.4(2). Though case law holds that where two statutes are passed at different times with terms in relation to the same subject matter, the subsequent act does not repeal the former *if* both can be made to harmonize, it is clear that the sections in question cannot be reconciled. The Iowa Supreme Court declared in *Silver Lake Consol. School Dist. v. Parker*, 238 Iowa 984, 29 N. W. 2d 214 (1947):

"There must be an absolute repugnancy between the two [statutes] in order [for the latter] to act as a repeal."

Section 111A.4(2), 1966 Code of Iowa, provides that:

"*No land* shall be acquired or accepted which in the opinion of the board and the state conservation commission. . . ."

Whereas the legislated amendment states:

"Approval of the state conservation commission shall *not be necessary* unless the cost of the proposed acquisition . . . exceeds $2,500.00; . . ."

There is no doubt that the two are repugnant.

In continuation of the rationale expressed in the *Parker* case, *supra*, the Federal Court of Appeals professed in *Building Supplies Corp. v. Wilcox*, (1922, C. A. 4th Dist. Va.), 284 F. 113 (1922):

"If two irreconcilable sections of a code, although originally enacted at different dates, are to be regarded as simultaneous expressions of the legislative will, the rule obtains [establishes] that the section last adopted in sequence must prevail."

The Iowa Supreme Court reiterated the above in *Curlew Consol. School Dist. v. Palo Alto County Bd. of Ed.*, 247 Iowa 112, 73 N. W. 2d 20 (1955), concluding:

"The latter enacted statute which is repugnant to and irreconcilable with [an] earlier statute, must prevail."

Considering the title of the Amendment, "An Act Relating to County Boards of Conservation," it may be construed that the text of said statute is merely a qualification of the former Act, and that both should continue in force. This is valid reasoning, but limited in its effect. The specificity of the Amendment presents no alternatives; its language is not a complete repeal of §111A.4(2), but does go so far as to dictate *when* the State Conservation Commission must be consulted in property acquisition proceedings by the County Conservation Boards.

Therefore, it is the conclusion of this office that since §111A.4(2) specifically gives reference to "*all* proposals for acquisition of land, and *all* general development plans," the amendment in question has the effect of eliminating the need for State Conservation Commission approval on acquisition and development programs evaluated at twenty-five hundred dollars ($2,500.00) or less, and that any programs of greater value are contingent upon State Conservation Commission appropriation.

November 2, 1967

TAXATION: Sales Tax Exemption for School Lunches. Section 422.45, Code of Iowa, 1966, as amended by Section 22(2), House File 702, Acts of the 62nd General Assembly (1967). Where the entire proceeds from the sale of school lunches are used to purchase food and equipment used directly in producing and serving said lunches, such entire proceeds are expended for an educational purpose. (Griger to Potter) 11/2/67. #67-11-4

Hon. Lynn Potter, Vice-Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your letter of October 17, 1967, in which you requested an opinion on the following inquiry:

"The principal inquiry seems, therefore, to be reduced to a question of whether the entire receipts from the sale of school lunches, pursuant to the National School Lunch Program, are used for 'educational purposes' as contemplated by Section 422.45(3), as amended by Chapter 348 (H.F. 702) Acts of the 62nd General Assembly, where such proceeds are used to purchase food and equipment used directly in producing and serving school lunches."

Prior to the enactment of House File 702, Acts of the 62nd General Assembly (1967), Section 422.45(3), Code of Iowa, 1966, provided for a sales tax exemption in pertinent part:

". . . the gross receipts from educational, religious or charitable activities, where the entire *net* proceeds therefrom are expended for educational, religious, or charitable purposes." (Emphasis supplied)

Section 22(2) of House File 702, Acts of the 62nd General Assembly (1967) amended Section 422.45(3) as follows:

"2. Subsection three (3) is hereby stricken and the following inserted in lieu thereof:

"3. The gross receipts from sales of educational, religious, or charitable activities, where the *entire proceeds* therefrom are expended for educational, religious, or charitable purposes." (Emphasis supplied)

The legislature deleted the word "net" from Section 422.45(3) and such deletion must be given effect where applicable.

Upon investigation, this office has determined the following facts. The school lunch program is a non-profit operation and receives most of its funds from the federal government. Prices for such lunches vary in the state from 25 cents to 45 cents with the state average about 32 cents. The standard type A lunch is designed to give students ⅓ of the daily bodily requirements and is a balanced meal. Officials intimately connected with the program state that its primary purpose is to train students in proper nutritional habits, a purpose which you recognize in your letter. A secondary purpose is to lessen absenteeism and tardiness by serving the lunches at the schools, a purpose which you also recognized in your letter.

Educational activities or purposes are not limited to classroom activity. For example, married students' dormitories are a proper and appropriate educational activity. *Shueller vs. Board of Adjustment*, 250 Iowa 706, 95 N. W. 2d 731 (1959). In fact, education is a broad and comprehensive term with a variable and indefinite meaning, and in its broadest significance, it comprehends the acquisition of all knowledge tending to de-

velop and train the individual whether in the classroom or outside of it. *Community Drama Ass'n vs. Iowa State Tax Commission*, 252 Iowa 854, 109 N. W. 2d 33 (1961); *In re Petty*, 241 Iowa 506, 41 N. W. 2d 672 (1950). The physical and mental powers of an individual are so interdependent that no system of education would be complete which ignored *bodily health*. *State ex rel Stoltenberg vs. Brown*, 112 Minn. 370, 128 N. W. 294 (1910). Any program which contemplates proper *maintenance of attendance* at school is educational. *In re Syracuse University*, 214 App. Div. 375, 212 N. Y. S. 253 (1925).

Expenditures for food and equipment used *directly* in producing and serving school lunches would appear to be so connected to the school lunch program as to be a part of the educational purpose of that program.

It is the opinion of this office that where the entire proceeds from the sale of school lunches are used to purchase food and equipment used directly in producing and serving said lunches, such entire proceeds are expended for an educational purpose as contemplated by Section 422.45(3), as amended by House File 702, Acts of the 62nd General Assembly (1967).

November 2, 1967

STATE OFFICERS AND DEPARTMENTS — Compatibility of offices; secretary of the senate and chairman of the Iowa merit employment commission — Article III, §§1, 7 and 9, Constitution of Iowa; §§2.2, 2.6, 2.18, 2.19, 2.20 and 2.21, Code of Iowa, 1966. There is neither incompatibility nor a conflict of interest in the same person holding both the office of chairman of the Iowa merit employment commission and the office of secretary of the senate. (Haesemeyer to Grassley, State Representative, 11/2/67) #67-11-8

The Hon. Charles E. Grassley, State Representative: Reference is made to your letter of September 22, 1967, in which you state:

"I request your official opinion in regard to the status of Al Meacham, who presently is on the payroll of the Senate as Secretary of that body and who, at the same time is a member of the Merit Employment Commission, as to whether or not his dual position is a violation of Section I of Article III of the Constitution of Iowa the title: 'Of the Distribution of Powers.'

"This section says '. . . and no person charged with the exercise of powers properly belong to one of these departments shall exercise any function appertaining to either of the others.'

"Also, would his dual position violate any other provision of the Constitution or of the statutes if the foregoing is not applicable."

In our opinion Article III, §1, Constitution of Iowa, has no application in the circumstances you describe. The secretary of the senate is not a member of that body but is a mere employee. As such he does not participate in the exercise of the legislative power of the state. Moreover, the duties of the secretary of the senate are only ministerial in nature.

Article III, §§7 and 9, Constitution of Iowa, provides:

"Sec.7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law."

"Sec. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and, with the consent of two thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the General Assembly of a free and independent State."

§§2.2, 2.6, 2.18, 2.19, 2.20 and 2.21, Code of Iowa, 1966, provide:

"2.2 Temporary organization. At ten o'clock in the forenoon of the day on which the general assembly shall convene, and at the place of convening the houses respectively, the president of the senate, or in his absence some person claiming to be a member, shall call the senate to order. If necessary, a temporary president shall be chosen from their own number by the persons claiming to be elected senators; and some person claiming to be elected a member of the house of representatives shall call the house to order, and the persons present claiming to be elected to the senate shall choose a secretary, and those of the house of representatives, a clerk for the time being."

"2.6 Officers — tenure. The president pro tempore of the senate and the speaker of the house of representatives shall hold their offices until the first day of the meeting of the regular session next after that at which they were elected. All other officers elected by either house shall hold their offices only during the session at which they were elected, unless sooner removed, except as may be otherwise provided by resolution of the general assembly."

"2.18 Officers and employees. Each house of the general assembly may employ such officers and janitors as it shall deem necessary for the conduct of its business."

"2.19 Compensation of chaplains, officers, and employees. The compensation of the chaplains, officers, and employees of the general assembly shall be fixed by joint action of the house and senate by resolution at the opening of the session, or as soon thereafter as conveniently can be done, and no other or greater compensation shall be allowed such chaplains, officers, and employees, except that they shall be furnished by the state such stationery and supplies as may be necessary for the proper discharge of their duties."

"2.20 Current expenses of general assembly. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated a sum sufficient to pay current and miscellaneous expenses of the general assembly, authorized by either the senate or the house, and the state comptroller is hereby authorized and directed to issue warrants for such items of expense upon requisition of the president and secretary of the senate and speaker and chief clerk of the house, after vouchers for said items of expense have been approved by action of the house and senate by resolution. Provided, however, that any interim expenses authorized by either branch of the general assembly shall be paid upon requisition to the state comptroller signed by the presiding officer of the legislative branch authorizing the same.

"There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of five hundred dollars annually, or so much thereof as may be necessary for each branch of the general assembly for the payment of any unpaid expense filed after adjournment of the general assembly or incurred in the interim between sessions of the general assembly. The state comptroller is hereby authorized and directed to issue warrants for such items of expense upon requisition of the president of the senate for senate expense and the speaker of the house for house expense."

"2.21 Issue of warrants. The state comptroller shall also issue to each officer and employee of the general assembly, from time to time, upon

certificates signed by the president of the senate and the speaker of the house, warrants for the amount due for services rendered."

In construing the foregoing Article III, §7 of the Constitution and the code section then in effect similar to the present §2.6 the supreme court held that the power to appoint a secretary of the senate is exclusively in each senate, which may remove him at any time without notice of hearing. *Cliff v. Parsons*, 90 Iowa 665, 57 N. W. 599 (1894). In an opinion of the attorney general issued October 24, 1933, it is stated:

"The speaker of the house of representatives holds his office until the first day of the meeting of the regular session next after that at which he was elected, and that the terms of office of all other officers of the house and all committee chairmanships and committee memberships expired with the adjournment of the regular session of the 45th General Assembly." 34 O.A.G. 394.

It should be noted that since the decision in *Cliff v. Parsons*, supra, and the attorney general's opinion described above that §2.6 has been amended to provide that the president pro tempore of the senate as well as the speaker of the house is to hold office until the first day of the next regular session. However, this change does not alter the conclusion which may be drawn from the foregoing authorities that in the absence of further action by the senate, the term of office of the secretary of the senate would ordinarily expire with the adjournment of the regular session of the general assembly for which he was elected.

Senate concurrent resolution 64, adopted June 30, 1967, provides among other things:

"Be It Further Resolved: That any officers or employees of the Sixty-second General Assembly who shall be engaged for work in connection with the closing up of the work of the Sixty-second General Assembly and the reconvening of any subsequent regular or special session, shall be compensated for such services at the same rate as was fixed for the regular session of the Sixty-second General Assembly."

Senate Resolution 8, adopted July 1, 1967, provides:

"WHEREAS, the members of the Senate are often in need of secretarial assistance and information in carrying out their duties during the interim between sessions of the General Assembly, and

"WHEREAS, to provide this service it is necessary to keep the office of Secretary of the Senate staffed during the interim period, and

"WHEREAS, there will be necessary expenses involved in providing this service to the Senators; Now Therefore

"BE IT RESOLVED BY THE SENATE That the President of the Senate is hereby authorized to approve such expenses and authorize payment of compensation for as many days each month as determined by him for the Secretary of the Senate and his secretary, at the same rate of pay as was fixed for the regular session of the Sixty-second General Assembly. The State Comptroller is hereby authorized and directed to issue warrants in payment of same on requisition signed by the President of the Senate as provided for in the first paragraph of section two point twenty (2.20), Code 1966."

Pursuant to the foregoing resolutions, Mr. Meacham has from time to time as the need arose continued to act in his capacity as secretary of the senate and has been compensated on a daily basis for the services

which he performed in such capacity. Effective August 16, 1967, Mr. Meacham was appointed Chairman of the newly created Iowa Merit Employment Commission. However, we are advised that on those days which he devotes his time to the business of the senate Mr. Meacham neither charges for nor is paid anything by the Iowa Merit Employment Commission.

Generally speaking a public officer, other than a legislator, may hold an additional public office or employment so long as there is no incompatibility between the two offices held. See e.g. §368A.22, Code of Iowa, 1966, which permits a municipal officer or employee to hold two or more compatible positions. Where two offices are found to be conflicting the result may be somewhat harsh. As pointed out by the Iowa Supreme Court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965):

"If a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N. W. 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

After noting that the application of the common law rule quoted above may result in the first of two incompatible offices becoming vacant, the court in *State v. White*, supra, offered certain guidelines for testing whether two offices or employments are incompatible:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constituted incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

Applying the foregoing tests or criteria to the case before us we find that there is neither incompatibility nor a conflict of interest involved in the same person holding both the office of chairman of the Iowa merit employment commission and the office of secretary of the senate during the interim between sessions of the legislature.

November 2, 1967

CONSTITUTIONAL LAW — Statutes — effective date of bills, Art. III, §§16, 17, 21 and 26, Constitution of Iowa; §§3.7, 3.10, 3.11 and 3.12, Code of Iowa, 1966; H.F. 57, S.F. 854, S.F. 856 and 877. Date a bill is "passed," "approved," "becomes a law" and "takes effect" defined and distinguished. (Turner to Faupel, Deputy Code Editor, 11/2/67) #S67-11-1

Mr. Wayne A. Faupel, Deputy Code Editor: This is in answer to your request for an opinion as to the effective date of bills enacted by the 62nd General Assembly which, in the longest regular session in Iowa's history, did not adjourn sine die until July 2, 1967.

Article III, §26, Constitution of Iowa, as amended by the people of Iowa at a general election on November 8, 1966, provides:

"No law of the General Assembly, passed at a regular session, of a public nature, shall take effect *until* the *first day of July next after the passage thereof.* Laws passed at a special session, shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State." (Emphasis added).

Some laws were *approved* by the governor after July 1, 1967. Some were even *passed* on or after that day. Confusion has arisen as to when these bills became law and when they became effective. To settle this confusion, it is necessary to determine and distinguish when a bill is "passed," "approved," "becomes a law" and "takes effect," all of which mean different things. Generally, the law in Iowa with reference to these matters is as follows:

I.

The "passage" of a bill occurs when it has received the requisite votes of both houses of the General Assembly, and not when it is approved by the governor. Art. III, §§16 and 17, Iowa Constitutions; S.F. 856 (Ch. 85), Acts 62nd G. A.; *Sawyer v. Gallagher*, 1911, 151 Iowa 64, 130 N. W. 173; *Carlton v. Grimes*, 1946, 237 Iowa 912, 938, 23 N. W. 2d 883, 896.

II.

The "approval" of a bill occurs when it is signed by the governor. Art. III, §16.

III.

A bill does not "become a law" following its passage until:

a. It is approved by the governor, or

b. It is constitutionally passed over the governor's disapproval by a two-thirds majority in each house, or

c. The governor fails to approve and return it after three days, the General Assembly being in session.

Art. III, §16; 1918 O.A.G. 397.

But it then becomes a law, although not necessarily effective. However, the significance of a law before it becomes effective is open to question. Art. III, §§16 and 26; *Schaffner v. Shaw*, 1920, 191 Iowa 1047, 180 N. W. 853; *Butters v. City of Des Moines*, 1926, 202 Iowa 30, 209 N. W. 401; 1918 O.A.G. 397; 1923-24 O.A.G. 351.

IV

A bill submitted to the governor during the last three days of a session also "becomes a law," although not necessarily effective, if the governor approves it within thirty days after adjournment. Art. III, §16. But, in this instance, approval is a requisite and a bill cannot become a law by the governor's failure to sign it after adjournment. *Darling v. Boesch*, 1885, 67 Iowa 702, 25 N.W. 887.

V.

A bill passed during a regular session, *which becomes a law* before July 1, takes effect on July 1 after its passage, under the provisions of §3.7, Code of Iowa, 1966, as amended by H.F. 57 (Ch. 83) Acts 62nd G. A., unless:

a. A specified time is provided in the act, or in another law, as to when it is to take effect on or after July 1, or

b. Being deemed of imediate importance, it is published in more than one newspaper in the State.

Art. III, §26; 1948 O.A.G. 31.

It should be noted that H.F. 57 (Ch. 83) was a necessary amendment to §3.7, Code, 1966, in order to change the effective date of most bills from July 4 to July 1 to correspond with the recent amendment to Art. III, §26, Constitution of Iowa. H.F. 57 was made effective on July 1 by another bill (S.F. 854, Ch. 84, 62nd G. A.) which was, itself, published so as to be effective before July 1, 1967.

VI.

A bill passed at a regular session prior to July 1 but not approved by the governor so as to become law until on or after July 1, takes effect on August 15 after approval unless:

a. It is an annual appropriation act with the effective date provided under §3.12, Code of Iowa, 1966, (and S.F. 877, Ch. 78, 62nd G. A.) or

b. The act, or another law, specifies when it is to take effect, or

c. It takes effect by publication.

S.F. 856 (Ch. 85), 62nd G. A.

VII

No bill of a public nature "passed" on or after July 1 during a regular session can take effect before the following July 1 unless published. In other words, a bill passed by the 62nd G. A. on or after July 1, 1967, will not become effective until July 1, 1968. In fact, no act of a public nature passed during a regular session, regardless of when it becomes a law, and whether or not it contains a specified effective date, can become effective *before* July 1 *after* its passage unless deemed of immediate importance and published as provided in Art. III, §26. 1948 O.A.G. 31. Nothing in that section of Iowa's constitution, as recently amended, prevents the legislature from making a law effective at a date *later* than July 1 next after passage. It provides only a minimum, not a maximum, time limitation before the bill can take effect without publication.

VIII

Acts passed at special sessions take effect ninety days after adjournment unless deemed of imediate importance and published. Art. III, §26. However, a later effective date, beyond ninety days, can be legally specified in a bill passed at a special session. 1898 O.A.G. 269.

IX.

A law deemed of immediate importance and published, takes effect the next day after its last publication in at least two newspapers. §3.10, Code of Iowa, 1966; *Arnold v. Board of Supervisors*, 1911, 151 Iowa 155, 130 N. W. 816. The determination that a bill is of immediate importance can be made only by the legislature and cannot be delegated. *Scott v. Clark*, 1855, 1 Iowa 70, *Pilkey v. Gleason*, 1855, 1 Iowa 521.

X.

"Acts of a private nature which do not prescribe the time when they take effect, shall do so on the thirtieth day next after they have been approved by the governor, or indorsed as provided in this chapter (3)." §3.11, Code of Iowa, 1966. In other words, acts appropriating money to an individual, granting patents to real estate and acts of a like nature need no publication clause, regardless of when passed, unless deemed of such immediate importance that they must be effective before 30 days after passage. Publication of certain legalizing acts, which may be of a private nature, might similarly be avoided. But caution should be exercised to determine whether such acts are public or private in nature.

XI.

With respect to appropriations acts and when they take effect, §3.12, Code of Iowa, 1966, provides: "All annual appropriations shall be for the fiscal year beginning with July 1 and ending with June 30 of the succeeding year and when such appropriations are made payable quarterly, the quarters shall end with September 30, December 31, March 31, and June 30, but nothing in this section shall be construed as increasing the amount of any annual appropriations." S.F. 877, (Ch. 78) Acts of 62nd G. A., was apparently enacted as the result of an abundance of caution, because in providing that "all appropriations acts enacted by the 62nd General Assembly shall, unless otherwise specified in each such Act, become effective on July 1, 1967" the legislature merely restated the law as it already existed.

XII.

A law may be retrospective or retroactive in its operation to a date prior to its enactment if expressly and clearly so specified, provided it is not of a nature to make an act, innocent when done, criminal; or, if criminal when done, to aggravate the crime, or increase the punishment, or reduce the measure of proof. The latter are unconstitutional as *ex post facto* under Art. I, §§9 and 10, Constitution of the United States. *State v. Squires*, 1868, 26 Iowa 340, 346. "No bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall ever be passed." Art. I, §21, Constitution of Iowa.

Summary

For most practical purposes, it may be said that Article III, §26, Constitution of Iowa was amended in 1966 to change the minimum time lapse, before the effective date after passage, from July 4 to July 1. §3.7 of the Code was amended by the 62nd G. A. to conform with this change (Chs. 83 and 84, 62nd G. A.). Therefore, all acts of the 62nd G. A. passed by both houses thereof before July 1, 1967, and approved, or allowed to become law without approval, before that date, which did not sooner take effect by publication, were effective on July 1, 1967.

However, many Acts were passed by the 62nd G. A. before July 1, 1967, but were not approved until after that date. These Acts were effective August 15, 1967, as provided in Ch. 85, Acts 62nd G. A., except as noted in said Act and Ch. 78, Acts 62nd G. A. Those Acts passed on, or after, July 1, 1967, are effective on July 1, 1968, unless sooner put into effect by publication, as provided by Article III, §26 as amended. See Acts of 62nd General Assembly, page iii.

November 2, 1967

BOARD OF CONTROL: Payment of costs for transfer and commitment of patient to Iowa Security Medical Facility. S.F. 721. Act in question operates prospectively. (Seckington to Brown, Board of Control, 11/2/67) #67-11-1

Mr. M. J. Brown, Administrative Assistant, Board of Control: This is in response to your letter of October 20, 1967, in which you ask the following questions:

"1. Does Section Eight (8) of S.F. 721 requiring the Board of Control to bill the counties and/or courts apply to patients (inmates) that were committed to the 'old facility' as part of the Men's Reformatory prior to the effective date of the Act or

"2. Does it apply only to those patients (inmates) committed to the newly-established institution after effective date of said Act which is the date of actual separation of facilities, patients and costs which were provided for in said Act?

"If the answer to 1) above is in the affirmative, then —

"3. Does the 12 months of commitment (confinement) prior to the effective date of the Act fulfill the requirements of Subsection four (4) and thus require that billings be made for the period immediately after the said effective date?"

Prior to the passage of S.F. 721, the cost of transferee and committed patients was governed by several different sections of the Iowa Code. As of the effective date of the act in question, the procedure of transfer and commitment and the cost thereof is completely covered by the Act, and other provisions were repealed. For example, the following sections have been repealed or amended by the new law: §§218.1, 218.9, 218.78, 218.92, 226.30, 245.12, 246.15, 246.16, 246.17, 783.3, 783.4, 783.5, 785.19, 1966 Code of Iowa.

The statute in question obviously creates a new mental health facility. However, it actually consolidates and revises the former procedure for committing and transferring people who need diagnosis treatment and

care and the cost thereof. It is not, however, an amendment, and cannot be construed as such. It is a new law, and as such is subject to several general rules of construction.

The Iowa Court has spoken on the rules of statutory construction a number of times. In examining these cases, I feel that the following rules are applicable to your questions.

In 82 CJS, Statutes §414, page 981, it is stated that:

"Retrospective or retroactive legislation is not favored. (citing cases) Hence, it is a well settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation (citing *Bascom v. District Court of Cerro Gordo County*, 1 N. W. 2d 220, 231 Iowa 360) and not as operating retrospectively (citing *In re Hall's Estate*, 11 N. W. 2d 379, 233 Iowa 1148)."

In Iowa, there is a presumption that a statute operates prospectively only and not retrospectively. *Grant v. Norris*, 85 N.W. 2d 261, 249 Iowa 236. Iowa courts have also held that the legislative intent that a statute shall operate retroactively must be clear to give it such effect. *Young v. O'Keefe*, 82 N. W. 2d 111.

There are various exceptions to the rules I have just cited. Thus, it is commonly recognized in Iowa and most other states that when an act refers only to the mode or procedure and not to the creation or protection of rights in existence then the statute may be applied retrospectively. Thus it is said in *Board of Directors of Cushing Consol. School Dist. v. Board of Ed. In and For Ida County*, 101 N. W. 2d 27, 251 Iowa 371:

"The general rules that statutes are not retrocative in effect in the absence of a clear legislative expression of intent is often modified where the statute deals only with procedural matters and not matters of substance."

It is my opinion that in putting this law into effect, the statute must be viewed as involving substantive rights, and therefore, the presumption and rule of construction for prospective operation is the proper one in this case. This being so, the answer to question 1) is no; the answer to 2) is yes; and in view of the above answers, question 3) is moot.

If I can be of further assistance, please let me know.

November 2, 1967

LABOR: Inspection and accident reports—§91.13, 91.16(3), Code of Iowa, 1966; Chapter 106, 62nd G. A. Right of public to examine inspection reports, notices of violations of law and accident reports; reports are no longer confidential and may be released to public, if a public purpose is served. (Zeller to Barrett, Bureau of Labor, 11/2/67) #67-11-6

Mr. R. Earl Barrett, Deputy Commissioner, Bureau of Labor: Reference is herein made to your letter of October 30, 1967, in which you write as follows:

"I would like to request your opinion regarding the release of inspection reports and/or notices of violation. Under Section 91.13, 1966 Code of Iowa the release of this information was prohibited. However, the

62nd General Assembly saw fit to repeal this section. (See Chapter 106, Section 9, 62nd General Assembly Session Laws of Iowa (1967), also Senate File 537, Section 9.)

[1] "Therefore, my question is whether our department can release these inspection reports to anyone who requests this information. Normally the people who request this information would be people that work in these plants, union personnel, and private attorneys.

[2] "Also, in connection with this, what effect does the repealing of Section 91.13, 1966 Code of Iowa have upon Section 91.16(3), 1966 Code of Iowa. Is this section's effect limited now to the release of information given in the strictest confidence since 91.13, 1966 Code of Iowa has been repealed? [3] Just what is the status of 91.16(3), 1966 Code of Iowa since 91.13, 1966 Code of Iowa has been repealed?"

Section 91.16(3), Code of Iowa, 1966, reads in pertinent part as follows:

"Any officer or employee of the bureau of labor, or any person making unlawful use of names or information obtained by virtue of his office, shall be fined not exceeding five hundred dollars or imprisonment in the county jail not exceeding one year."

An "unlawful use" is now defined by a bill known as Senate File 537, Acts of the 62nd General Assembly, also described as Chapter 106 of said Acts. This statute is entitled "An Act to Protect the Right of Citizens to Examine Public Records and Make Copies Thereof." This act was approved on July 28, 1967, and provides at Section 7, subsection 6 as follows:

"The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information: . . .

"6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose."

There are other subsections which are described as confidential, but the above subsection 6 is the one most relevant to your questions.

Section 88.12, Code of Iowa, 1966, requires the forwarding of a written report within 48 hours after an accident by any proprietor of a factory, mercantile establishment or business house. It also states that:

"No statement contained in any such report shall be admissible in any action arising out of the accident therein reported."

Heretofore, this section has been construed as authorizing the Commission to consider such reports as *"confidential records not subject* to the general inspection of the public." This was based upon an old common law rule to this effect. See 1938 O.A.G. 431, 432.

But the common law rule is now changed by the enactment of Senate File 537 which provides at Section 2 as follows:

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

Since the public records to be kept confidential are now expressly

limited and described in Section 7, and accident reports are not included therein, it is my opinion that the old common law rule is now changed.

In answer to your first question, these reports would now serve a public purpose in preventing similar accidents in the future, and in the enforcement of labor safety laws written in Chapters 88 and 88A, 1966 Code of Iowa. Inspection reports dealing with accidents resulting from violations of statutes and rules, validly adopted relating to the health and safety of persons employed in the factory or business would not be confidential, because these reports do serve a public purpose. Other portions of these reports may be confidential if no public purpose is served by releasing them.

In answer to your second question, §91.16, Code of Iowa, 1966, is still in full force and effect, but it must now be read in conjunction with the above statute Senate File 537, supra, which takes the place of §91.13 which has been repealed. Unlawful use of confidential information is now exactly limited and defined by the provisions of Senate File 537.

In answer to your third question, the provisions of §91.16(3), Code of Iowa, 1966, are in full force and effect, but must be read in conjunction with Senate File 537.

November 2, 1967

COUNTY AND COUNTY OFFICERS: Drainage Districts, Chapter 461, §455.1, Chapter 455.135, Chapter 455A, 1966 Code of Iowa. Chapter 461 permits a drainage district which accumulates water at the lower end of a watershed to elevate the same by means of a pumping station and transfer it to a swale providing statutory procedures are followed. (F. Hendrickson to Blum, Franklin County Attorney, 11/2/67) #67-11-2

Mr. Lee B. Blum, Franklin County Attorney: This is in acknowledgment of your letter of August 31, 1967, wherein you request an opinion as to the following:

"Your opinion is requested as to whether or not Chapter 461 Iowa Code (1966) permits the establishment of a drainage district which accumulates water at the lower end of a watershed and then, by means of a pumping station, elevates the same and deposits it in a swale which would be the normal course of drainage for the waters originating within the drainage district. The pumping station and the outlet would both be within the boundaries of the district."

It would appear, though the facts presented are somewhat limited, that the proposed drainage district may be established pursuant to §455.1, 1966 Code of Iowa, which is the general statute applicable to such proceedings. Likewise, §461.1, 1966 Code of Iowa, provides that a pumping station may be established and maintained by the board of supervisors of the county within which the drainage district in question is located. As to the pumping of additional water into a swale which is a natural watercourse, there is also the necessity to adhere to a statutory procedure.

Your attention is directed to §461.12, 1966 Code of Iowa, conditional to the purchase, lease, or condemnation of lands necessary for channel construction and settling basin, as well as §455.135, which stipulates the pro-

cedure for repair and/or change of a natural watercourse. It is suggested that if the nature of the swale intended to be used in said project will be artificially changed in any manner, the board of supervisors obtain titles to the necessary property.

Finally, §455.156, 1966 Code of Iowa, prescribes the manner in which lands in an adjoining county may be obtained by a drainage district if necessary in the establishment of a satisfactory outlet. Said district should also take notice of the jurisdiction of the Iowa Natural Resources Council pursuant to Chapter 455A, 1966 Code of Iowa.

Therefore, it is the opinion of this office that the drainage district in question may be established if all necessary statutory requirements procedures are followed.

November 2, 1967

COUNTY AUDITOR: Ch. 409, 1966 Code of Iowa. County Auditor must comply with provisions of §409.1, 1966 Code of Iowa, when he is required to order a plat prepared. (Seckington to Black, Board of Engineering Examiners, 11/2/67) #67-11-7.

Mr. H. M. Black, Chairman, Board of Engineering Examiners: This is in response to your letter of October 24, 1967, wherein you ask the following question:

"Will you please furnish the Board with your written opinion as to whether a County Auditor may order a Plat made under the provisions of Chapter 409 of the 1966 Code of Iowa without such Plat having been prepared by and the land surveying required therefor having been done by a Registered Land Surveyor holding a Certificate issued under the provisions of Chapter 114 of the 1966 Code of Iowa?"

You did not state, and I assume that your question has no reference to the question of when an auditor must prepare plats. My opinion relates only to how an auditor must proceed once it is determined that a plat must be prepared.

Section 409.1, 1966 Code of Iowa, reads as follows:

"Every original proprietor of any tract or parcel of land, who has subdivided, or shall hereafter subdivide the same into three or more parts, for the purpose of laying out a town or city, or addition thereto, or part thereof, or suburban lots, shall cause a registered land surveyor's plat of such subdivisions, with references to known or permanent monuments, to be made by a registered land surveyor holding a certificate issued under the provisions of chapter 114, giving the bearing and distance from some corner of a lot or block in said town or city to some corner of the congressional division of which said town, city, or addition is a part, which shall accurately describe all the subdivisions thereof, numbering the same by progressive numbers, giving their dimensions by length and breadth, and the breadth and courses of all the streets and alleys established therein."

Section 409.27, 1966 Code of Iowa, reads as follows:

"Whenever the original proprietor of any subdivision of land located in a city having a population, by the latest federal census, of less than twelve thousand has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor shall by mail or otherwise notify some or all of such owners, and de-

mand its execution. If such owners, whether so notified or not, fail and neglect for thirty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause one to be made, *making any survey necessary therefor.*" (Emphasis supplied)

Section 409.31, 1966 Code of Iowa, provides as follows:

"Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in sections 409.27 to 409.30, inclusive, and all of their provisions shall govern. No such plat of land in cities having a population of over twelve thousand by the latest federal census shall be so filed and recorded unless and until the same shall have been approved by the council of such city, and by the city plan commission as required by law in such cities where such commission exists."

Section 409.36, 1966 Code of Iowa, provides as follows:

"If the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat thereof, and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or, in case of appeal, as directed by the board of supervisors, then the auditor shall proceed as is provided in this chapter, and cause such plat to be made and recorded in his office and the office of the county recorder, and thereupon the same result shall follow as provided in §409.31."

As a reading of the above section indicates, there are several different instances in which the county auditor is required to prepare plats. In each section in which the auditor is required to have the plat prepared there is a statement making it mandatory to do so in accordance with the provisions of Chapter 409.

A reading of the entire chapter discloses that there is only one section which specifies how plats are to be prepared. That section is §409.1. Thus, the wording of §409.27, to the effect that the auditor must cause a plat to be prepared, ". . . making any survey necessary therefor. . . .," must relate back to §409.1 which gives the procedure for preparing a plat.

In §409.31, the auditor is required in certain circumstances to have a plat prepared, ". . . proceeding as directed in §§409.27 to 409.30, inclusive, and all of their provisions shall govern. . . ."

Again in §409.36, the auditor is required, in certain circumstances set forth, to have a plat prepared, ". . . as is provided in this chapter. . . ." Thus must necessarily include the provisions of §409.1.

It is therefore my conclusion that a county auditor must comply with the provisions of §409.1 which includes the survey by a registered land surveyor holding a certificate under Chapter 114, 1966 Code of Iowa.

November 6, 1967

CITIES AND TOWNS: Authority to lease municipal parking facilities to private concerns for use as other than parking facilities. §390.5, Code of Iowa, 1966. A municipality may not lease a parking facility to be used for purposes other than parking. (Martin to Van Roekel, Marion County State Representative, 11/6/67) #67-11-9.

The Hon. Gerrit VanRoekel, Marion County Representative: This will acknowledge receipt of your letter requesting an opinion of this office as follows:

1. Can a municipality rent space in the basement of an offstreet parking facility for storage of materials?

2. Can a municipality rent space in an offstreet parking facility to a private firm engaged in a retailing business?

3. Can a municipality rent space in an offstreet parking facility to a private firm for use as office space?

Section 390.5, Code of Iowa, 1966, in pertinent part provides as follows:

"The city or town council shall have the right and authority to lease and rent such lands to other persons, firms, or corporations, to be used for *such purposes* and fix the rental to be charged therefor, and when such lands are so leased, to regulate the rates and charges to be exacted for such purposes. In no event shall such lease or agreement be for a period of more than twenty-five years." (Emphasis added)

The words "such purposes" in the statute above set out, means for the purposes of providing parking facilities. This is apparent from the use of the same words "such purposes" in §390.3, Code of Iowa, 1966. That section provides as follows:

"Any such city or town shall have the power to provide for the condemnation of, and pay for out of the general fund or parking lot fund or from funds created other than through taxation, enter upon and take any lands for *such purposes* in accordance with the provisions of section 368.38." (Emphasis added)

It is clear that the language under consideration in the above section refers to parking facilities and we can find no reason for defining those terms differently in §390.5, Code of Iowa, 1966.

Further reason to link "such purposes" in §390.5 to a parking purpose, is to be found in the power granted to the city to regulate "the rates and charges to be exacted for such purposes." Such a power clearly relates to the charges made to users of the parking facilities and further evidences the parking facility use requirement which must follow a lease of such facilities.

It is, therefore, the opinion of this office that leases of municipal parking facilities may not be made for purposes which are inconsistent with the use of the grounds as a parking facility.

November 6, 1967

CONSERVATION, COUNTY CONSERVATION BOARD: Constitution of Iowa, Article III, Section I. §§106.2(4)(8), 106 12(1), 106.17, 106.31. 1. Primary regulation and control of navigable waters within the State is subject to the right of the national government to regulate inter-

state commerce. 2. A dam constructed across a navigable river does not create an artificial lake as defined in §106.31. 3. Navigable waters are subject to regulation by the State if the delegation of rule-making power is not unconstitutional. 4. The State Conservation Commission has a right to decide what local regulation may be adopted under §106.17 and if local regulations are promulgated the duty to enforce these regulations is with both the State Conservation Commission and the County Conservation Board. (F. Hendrickson to Faches, Linn County Attorney, 11/6/67) #67-11-10

Mr. William G. Faches, Linn County Attorney: You have requested an opinion of this office regarding the following:

"Linn County, Iowa, desires to establish local regulations for boating under the provisions of Section 106.17 of the 1966 Code of Iowa with respect to certain segments of the streams which run through parks. The question comes up as to whether or not the Wapsie Pinicon River is under the control of the State of Iowa so that local rules and regulations could be adopted under the provisions of Section 106.17 or is the Wapsie Pinicon River a stream that would be under federal control. If it is under federal control, what measure of control is there over boats and vessels using said waters."

Subsequent thereto the Linn County Conservation Board passed a resolution setting forth certain specific questions to be answered. They are as follows:

"1. Is the water in question under State or Federal control?

2. If under State control, is it an artificial lake as defined in Chapter 106.31, 1966 Code of Iowa?

3. If the answer to Question No. 2 is negative, then is this water subject to control as provided for under Chapter 106.17 of the 1966 Code of Iowa?

4. If local regulations are adopted under Chapter 106.17, Code of Iowa, by the State Conservation Commission, who has the responsibility to enforce these regulations?

5. Who is to make the final decision as to what local controls are needed?"

Part of the resolution passed by the Linn County Conservation Board is as follows:

"WHEREAS, the Linn County, Iowa, Conservation Board has caused to have constructed as a park facility for Pinicon Ridge Park a lowhead dam across the Wapsipinicon River near Central City, Iowa, as part of its county-wide program of developing recreation facilities, and

"WHEREAS, the Linn County, Iowa, Conservation Board intended this dam to serve the needs of Pinicon Ridge Park in terms of increasing the water recreation potential, and

"WHEREAS, the Linn County, Iowa, Conservation Board obtained prior approval of a Master Plan of Development for Pinicon Ridge Park as provided for under Chapter 111A, Code of Iowa, which seeks to emphasize the following:

"1. Family recreation;

"2. Enhancing and making available the natural beauty of the Wapsipinicon River Valley to the greatest number of people consistent with the ability of the resource to support certain forms of recreation;

"3. Promote unorganized outdoor recreation experiences;

"WHEREAS, the impoundment created consists of 65 acres of water, and

"WHEREAS, the Linn County, Iowa, Conservation Board feels that unrestricted boating on the subject water is inconsistent with public safety in general and County Conservation Board policy, . . ."

You are advised that the following statutes are applicable to answering the questions. Section 106.2, Subsection 4 of the 1966 Code of Iowa provides:

" 'Waters of this state under the jurisdiction of the state conservation commission' means any navigable waters within the territorial limits of this state, and the marginal river areas adjacent to this state, exempting only farm ponds, privately owned lakes and waters specifically delegated to local authorities."

Section 106.2, Subsection 8, provides as follows:

" 'Navigable waters' means all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years."

Section 106.12, 1966 Code of Iowa, Subsection 1 under the heading, "Prohibited Operation" states:

"No person shall operate any vessel, or manipulate any water skis, surfboard or similar device in a careless, reckless or negligent manner so as to endanger the life, limb or property of any person."

Section 106.17, 1966 Code of Iowa, entitled "Local regulations restricted" provides as follows:

"1. The provisions of this chapter and other applicable laws of this state shall govern the operation, equipment, numbering and all other matters relating thereto of any vessel whenever such vessel is operated or maintained on the waters of this state under the jurisdiction of the commission, but nothing in this chapter shall be construed to prevent the adoption of any ordinance or local law relating to the operation of equipment or vessels. Such ordinances or local law shall be operative only so long as they are not inconsistent with the provisions of this chapter or the rules and regulations adopted by the commission.

"2. Any subdivision of this state may, but only after public notice thereof by publication in a newspaper having a general circulation in such subdivision, make formal application to the commission for special rules and regulations concerning the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules or regulations necessary or appropriate.

"3. The commission is hereby authorized upon application of local authorities to make special rules and regulations, in conformity with this chapter, concerning the operation of vessels on any waters of this state under the jurisdiction of the commission within the territorial limits of any subdivision of this state."

Section 106.31 entitled "Artificial Lakes," subsection 1, provides:

"1. No motorboats with inboard motors; motorboats of plane or gliding type, including combination plane and displacement types, propelled by an outboard motor; rowboats of displacement type with outboard motor, shall be permitted on any artificial lake under the jurisdiction of the commission except that rowboats or motorboats equipped with an outboard motor, not to exceed six horsepower shall be permitted upon any artificial lake of one hundred acres or more in size.

"2. No person shall operate any sailboat on any artificial lake under the jurisdiction of the commission except those lakes specifically designated by the commission. All sailboats, so operated, must be of a type and size approved by the commission.

"3. All privately-owned boats on artificial lakes under the jurisdiction of the commission shall be kept at locations designated by the commission.

"4. All privately-owned rowboats, used on or kept at the artificial lakes under the jurisdiction of the commission, shall be seaworthy for the waters where they are kept and used. All such boats shall be removed from state property whenever ordered by the commission, and, in any event, shall be removed from such property not later than December 15 of each year."

Since the Wapsipinicon River is a meandered river and also capable of being navigated by the public and used by the public for other public purposes it is not necessary to cite the legal authority supporting the State's ownership of the bed of said river in trust for the public. The Iowa Supreme Court has consistently held that such rivers are navigable rivers in law and that they are subject to regulation by the State. In Iowa the regulation of navigable waters has been delegated to the Iowa State Conservation Commission pursuant to Chapter 106 of the 1966 Code of Iowa. The legislature has also delegated certain rule-making power to local subdivisions of the State pursuant to Section 106.17, 1966 Code of Iowa.

In answer to question number 1, the State and Federal governments share concurrent jurisdiction over navigable waters in the State of Iowa. The extent of this concurrent jurisdiction was answered by the Iowa Supreme Court in the case of *Peck v. Alfred Olson Construction Company*, 216 Iowa 519, 245 N. W. 131 (1932). The Iowa court in this case stated that West Okoboji Lake is a navigable lake and that legal title of its bed is in the State, such title extending to the high water mark. As to the right of the state to regulate in light of certain federal rights, the court at page 134 stated as follows:

"This brings us to the crucial question: Is the plaintiff's right of access as riparian owner paramount to the trusteeship of the state in relation to this navigable lake? By the cession of the national government to the state, no proprietary benefit was conferred. On the contrary, a burden was imposed. The subject matter of the cession carried with it no emolument nor promise of future revenue. The state came under the burden of maintaining and promoting the navigation of the navigable lake. The dominion thus conferred upon the state was subject to the power and duty of the national government to regulate interstate commerce. In all other respects, the dominion of the state is supreme. The question here is which is paramount, the right of access of the riparian owner, on the one hand, or, on the other hand, the title and trusteeship of the state? The question is not a new one. It has been concerned and debated by the courts of many states and by the United States Supreme Court. The question has never been directly passed upon in this state. The United States Supreme Court has held definitely that the riparian owners in such a case takes the incidents of his title, such as right of access, subject to the navigability of the waters and subject to those incidents of navigability, which look to its maintenance and promotion; that the right of the government to maintain and promote navigation by whatever reasonable means it may is paramount to the right of ingress and egress of a riparian owner. When the national government has occasion to assert its power over navigation in the regulation of interstate commerce, it holds the riparian right of access as subordinate to the power of the government to promote navigation.

"One brief quotation from *Scranton v. Wheeler*, 179 U. S. 163, 21 S. Ct. 48, 57, 45 L. Ed. 126, will suffice to indicate the doctrine established by the Supreme Court.

" 'Whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public has in the navigation of such waters. The primary use of the waters and lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use and infringes no right of riparian owners.' "

In answer to question number 1 then, control may be exercised by both the state and federal government. The state has the right to control and regulate navigable waters until pre-empted by federal control in line with the right of the national government to regulate interstate commerce.

Question number 2 has been answered by the Iowa Supreme Court in the case of *McCauley v. Salmon*, 234 Iowa 1020, 14 N. W. 2d 715 (1944). Although this case does not involve the issues of delegating rule-making power to local subdivisions, some of the questions regarding the operation of boats upon navigable rivers which have been dammed by artificial dams is answered in this case.

In this case the plaintiff who was a riparian owner sought to enjoin the operation of certain motorboats on the Des Moines River. The court recited the following facts in this case by stating that the portion of the river is used largely for public recreation, the river being about 300 feet wide. In the summer season various canoes, rowboats and motorboats are operated upon it. On the east side of the river is a municipal park. On the west side, near appellant's land, is the clubhouse of the Northwest Iowa Boat Club. Its members and others have small pleasure craft, operated by inboard or outboard motors, some of which attain a maximum of 35 miles per hour. According to the record, the faster boats, except one six-passenger commercial boat, are of the planing type which usually create larger waves at low speeds than at higher speeds. The court further stated that during the past three years the water has been undermined and cut away several feet of the riparian banks at some places and undermined some trees along the bank.

The court at page 716 stated as follows:

"The parties agree that the Des Moines River at this place is a navigable stream. Hence, riparian owners own only to ordinary high-water mark and the whole bed of the river belongs to the state in trust for the public. *Shortell v. Des Moines Electric Co.*, 186 Iowa 469, 172 N. W. 649. The right of the public to navigate the water is paramount. *Mills & Allen v. Evans & McCutchin*, 100 Iowa 712, 69 N. W. 1043; *Peck v. Olson Construction Co.*, 216 Iowa 519 245 N. W. 131, 89 A.L.R. 1132. This includes the right of fishing, boating, skating and other sports. See *Board of Park Commissioners v. Diamond Ice Co.*, 130 Iowa 603, 105 N. W. 203, 3 L.R.R., N.S., 1103, 8 Ann. Cas. 28. Navigable waters has been likened to a public highway. 45 C.J. 444. The shore is subject to the dangers incident to the reasonable exercise of the right of navigation, such as the wash from the reasonable propelling of vessels in the stream. 48 Am. Jur. 191. The damage which a riparian owner may sustain as a natural and unavoidable consequence of the navigation of a stream, where the same is conducted with due care and in a reasonably prudent manner,

must be borne by him as a natural and consequent injury. 27 R.C.L. 1323.

"The only positive statutory limitation of the speed of motorboats of the types here involved upon navigable rivers concerns unobstructed vision. Subsection 2 of Code, Section 1703.13. No violation of said statute was shown. Nor does it appear that the operation of said boats at such speed and in such manner as to produce the waves in question was unreasonable or careless in that respect, or that it constituted a wrongful invasion of the rights of the riparian landowners.

"Appellant makes some contention that the portion of the river here involved is an artificial lake or that it should be considered subject to the provisions of Code, Sections 1703.16 and 1703.17 which involve boating upon artificial lakes. It is sufficient answer to say that though the dam raised the level of the river, the character of the portion of the stream affected was not changed and it remains a river.

"The trial court did not err in refusing to enjoin the operation of the motorboats at the elleged excessive rates of speed.

"Affirmed.

"All Justices concur."

Since Section 106.31 has been specifically interpreted, it would be the answer of this office that no, the water in question is not an artificial lake as defined in Section 106.31. In answer to question number 3 since the answer to question number 2 is negative, it is difficult to give a blanket answer if this water is subject to control under the provisions of Chapter 106.17. You will note that in the case of *McCauley v. Salmon, supra*, the court stated that there was no positive statutory limitation on the speed of motorboats upon navigable rivers. This office does not know of any recent statute which has placed statutory limitations on the speed of motorboats on navigable rivers.

It is the law of the State of Iowa that the legislature cannot delegate its power to make a law, but that it can make a law to delegate a power to determine some fact or state of things on which a law makes or intends to make, its own action depend. It has also been held that giving an administrative officer body power to do whatever is thought necessary to carry out his or its purposes and to enforce the laws without other guide than that he or it must keep within the law is not sufficient. It is also recognized that a delegation of rule-making power without sufficient guidelines is unconstitutional as being in violation of Article III, Section 1, of the Iowa Constitution. Suffice it to say that any rule or regulation passed pursuant to the rule-making delegations of Chapter 106 must be construed in light of the Iowa cases governing the delegation of rule-making power. In making any such determination, the following cases should be read. *Goodlove v. Logan*, 217 Iowa 98, 251 N. W. 39 (1933); *Central States Theater Corp. v. Sar*, 245 Iowa 1254, 66 N. W. 2d 450; *State v. Van Trump*, 224 Iowa 504, 275 N. W. 569 (1937); *Bulova Watch Company v. Robinson Wholesale Company*, 252 Iowa 740, 108 N. W. 2d 365 (1961); *Spurbeck v. Statton*, 252 Iowa 279, 106 N. W. 2d 660 (1960); *Lewis Consolidated School District v. Johnston*, 256 Iowa 236, 127 N. W. 2d 118 (1964).

Particular attention is called to the case of *State v. Van Trump, supra*, wherein the Iowa Supreme Court discussed the rule-making power of the

Iowa State Conservation Commission. In this case the rule and regulation which was adopted regarding commission regulations was declared invalid and unconstitutional. In light of the intended regulation by the Linn County Conservation Board one would have to determine whether the proposed regulation is legislative in nature. If it is legislative in nature, then it is an unlawful delegation. The Iowa case of *Goodlove v. Logan, supra,* would seem to indicate that a commission rule and regulation pertaining to the movement of a vehicle such as a boat would be legislative in nature and therefore an unconstitutional delegation of legislative power. The court in the case of *Goodlove v. Logan* specifically held that the power of the highway commission to pass rules and regulations which were legislative in character were void and expressly provided their reasons why such rules and regulations are an unlawful delegation of power to an administrative agency. The court at page 43 of that opinion declared as follows:

"Thus an analysis of every case cited by the appellant presents the situation only where the details of the statute are left to be administered by a board or commission in applying the law as expressed in the statute. If the Legislature had a right to pass section 5066, granting to the highway commission the authority to adopt rules and regulations governing the stopping of cars upon a paved highway, the Legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way, and all duties of automobile drivers. If the Legislature can delegate to the highway commission the right to do these things, then, of course, the Legislature can delegate the same power to the board of control, to the insurance commissioner, superintendent of banking, and all other administrative departments of the state may be likewise empowered to enact rules and regulations to be given the force of statutes, which said commission might in their judgment determine to be for the general protection of the public. Once such bureaucracy has fastened itself into the life of legislative power, little else need be done by the Legislature than to meet and create boards. The Legislature has no such right to delegate to the highway commission legislative power to pass rules and regulations concerning the use of the primary highways of this state by the people of this state, such as rule VII. If the Legislature in its wise judgment desires to pass such a statute, it, of course, has the right and authority to do so, for the Legislature is composed of the representatives of the people; it is chosen by the people for the purpose of making the laws of this state. The Legislature cannot transfer the power of making laws to any one else, or place the right to make laws anywhere but where the people have placed it. The highway commission is appointed by the Governor of the state for the purposes of administering the laws and not for the purpose of making the laws. If the right were given to the highway commission to make the laws governing the highways of this state, how is the individual using the highways to know what rules and regulations the highway commission passes? The highway commission meets at various and different times. It might pass some rule or regulation today and revoke it next week. There is no way that the people throughout this state could know just what were the rules and regulations that the highway commission adopted. About the only way that one could be certain as to what the rules and regulations were — if the highway commission had the right to pass them — would be to telephone to the highway commission everytime one started on a journey, and, if that journey were to be a long one, a wise and cautious individual would put in a telephone call before starting on the return journey.

"Thus, it seems to us that the Legislature under Code §5066 has left to the highway commission first to say whether there shall be any law, and, second, what that law shall be. This is a delegation of legislative power, and same is unconstitutional."

As previously stated, this office is not prepared to pass on any constitutional questions because there are not sufficient facts presented in the request for an opinion. This opinion should not be construed as meaning that any rules and regulations which would be passed by the Iowa Conservation Commission or a local subdivision such as the State Conservation Board would be invalid and unconstitutional.

The Minnesota case of *Nelson v. De Long*, 213 Minn. 425, 7 N. W. 2d 342 (1942) illustrates the type of local regulation which is permissible. Many of the questions which have been raised in this request for an opinion were answered by the Minnesota Supreme Court in the Nelson case. For example, the Minnesota court noted that they had not overlooked the fact that the power of congress to regulate navigable waters is paramount to that of the State but pointed out that here, congress has not asserted its jurisdiction. Hence, the court stated for the present purposes, its right to do so is not important. The court made the following statements regarding the delegation of powers to local subdivisions. On page 347 of the Nelson opinion the court stated:

"It is not essential that the state itself should exercise its powers to regulate navigable waters. The state may delegate its powers over navigable waters to agents selected by it to act in a representative capacity in performing its public functions."

And at page 348 of the Nelson opinion the court stated:

"The power to regulate the use of navigable waters involves an exercise of the police power, under which rules may be prescribed to insure to all the equal enjoyment of public rights and to prevent and to suppress the clashing of private interests and resulting public disorder."

The Nelson court at page 350 of the opinion stated what type of regulation would be permissible under the Minnesota statutes:

"The roping off of a bathing beach for the exclusive use of bathers was a reasonable regulation under the circumstances. Ample provision was made for taking care of the needs for boating, the only other public use shown here. Since one of the objects of regulation is to secure the orderly use of public waters, it is proper to ordain where, when, and how the several uses of which the waters are susceptible shall be enjoyed. For example, during certain reasonable times navigable waters may be devoted to the taking of spawn to the exclusion of other uses such as logging. *State v. Tower Lbr. Co.*, 100 Minn. 38, 110 N. W. 254. A part of a navigable body of water may be devoted to one public use to the exclusion of others. *Schmidt v. Gould*, 172 Minn. 179, 215 N. W. 215 (reservation of waters for propagation of fish to the exclusion of the right to fish); *Commonwealth v. Weatherhead*, 110 Mass. 175; *People v. Silberwood*, 110 Mich. 103, 67 N. W. 1087, 32 L.R.A. 694; 1 Farnham, Waters and Water Rights, §140, p. 653. It has been assumed in numerous cases that a part of navigable waters may be set aside for bathing beaches. See *St. John v. City of St. Paul*, 179 Minn, 12, 228 N. W. 170, and *State ex rel. Johnson v. Brown*, 111 Minn. 80, 126 N. W. 408, *supra*. Bathing being a recognized public use, it therefore follows that under the principles stated a part of public waters may be used exclusively for that purpose.

"While the village, in virtue of its ownership of the part fronting on the lake, is a riparian owner, *Troska v. Brecht*, 140 Minn. 233, 167 N. W. 1042, its power to adopt the regulations in question stems, not from its rights as a riparian owner, but from the statute which delegates to it as a governmental agency of the state regulatory power over navigable waters. The regulations have their basis, not in property rights, but in governmental power, to which all riparian rights are subject.

"Our conclusion is that all the regulations in question are lawful exercises of the village's governmental power. Consequently defendant's acts were not wrongful, and he is not liable."

Questions numbered 4 and 5 may be answered together. It would be the opinion of this office that the final decision as to what local controls are needed would be governed by the subsections 2 and 3 of section 106.17, 1966 Code of Iowa. It is apparent that the final decision as to whether or not local rules and regulations should be promulgated would rest with the State Conservation Commission. Any answer to question number 4 would be dependent upon what types of rules and regulation would be passed. It would be the opinion of this office that State Conservation Commission enforcement officers as well as the law enforcement officials of local subdivisions such as the County Conservation Board could enforce the regulations. The answer to question number 4 would be that both the State Conservation Commission and the County Conservation Board would have the duty to enforce regulations.

November 7, 1967

APPROPRIATIONS. The discrepancy between the aggregate appropriation and the detailed appropriations shows upon the face of the Bill, a resort to the Journal is authorized, and the appropriation fixed at $6,100.00. (Strauss to Selden, State Comptroller, 11/7/67.) #67-11-26.

Mr. Marvin R. Selden, Jr., State Comptroller: Reference is herein made to yours of the 31st ult. in which you submitted the following:

"House File 752, Acts of the 62nd General Assembly, reads as follows:

" 'Section 1. There is hereby appropriated from the general fund of the state for the biennium beginning July 1, 1967, and ending June 30, 1969, to the commission on uniform laws the sum of five thousand two hundred (5,200) dollars, or so much thereof as may be necessary, to be used in the following manner:

" 'For support of the conference of commissioners on uniform state laws	$2,200.00
" 'For traveling expenses of members of the commission on uniform laws	3,900.00
" 'Grand total of all appropriations for all purposes for the biennium for the commission on uniform laws	$6,100.00' "

"Please note that in paragraph one (1) the biennial appropriation is stated as $5,200.00, while in the last paragraph the biennial appropriation is stated as $6,100.00.

"I respectfully request your opinion as to the following:

"1. What is the total amount of the biennial appropriation made by House File 752?

"2. In the event that you should rule that the total amount is $5,200.00, from which purpose should the portion of the appropriation of $900.00 be taken?"

In reply thereto I advise the following:

In a legislative situation comparable to the situation outlined in your letter, in an opinion of July 16, 1963, it was stated as follows:

"1. The State of Iowa is loyal to the rule that the enrolled bill, nothing to the contrary appearing on its face, is conclusive evidence of its textual content, and cannot be impeached by the journals or evidence extrinsic to the journals. 60 *OAG* 184. In this case there is a contrary appearance on the face of the bill."

The contrary appearance in H.F. 752, Acts of the 62nd G. A., is noted by you in that the biennial appropriation is stated as $5,200.00 while the uses to which the money is to be put as described in the bill aggregate the sum of $6,100.00. It is necessary therefor to go behind the enrolled bill. In so doing it appears that the numbered bill H.F. 752 contained an appropriation of $5,200.00 both in the appropriation and in the designations of amounts for the several uses of the money, that sum being $5,200.00. Further, it appears that the bill was amended in the House by striking the figures $3,000.00 for traveling expenses of the members of the commission on uniform laws and substituting therefor the sum of $3,900.00, and likewise it was further amended by striking the figures $5,200.00 in line 13 of the filed bill, which was the last line thereof, and inserting in lieu thereof the figures $6,100.00. The House further amended the numbered bill by striking from the title the words "five thousand two hundred dollars" and inserting in lieu thereof "six thousand one hundred dollars."

On consideration of the bill in the Senate the figures $5,200.00 in line 13, being the last line of the filed bill, were stricken and in lieu thereof the figures $6,100.00 were inserted. It was further amended by the Senate by striking from the title the words "five thousand two hundred dollars" and inserting in lieu thereof "six thousand one hundred dollars," and by striking from line 10 of the original bill the figures $3,000.00 and inserting in lieu thereof the figures $3,900.00.

The Senate Journal on page 2166 shows a record of an amendment to H.F. 752 by striking the figures $3,000.00 in line 10 and inserting in lieu thereof the figures $3,900.00. The Senate further amended the bill by striking the figures $5,200.00 and inserting in lieu thereof the figures $6,100.00. The foregoing Senate amendment was adopted by the Senate (See Journal of the Senate, 62nd G. A. 2173). Senate Journal 2181 shows upon a reconsideration of the bill by the Senate the following amendment was adopted:

"Amend the title by striking from lines three (3) and four (4) the following, 'five thousand two hundred (5,200)' and by inserting in lieu thereof the following: 'six thousand one hundred (6,100)'."

Thereupon the bill as so amended passed the Senate by a vote of aye 545, nay 1. Senate Journal 2182.

Upon consideration of said bill by the House Journal, 2280, shows the House concurred in the bill as amended by the Senate. Such concurrence consisted of striking from lines three (3) and four (4) of the title the words and figures "five thousand two hundred (5,200)" and inserting in lieu thereof the words and figures "six thousand one hundred (6,100)," by striking from line 10 of the original bill the figures $3,000.00 and inserting in lieu thereof the figures $3,900.00, and by striking from line 13 of the bill the figures $5,200.00 and inserting in lieu thereof the figures

$6,100.00. And thereupon the bill in that form passed the House, the ayes being 108 and the nays none.

The result of the foregoing is that the bill was passed by the legislature with the appropriation in the aggregate amounting to the sum of $6,100.00 and the individual appropriations aggregating the same amount. Therefore, I answer your question by stating that the biennial appropriation contained in H.F. 752 is $6,100.00. With that view there is no reason for answering your question number two.

November 9, 1967

LABOR: Right to enter business premises for inspection — §§91.9, 91.16, 92.15, 92.16, Code of Iowa, 1966; U. S. Const., 4th Amend. Inspectors may not compel entry under §§91.9, 91.16, 92.15, but may obtain court order under §92.16, Code of Iowa, 1966. (Zeller to Barrett, Bureau of Labor, 11/9/67) #67-11-12.

Mr. R. Earl Barrett, Deputy Commissioner, Bureau of Labor: Reference is made to your recent letter in which you write as follows:

"I would like to request an opinion on our department's right to enter premises. Our factory inspectors have the right to enter premises by virtue of 91.9, 1966 Code of Iowa. Our child labor and migratory labor inspectors' rights to enter the premises are derived from 92.16, 1966 Code of Iowa.

". . . (In light of two recent Supreme Court cases (Roland Camara vs. Municipal Court of the City and County of San Francisco (See June 6, 1967, Volume 35, No. 47 of Law Week) and Norman See vs. City of Seattle (See Law Week, Volume 35, No. 47, June 6, 1967). [1] I would like to know how this effects our inspectors' rights to enter the premises? In the recent past this right to enter the premises was interpreted as an absolute right, but is is my opinion that this has been changed by these recent Supreme Court rulings i.e. we will be required to obtain search warrants.

"In connection with this I don't foresee a problem with regard to our factory inspectors or our child labor inspector, but I do foresee a real problem with our migratory labor inspector. We have experienced some difficulty in entering upon the premises of persons hiring migratory labor.

"I would like these answered separately, since the right to enter premises is derived from two different sections.

[2] "Also in connection with this question, I would like to know the current status of 92.15, 1966 Code of Iowa and 91.16(1). These two sections pertain to violations with regard to our right to enter the premises . . .

[3] "In light of your answer to your first question, will we be able to obtain a conviction under these sections in a case where we haven't previously obtained a search warrant?

[4] "I would also like your opinion as to what information will we need in order to obtain a search warrant. That is just what probable cause will we need before a valid search warrant will be issued?"

Section 91.9, Code of Iowa, 1966, reads as follows:

"The labor commissioner and the inspectors shall have the power to enter any factory or mill, workshop, mine, store, business house, public

or private work, when the same is open or in operation, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employees, and the sanitary conditions in and around such buildings and places, and make a record thereof."

Section 91.16, Code of Iowa, 1966, provides for a fine or imprisonment for any owner, superintendent or manager, who shall refuse to allow any inspector or employee of the bureau to enter the same.

1. It is our opinion that the case of *See vs. City of Seattle*, 87 S. Ct. 1737 applies and limits your inspections of factories and business houses to voluntary ones under §91.9, Code of Iowa, 1966. The above case holds as follows:

"Administrative entry, without consent, upon portions of commercial premises which are not open to the public, may only be compelled through physical force, within the framework of a warrant procedure."

Accordingly, you may not enforce a fine or other penalty for refusal to permit entry and inspection.

2. Your second question also asked our opinion as to the inspections provided in §§92.15 and 92.16, Code of Iowa, 1966, since these are different statutes. §92.15 provides as follows:

"Any superintendent or manager, who shall refuse to allow any authorized officer or person to inspect any place of business under said provisions * * * shall be deemed guilty of a misdemeanor, and upon conviction shall be fined * * * or be imprisoned * * * not to exceed thirty days."

Section 92.16, Code of Iowa, 1966, also provides for enforcement of this statute by the labor commissioner, his deputies, inspectors, etc., but also provides in pertinent part as follows:

"All such officers and any person authorized in writing by any court of secord shall have authority to enter for purposes of investigation any of the * * * places mentioned."

Accordingly, it is our opinion that the decision of *See vs. City of Seattle* (supra) controls this statute and you may not enforce any penalties, under §92.15, Code of Iowa, 1966, for refusal to allow an inspection. But under §92.16, Code of Iowa, 1966 you have an additional remedy, which is not overruled by the above case. You may apply upon affidavit to any court of record, for authority permitting the commissioner or any of his inspectors or deputies to enter for purposes of investigation, any of the establishments and places mentioned. Then with the aid of a court order, you or your agents may enter and investigate fully as to any violation of Chapter 92, Code of Iowa, 1966, dealing with Child Labor, in spite of any refusal by the manager.

3. You will not be able to obtain a conviction under §§91.9 and 91.16, without previously obtaining a search warrant.

4. There is no provision in the Iowa Code for the issuance of a search warrant to assist in the labor inspections and investigations, which you request. Chapter 751 deals with search warrants and at §751.3, Code of Iowa, 1966, the statute prescribes the nine different properties which are legally subject to a search warrant. The factories and business houses

above-mentioned are not subject to a search warrant, except as specifically provided in these nine cases, and these provisions do not apply to your labor law violations.

However, pursuant to §92.16, Code of Iowa, 1966, if your deputy or other officer applies by affidavit and obtains a court order, this will qualify a deputy or inspector to make a valid inspection and the manager cannot refuse an inspection, if the court order is presented. The affidavit signed by the Commissioner or one of his deputies need not reflect direct personal observations of affiant, but may be based on hearsay information. Affiant, however, must set forth some of the underlying circumstances supporting his conclusions and his belief that any informant involved (whose identity need not be disclosed) was credible or his information reliable.

November 13, 1967

AREA HOSPITALS — Existing school district board may not form "area hospitals." H.F. 435, 62nd G. A. Acts requires **merger** of two or more existing political subdivisions. Trustees of "area hospital" have no power to increase maximum millage rate once plan is approved. Political subdivisions which are already supporting a county or municipal hospital may be included in "merged area" and taxed to finance area hospital. (11/13/67, R. Ivie to M. McCauley, Dubuque County Attorney.) #67-11-11

Mr. Michael S. McCauley, Dubuque County Attorney: This will acknowledge your inquiry with regard to the recently enacted "Act to Authorize the Creation of Area Hospitals," House File 435, 62nd General Assembly. Several questions are propounded in your inquiry, the first of which involves the definition of "merged area." With regard to this first question, you ask:

"The whole statute seems to refer to the merger of two or more politican subdivisions. The statute, on the other hand, does not specifically prohibit the use of one political subdivision as an area for taxation. For instance, rather than merge two political subdivisions, would this law permit the use of a large school district. Note section 2 of the law defines political subdivision to be a school district. To use one's school district would not technically constitute a merger because officials of the civil townships within this school district would not be consulted or involved. Only the school board officials of the school district would be consulted and they would make the decisions. On the other hand could it be interpreted that to use a school district would be nothing more than a merger of the political townships within the school district and the public officials of each township would have to be consulted and they would have the rights and duties as explained in the statute."

With reference to this portion of your inquiry, the statute clearly contemplates the *merger* of political subdivisions for the purpose of creating an area hospital. While a school district is a political subdivision, after comprising merged townships, it is not possible for a single school district to create an area hospital under this statute as this was not the purpose for which the school district itself was formed. (See Chapter 274, 1966 Code of Iowa.) The statute clearly contemplates as set out in §7 that the qualified voters of each political subdivision proposed for merger into a "merged area" be given the opportunity to approve or reject the order setting out the proposed merger plan. Any attempt to

form a "merged area" without giving the voters of each political subdivision to be included therein the opportunity to reject the plan would clearly violate the intent of the legislature.

This is not to say that it would be improper to form a "merged area" for the purpose of establishing an area hospital that would comprise the same political subdivisions as are now included in an existing school district. But the establishment of the school district itself did not make the political subdivisions which form a part thereof captive for the purpose of creating an area hospital or any other new political subdivision.

In light of the negative answer to the first question proposed by you, the next three questions you raise which are based on an affirmative answer to the first question, need not now be answered.

However, you do raise two other questions which still require answers despite the negative answer to the first question proposed. They are:

"Can the maximum millage rate required to be set in Section 3 be changed at any time after the trustees are appointed and elected, and if so in what manner and by whom.

"If persons and property inside a proposed 'merged area' are already being taxed to support a county or municipal hospital, can they still be taxed to support the new proposed hospital under this new law as long as they do not avail themselves of Section 3 or 6."

In response to the first of the above questions, I would advise that the board does not have authority to change the maximum millage rate as established in the original plan. Pursuant to the wording of §3 of the Act, the officials of the various political subdivisions involved in the "merged area" are required to establish the maximum millage rate as a part of the original plan. Under §12 the general powers of the board are outlined and none of these powers delegate to the board authority to change the maximum millage rate established in the original plan. In addition, you will note that in §14 the board is directed to prepare the annual budget and specifically instructed to keep expenditures within the original millage limits. This section would indicate the complete denial of the power to increase the maximum millage rate set out in the original plan.

In answer to the last question set out above, the answer is in the affirmative. Such persons do have, as pointed out in the question, the right to petition for an election in which they may reject the inclusion of their political subdivision in the proposed area. In addition, you will note that the board in §17 and §19 is granted the power to acquire sites, purchase or construct buildings and equipment for the purpose of maintaining, remodeling, improving or expanding the hospital area. This language coupled with the powers granted to the political subdivisions by virtue of Chapter 28E, 1966 Code of Iowa, may be construed to authorize the new area hospital to engage in the operation of an already existing county or municipal hospital in conjunction with the officials of the board of any such existing hospital.

November 15, 1967

TAXATION: Property Tax: Homestead Tax Credit: Sections 425.2, 425.11, Code of Iowa, 1966. Vendor who was the owner of the homestead at the time of filing his application for the homestead tax credit, who conveyed title to the vendee prior to July 1 of the year in which the credit was claimed, and who continued to occupy the premises until after July 1, may be entitled to the credit, but the vendee cannot file and obtain the credit on behalf of himself. (Murray to Johnson, Jasper County Attorney, 11/15/67 #67-11-13)

Mr. Lester C. Johnson, Jasper County Attorney: This is to acknowledge receipt of your letter of October 24, 1967, in which you submitted the following:

"A was the owner in fee simple of a city residence in which he resided. On March 28, 1967, A signed his application for homestead exemption. On June 21, 1967, A entered into a contract to sell said real estate to B. Said contract, which was never recorded, provided that A could 're-retain possession of premises until September 1, 1967, even though title given prior to that date.' On June 30, 1967, A and his spouse signed a warranty deed conveying said premises to B. On June 30, 1967, B recorded said warranty deed. A continued to reside in the premises until September, 1967.

"My questions are:

"1. Can B claim the homestead credit applied for by A on March 28, 1967, when a deed was given by A to B and recorded by B prior to July 1, 1967?

"2. Does Section 425.11 subsection 1a quoted above and interpreted by the 1952 OAG quoted above permit the homestead credit to apply in any case where a titleholder makes application for homestead exemption in good faith and then later, but prior to July 1, conveys title and the deed is recorded?"

Section 425.2, Code of Iowa, 1966, provides:

"425.2 Qualifying for credit. Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, or blank forms to be furnished by the assessor, a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation on July 2 of each year to the county auditor with his recommendation for allowance or disallowance indorsed thereon. In case the owner of the homestead is in active service in the military, naval, or air forces or nurse corps of this state or of the United States, such statement and designation may be delivered or filed by any member of the owner's family. The county old-age assistance investigator shall make application for the benefits of this chapter as the agent for and on behalf of persons receiving assistance under chapter 249."

Section 425.11(1)(a), Code of Iowa, 1966, provides:

"a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, provided further, that when any person is inducted into active service under the selective training and service Act of the United States or whose voluntary entry into active service results in a credit on the quota of persons required for service under the selective training and service Act, or who, being a member of any component part of the military, naval, or air forces or nurse corps of this state or nation,

is called or ordered into active service, such person shal lbe considered as occupying or living on the homestead during such service, and where equitable or legal title of the homestead is in the spouse of the person who is a member of or is inducted into the armed services of the United States, the spouse shall be considered as occupying or living on the homestead during such service."

Section 425.11(2), Code of Iowa, 1966, provides:

"2. The word, 'owner,' shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the hoemstead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption, or the person occupying the homestead under a deed which conveys a divided interest where the divided interest is shared only by persons related or formerly related to each other by blood, marriage or adoption."

Section 49 of H.F. 686, Acts of the 62nd General Assembly, (1967) amended Section 425.11 by adding thereto the following sentence:

"For the purpose of this chapter the word 'owner' shall be construed to mean a bonafide owner and not one for the purpose only of availing himself of the benefits of this chapter."

The effective date of this amendment was July 1, 1967. Section 53 of H.F. 686. The above amendment adds nothing to our interpretation of the Homestead Credit Act under the facts which you have submitted.

Section 425.11 is a tax exemption statute and should be strictly construed and those claiming the exemption must show entitlement thereto within the purview of the statute. *Ahrweiler vs. Board of Supervisors*, 226 Iowa 229, 283 N. W. 889 (1939); *Johnson vs. Board of Supervisors*, 237 Iowa 1103, 24 N. W. 2d 449 (1946).

In construing the Homestead Tax Credit Act, the definition of terms made use of by the legislature is binding on the Courts. *Eysink vs. Board of Supervisors*, 229 Iowa 1240, 296 N. W. 376 (1941).

You will note that Section 425.11 requires the homestead tax credit claimant to be an "owner" as defined in the statute of the homestead at the time of filing the application for the credit, but there is no provision requiring ownership of the homestead throughout the entire occupancy as a home thereof. Thus, the credit is to be given against the tax on the homestead, as distinguished to the owner. 1952 OAG 78, 79. Since A was the "owner" at the time he filed his application for the homestead tax credit and assuming that his application was in good faith, pursuant to Section 425.11, he would be entitled to the credit based on the facts you have presented.

B cannot obtain the credit. In the first place it does not appear that he filed an application for the same. In 1954 OAG 25, 26, the Attorney General, in construing Section 425.2, ruled:

"Under the authorities set out in this opinion, we believe that the affidavit and verified statement must be made by the person claiming the credit."

See also Section 425.6, Code of Iowa, 1966. Secondly, B cannot, after July 1, file a verified statement of his intention to occupy the homestead in good faith as a home for *6 months* or more in the year for which the credit is claimed as required by Section 425.11.

Of course, under the facts you presented, if B contracted with A to pay A's property taxes on the homestead, the credit should be granted against such property and therefore, deducted from the total property tax liability on the homestead normally assessed to A.

We trust that the above opinion answers both of your questions.

November 15, 1967

TAXATION: Property Taxes: When taxes become delinquent, Sections 4.1(23), 445.36, 445.37, Code of Iowa, 1966. In all cases where one half of the property taxes have not been paid before the first day of April succeeding the levy, the first half thereof shall become delinquent on the first day of April after due, and in case the second installment is not paid before the first day of October after due, it shall become delinquent on October 1 after due, regardless of the fact that the last day of March or September may fall on a Saturday or Sunday. (Griger to Eaton, Fremont County Attorney, 11/15/67, #67/11/14)

Mr. Gene Eaton, Fremont County Attorney: This will acknowledge receipt of your letter of October 23, 1967, in which you requested an opinion as follows:

"1. Does the penalty on delinquent taxes commence to accrue on the following Monday when the 30th of the month falls on Saturday?

"2. Does it commence to accrue on Tuesday if the 30th falls on a Sunday?

"3. Would the fact that the court house in Fremont County is open Saturday mornings have any bearing on your determination with respect to the two prior questions?

"The Treasurer is of the opinion that in counties where the court house is open Saturday mornings, the penalty would commence to accrue on Monday if the 30th were to fall on the Saturday preceding and on Tuesday where the 30th would fall on a Sunday. She basis her conclusion on an attorney general ruling of 1965, which I am unable to find, which apparently concluded that where court houses were not open Saturday mornings and the 30th fell on a Saturday or Sunday the penalty would not commence to accrue on the following Monday but would accrue thereafter."

Upon diligent search, this office has been unable to find any pertinent Attorney General Ruling of 1965, and we therefore, proceed as if such opinion does not exist.

Section 445.36, Code of Iowa, 1966, provides:

"Payment — installments. No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

Section 445.37, Code of Iowa, 1966, provides:

"When delinquent. In all cases where the half of any taxes has not

been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due."

Section 4.1(23) provides for the computing of time as follows:

"Computing time — legal holidays. In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday, provided that, whenever by the provisions of any statute or rule prescribed under authority of a statute, the last day for the commencement of any action or proceedings, the filing of any pleading or motion in a pending action or proceedings or the perfecting or filing of any appeal from the decision or award of any court, board, commission or official falls on a Saturday, a Sunday, the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, and the following Monday whenever any of the foregoing named legal holidays may fall on a Sunday, and any day appointed or recommended by the governor of Iowa or the president of the United States as a day of fasting or thanksgiving, the time therefore shall be extended to include the next day which is not a Saturday, Sunday or such day hereinbefore enumerated."

It would appear that Section 445.36 fixes the time periods within which the taxpayer has a duty to pay his property taxes. Section 445.37 provides when the taxes shall become delinquent. Section 445.37 is a specific statute and refers to "all cases" when the taxes shall become delinquent and we fail to see why Section 4.1(23) would be applicable since the dates that property taxes become delinquent do not appear to be related to the question of computing a time period of days, weeks, months or years, pursuant to that Section. See Also 1962 OAG 201. Section 445.37 may be compared with Section 324.60 which expressly provides for an extension of time for the filing of reports and remittances of fuel taxes as follows:

"Timely filing of reports — extension. The reports and remittances required under this chapter shall be deemed filed within the required time if postpaid, properly addressed and postmarked on or before midnight of the day on which due and payable. If the final filing date falls on a Saturday, Sunday or legal holiday the next secular or business day shall be the final filing date.

"The treasurer upon application may grant a reasonable extension of time for the filing of any required report or tax payment, or both."

You will note that there is a one month time period between the due dates of the property taxes and when the same becomes delinquent. It has been held that before equity will grant relief in cases concerning the fixing by statute of a penalty for failure to comply with the statutory filing requirements, it usually must be shown that he who claims such equity by his own diligence or foresight could not have prevented the alleged prejudicial situation. *Miller Oil Co. vs. Treasurer of State*, 252 Iowa 1058, 109 N. W. 2d 610 (1961).

It is our opinion that in all cases where one half of the property taxes have not been paid before the first day of April succeeding the levy, the first half thereof shall become delinquent on April 1 after due and in

case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent on October 1 after due, regardless of the fact that the last day of March or September may fall on a Saturday or Sunday.

November 18, 1967

MUNICIPAL COURTS. The provisions of §602.7, Code of 1966, that a judge of that court shall be a practicing lawyer is a qualification of such judgeship that attaches at the time of qualification and not at the time of election. (Strauss to Faches, Linn County Attorney, 11/18/67) #67-11-15.

Mr. William G. Faches, Linn County Attorney: This will acknowledge receipt of your request for an opinion of date October 27, 1967, in which you state:

"What are the minimum requirements that must be met to qualify as a 'practicing lawyer' as the words are used in Section 602.7 of the 1966 Code of Iowa in order to enable one to have his name placed on the ballot entitled "The Municipal Judiciary Ballot" in the municipal election as provided in Section 602.12 of the 1966 Code of Iowa?"

Accompanying your request is a letter of Eldon L. Colton, Attorney at Law, Cedar Rapids, to Harold Schaefer, Cedar Rapids City Clerk, in which Mr. Colton stated his doubt that the candidate Jay Gross for municipal judge met the requirement of the statute, §602.7, Code of 1966, that "The judge shall be a practicing lawyer" and stating further in such letter:

"Before Mr. Gross' name is placed on the ballot for the November 7th election your office should secure from either the County Attorney or the Attorney General an interpretation of the statutory provision above referred to and an opinion as to whether or not candidate Jay Gross has the qualifications to be a candidate for the office of the Municipal Court Judge. I request such an opinion be secured immediately."

Also accompanying your request was a letter of the candidate Gross dated October 27, 1967, to Richard Turner, Attorney General of Iowa, setting forth the facts of his status as a candidate for the office of judge of the municipal court of Cedar Rapids and requesting "a ruling on just what a 'practicing attorney' is in regards to running for a Municipal Judgeship."

It thus appears that the question at issue is whether this qualification requirement, that the judge shall be a practicing lawyer, shall exist at the time of the election or at the time of entering the office as judge of the municipal court. The applicable rule in the foregoing situation is set forth in the case of *State of Iowa, Ex rel. Zenas C. Thornburg v. Jennie C. Huegle, et al,* 135 Iowa 100, 112 N. W. 234, where it was claimed that Jennie C. Huegle was ineligible to hold the office of county superintendent by reason of her failure to hold a first grade certificate, a state certificate or a life diploma as required by §2, Chapter 122, Acts of the 31st G. A. The court recited the following:

"The question involves a construction of the statutes of the State, and we are in no manner concerned with the policy or apparent justice or injustice thereof. It is within the exclusive province of the Legislature

to fix the qualifications for public office, and the courts have no concern therewith except to see that the statutes are observed. State v. Covington, 29 Ohio St. 102; Darrow v. People, 8 Colo. 417 (8 Pac. 661). Moreover, the Legislature, in the absence of constitutional prohibition, may at pleasure alter or add to the qualifications for office. Mechem on Public Officers, section 97. And an office created by statute may be abolished, the term increased, or diminished, the manner of filling it changed by will of the Legislature at any time even during the term for which the then incumbent was elected or appointed. It may also declare the office vacant, or abolish the office by leaving it devoid of duties. Bryan v. Cattell, 15 Iowa, 538; Atty. Gen. v. Squires, 14 Cal. 13; Conner v. New York, 5 N. Y. 285. The necessary qualifications must exist either at the time of the election or at the time of entering upon the duties of the office, as the statutes may indicate or direct. State v. Holman, 58 Minn. 219 (59 N. W. 1006). Generally speaking, if the words used are 'eligible to office' or the equivalent, they mean eligibility at the time of enteirng upon the office, and not at the time of election. People v. Hamilton, 24 Ill. App. 609; Smith v. Moore, 90 Ind. 294; Privett v. Bickford, 26 Kan. 52 (40 Am. Rep. 301); State v. Smith, 14 Wis. 497; Kirkpatrick v. Brownfield, 97 Ky. 558 (31 S. W. 137, 29 L.R.A. 703, 53 Am. St. Rep. 422); Demaree v. Scates, 50 Kan. 275 (32 Pac. 1123, 20 L.R.A. 97, 34 Am. St. Rep. 113); Shuck v. State, 136 Ind. 63 (35 N. E. 993); People v. Leonard, 73 Cal. 230 (14 Pac. 853). But, whichever view be taken of this matter, the statute we have now to consider went into force and effect October 1, 1906, and provides that the county superintendent shall be the holder of a first-grade certificate as provided in that Act or of a state certificate or of a life diploma. So that the qualifications required were in force both at the time of election and at the time when the term of office began."

Applying the foregoing rule, §602.7, Code of 1966, provides:

"Each officer of the court shall be a qualified elector residing in the municipal court district. The judge shall be a practicing lawyer, . . ."

§602.10, Code of 1966, provides that:

"Whenever a municipal court has been established, there shall be elected at the following city election a judge or judges thereof; . . ."

§602.12, Code of 1966, provides that:

"At all primary and general municipal elections at which officers of the court are to be nominated or elected, as the case may be, there shall be a separate ballot entitled 'The Municipal Judiciary Ballot' upon which shall be placed the names of the candidates without party designation."

Thus at the election the statutory requirement is that upon establishment of the court there shall be elected a judge or judges. The statute makes no requirement of election of a practicing lawyer to the judgeship. It only requires the names of the candidates upon the ballot. These statutory provisions are the equivalent of a statutory designation of eligibility to office and mean eligibility upon the time of entering the office and not at the time of the election.

In view of the foregoing the question propounded by you will be the subject of answer if and when Gross is elected and seeks to qualify.

November 18, 1967

CITIES AND TOWNS: **Officers and employees, bonding and oath of office requirements** — §§63.1, 63.10, 64.2, 64.13, 368A.1(13), 368A.2(7), 368A.4(5), Code of Iowa, 1966. A municipality may opt to cover its

officers and employees with a blanket bond with the exception of mayors, mayors pro tem, and treasurers who must file individual bonds. The blanket bond provisions of §368A.1(13), Code of Iowa, 1966, do not affect the requirements of §§63.1 and 63.10, Code of Iowa, 1966, wherein it is required that each public officer elected or appointed, take and subscribe an oath of office. (Martin to Smith, Auditor of State, 11/18/67). #67-11-17.

The Hon. Lloyd R. Smith, Auditor of State: I have received your letter of September 18, 1967, in which you request the opinion of this office as follows:

". . . [Is] an individual surety bond . . . required for mayors, mayors pro tem, treasurers and clerks of municipalities, or . . . [may] a surety bond covering all municipal officers and employees [be purchased] . . ."

and:

"In the event a 'blanket surety bond' is permissible for all officers and employees, is each officer and employee required to file a separate oath of office?"

It has been the consistent opinion of this office that, unless otherwise expressly authorized, all public officials with minor exceptions are required to furnish individual bonds. Section 64.2, Code of Iowa, 1966; 64 O.A.G. 101; 58 O.A.G. 4.9; 56 O.A.G. 51.

The cited opinions find no express authority permitting blanket bonds in the following cases: elected county officials, their deputies, appointed county officials, county employees, and state conservation commission employees.

Section 368A.1(13), Code of Iowa, 1966, however, creates an exception to this generalization in favor of municipalities as follows:

"In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall: .

"13. Have power to purchase a surety bond running to the municipal corporation and covering all municipal officers and employees for the purpose of indemnifying the municipal corporation against any loss occasioned through the failure of such officers and employees to faithfully perform their duties, or, in the alternative may purchase a surety bond indemnifying it against any loss due to any fraudulent or dishonest act of such officers and employees."

However, in the case of mayors pro tem, §368A.2(7), Code of Iowa, 1966, specifically provides as follows:

"Said mayor pro tempore shall . . . give bond in the sum of five hundred dollars."

Section 368A.4(5) specifically provides, with reference to the city treasurer:

"In all municipal corporations the treasurer shall perform the following duties: . . .

"5. He shall give bond in such sum as is fixed by the council and the cost of said bond, not to exceed one percent per annum, shall be paid by the municipal corporation."

Section 64.13, Code of Iowa, 1966, specifically provides with reference to mayors:

". . . bonds of mayors shall not be in less sum than five hundred dollars each."

Section 368A.1(13), Code of Iowa, 1966, above set out, authorizes a blanket bond covering all municipal officers and employees while §§368A.2 (7), 368A.4(5) and 64.13, Code of Iowa, 1966, above set out, require individual bonds for certain officers.

To argue that §§368A.2(7), 368A.4(5) and 64.13, Code of Iowa, 1966, require a bond, which may be a blanket bond or an individual bond is to urge that either §§368A.2(7), 368A.4(5), and 64.13, on the one hand, or §64.2 on the other, is redundant. This follows as a result of the existence of the two separate requirements that treasurers, mayors, and mayors pro tem be bonded. Unless §§368A.2(7), 368A.4(5) and 64.13 are viewed as an exception to §368A.1(13), they are chimerical. We will not attribute such a result to the legislature.

It is also well established that when general and specific statutes conflict, the specific will control. *Rath v. Rath Packing Co.*, 257 Iowa 1277, 136 N. W. 2d 410 (1965); *Baird v. Webster City*, 256 Iowa 1097, 130 N. W. 2d 432, citing 82 C.J.S. Statutes §368 (1964); *Smith v. Newell*, 254 Iowa 496, 117 N. W. 2d 883 (1962). In this case a general statute, §368A.1(13), allows a municipality to obtain a blanket bond for its officers and employees, while specific statutes, §§368A.2(7), 368A.4(5) and 64.13, require individual bonds for certain officers. Such a conflict must be resolved in favor of the specific statute.

Therefore, a municipality's officials and employees may be covered by a blanket bond with the exception of the mayor, mayor pro tem and treasurer who are directed by specific statutory provisions to file individual bonds.

The blanket bonding provisions of §368A.1(13) do not affect the requirements of §§63.1 and 63.10, Code of Iowa, 1966, wherein it is required that each public officer, elected or appointed, take and subscribe an oath of office.

November 18, 1967

ADJUTANT GENERAL. §29A.14. There is no authority in the Adjutant General in the foregoing statute to lease land in Camp Dodge for the purpose of removing gravel, sand or rock therefrom. (Strauss to May, Deputy Adjutant General, 11/18/67) #67-11-16.

Joseph G. May, BG, AGC, Iowa ARNG, Deputy Adjutant General: Reference is herein made to yours of the 8th inst. in which you submitted the following:

"The Hallett Construction Company, General Contractors, Home Office, Crosby, Minnesota, with local office address Box 13, Boone, Iowa 50036, is interested in the location and development of sand, gravel, and rock deposits for commercial and highway construction use.

"This office recently received a letter from the above company stating the belief that such materials were available on the Camp Dodge Military Reservation area and indicating interest in the possibility of a lease arrangement for the purpose of removing available deposits as required for such use.

"Opinion of the Attorney General is respectfully requested as to whether or not the powers and duties of the Adjutant General, as provided in Sections 29A.12, 29A.13, and more particularly 29A.14, Code of 1966, authorize the Adjutant General to negotiate a lease arrangement as indicated above."

In reply thereto I advise that the statute conferring authority upon the Adjutant General to lease property, or a portion thereof, known as Camp Dodge, is §29A.14 providing as follows:

"Leasing facilities. The adjutant general shall have authority to operate or lease any of the facilities at Camp Dodge. Any income or revenue derived from such operation or leasing shall be deposited with the state treasurer as a Camp Dodge permanent improvement fund."

Whatever may be included in the term "facilities" at Camp Dodge, it is to be said that such term is not defined in this section. However, by the authorities the term is deemed "of indefinite meaning." *People ex rel Schlaeger v. Coal Company*, 64 N. E. 2d 365, 370, 302 Ill. 153. It is defined in the case of *Cheney v. Tolliver*, 356 S. W. 2d 636, 234 Ark. 417, as a thing that promotes ease of any action, operation, course of conduct and can be animate beings such as persons, people and groups thereof. In *Knoll Golf Club v. U. S.*, 179 F. Supp. 377, "facilities" is defined as something by which anything is made easy or less difficult; an aid, advantage or convenience usually in the plural as "facilities for travel." Its indefinite meaning is illustrated by the case of *State ex rel Knight v. Cave*, 52 P. 200, 20 Mont. 468, where it is said:

"'Facility' is not a technical word, but one in common use, and its meaning is to be found in the sense attached to it by approved usage. Roget's Thesaurus gives 'aid,' 'assistance,' and 'help' as equivalents of 'facility.' Webster, among other definitions of the word, includes 'the quality of being easily performed; ease in performance; that which promotes the ease of any action; advantage; valuable aid; assistance.' The Century Dictionary follows the definitions of Webster, and adds: 'The means by which the performance of anything is rendered more easy; convenience.' That which aids, assists, or makes more easy the acquisition of knowledge is a convenience and an advantage, and is clearly a 'facility.' Books, maps, globes, and charts are facilities to the imparting of knowledge. Through them or by means of them information is conveyed to the pupil. But the meaning of the word is not limited to inanimate bodies or things. Men are often facilities. Without a crew to man his vessel, the master of a ship would not have the necessary facilities. A school with a complement of pupils in every room, but lacking teachers, would certainly not have the facilities to carry on educational work."

In the foregoing situation, and without guidelines, what facilities are as used in the foregoing noted statute may be arrived at by what are not facilities. The proposal is for the leasing of land at Camp Dodge for the purpose of removing therefrom gravel, sand and rock.

Treating the terms "gravel," "sand" and "rock" as far as facilities are concerned as being in the same category, see *Fellows v. Dorsey*, 157 S. W. 995, 1000, 171 Mo. App. 289, where it was said:

" 'Gravel' means small stones, or fragments of stone often intermixed with particles of sand, and 'sand' is defined as fine particles of stone not reduced to dust; . . ." Words & Phrases, Vol. 38, Title Sand, page 352.

In *Walker v. Dwelle,* 187 Iowa 1384, 175 N. W. 957, it was said:

"The grant of 'the use of the gravel pit to repair the dam now in connection with the said gristmill' gave the grantee the right to remove the gravel from the pit; for in no other beneficial manner might the pit be used. The grant of the right to take gravel from the pit is what is denominated in law as profit a prendre, and is the right to take a part of the soil or the produce of the land. Pierce v. Keator, 70 N. Y. 419 (26 Am. Rep. 612); Ladd v. Smith, 107 Ala. 506. . . .

* * *

"In this case, the right is incorporeal, not being a grant of the ore in place, but for a mere right to dig and take it away for a special use, and is clearly annexed to the Mount Hope estate by express terms.

* * *

"The case is much like that now before us, and in harmony with the decisions generally; and we conclude that the grant was of 'a right of common,' as formerly designated, or profit a prendre, appurtenant to the land granted, and constituted an incorporeal hereditament, appurtenant to the estate on which the mill dam was located.

* * *

"That the deed conveying the incorporeal hereditament described affected real estate is fully settled by the authorities. Jones on Easements, Section 118; Joy v. St. Louis, 138 U. S. 1; Whitney v. Union R. Co., 11 Gray (Mass.) 359 (71 Am. Dec. 715); Shannon v. Timm, 22 Colo. 167 (43 Pac. 1021); Brewer v. Marshall, 19 N. J. Eq. 537 (97 Am. Dec. 679)."

In the case of *Sutton v. Wright, et al,* 280 S. W. 908, illustrating that removal of gravel from land is a matter of contract, it is said there:

"In this case it will be noted by the oral contract, there was no intention, express or implied, to sell land per se, but the sale of gravel thereon only. There was no intention to pass ownership or title to the land, and only a permission was given to enter thereupon in order to excavate and remove 100,000 cubic yards of gravel therefrom. Of course, a contract for any interest in land is widely different from a contract to remove a commodity therefrom, because a sale of the land, as such, would carry the gravel with it, but the sale of the gravel, as such, would not include or pass title to the land in which it was situated, or any part thereof. Anderson v. Powers, 59 Tex. 214.

* * *

". . . As stated, we think gravel on the natural soil stands with the same relation to it as the growing trees.

"The rule is thus stated in 28 American and English Encyclopedia of Law (2nd Ed.) p. 541:

" 'The essential difference, however, between land and trees growing out of the land, and the fact that the latter have in commercial transactions come to be regarded rather as personalty, have led the courts in many modern cases to draw a distinction; and it is now very generally recognized that a contract for the sale of trees, if the vendee is to have the right to the soil for a time for the purpose of further growth and profit, is a contract for an interest in land, but that where the trees are sold in the prospect of separation from the soil immediately or within a reasonable time, without any stipulation for the beneficial use of the

soil, but with license to enter and take them away, it is regarded as a sale of goods only, and not within the fourth section of the statute.

" 'Contracts for the sale of standing trees to be removed within a specified time have generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated, the balance remaining the property of the vendor. Such a sale may, however, be regarded as absolute, and the agreement to remove as a covenant, in which case the timber remains the property of the purchaser, although not removed within the time provided for, and for the failure to remove the vendor may bring an action for breach of covenant. A wrongful taking of the timber by the vendor would in such a case constitute a conversion for which the purchaser would have a right of action.' Leonard v. Medford, 37 A. 365, 85 Md. 666, 37 L.R.A. 449."

I conclude from the foregoing that §29A.14, Code of 1966, is not authority for the Adjutant General to negotiate a lease arrangement involving the removal of sand, gravel and rock from Camp Dodge. The use of such gravel, sand and rock can only be accomplished by a contract of sale of the land or of the gravel itself. Whether sale of such land or gravel is within the power of the state is not here determined.

November 18, 1967

CRIMINAL LAW — Hunting and hunting dogs — §§351.27, 717.1, 714.25. Where a person hunting with dogs does not himself enter without permission the premises of another but merely permits his dog to do so such person would not be in violation of §714.25. §351.27 would not justify the killing of a licensed dog which while in pursuit of game incidentally causes livestock to stampede and any person maliciously killing such a dog under such circumstances would be subject to the penalties provided in §717.1 (Haesemeyer to Burdette, Decatur County Attorney, 11/18/67) #67-11-20

Mr. Robert W. Burdette, Decatur County Attorney: By your letter of November 14, 1967, you have presented the following questions:

"What if I, as a hunter, know that you do not want me to hunt on your premises, so I do not go onto your premises, but in fact, I allow my hunting dog, hunting perhaps fox, wolf or coon, to cross your posted premises. Have I committed an illegal act in allowing my dog to hunt on land where I know that I am forbidden to hunt? Also, would the owner of that premises have the right to shoot a licensed dog hunting across that premises if it was not in the act of 'worrying' livestock at that particular time?

"The reason why this is such an important question is, as I indicated when I visited with you over the phone. Often times dogs in hunting across a premises and perhaps chasing a fox or wolf will, in fact, terrify a bunch of cattle so that it will, in fact, cause those cattle to stampede and go right through a fence and cause serious damage both to the cattle and to the fence, so that the owner of the cattle will suffer a sharp economical loss as a result of the hunting activity of the dog. Yet, at the same time, perhaps the owner of this dog has never set foot on these premises."

The questions you have thus raised do not differ substantially from those set forth in your previous letter of September 22, 1967. In our reply of October 9, 1967, to this prior inquiry we pointed out that §717.1, Code of Iowa, 1966, applies to these facts and reads as follows:

"If any person maliciously kill, maim, or disfigure any horse, cattle, or domestic animal or dog of another, or maliciously administer poison to

any such animal; or expose any poisonous substance with intent that the same should be taken by such animal, he shall be imprisoned in the penitentiary not exceeding five years, or imprisoned in the county jail not exceeding one year, or be fined not exceeding three hundred dollars."

We also noted that §351.27, 1966 Code of Iowa, authorizes the killing of a licensed dog in certain limited circumstances:

"It shall be lawful for any person to kill a dog, licensed and wearing a collar with license tag attached, when such dog is caught in the act of worrying, chasing, maiming, or killing any domestic animal or fowl, or when such dog is attacking or attempting to bite a person."

Under the facts you describe, as I understand them, the dog is in pursuit of game and the livestock stampede not because the dog is worrying, chasing, maiming, or killing them but because the presence of the dog and his quarry and the activities of both of them cause such livestock to become excited.

There do not appear to be any Iowa cases construing the word "worry." However, in New Jersey such term as used in a statute permitting the destruction of a dog worrying sheep, means to run after, to chase, or to bark at *Bunn v. Shaw*, 69 A. 2d 576, 577, 3 N. J. 195, 15 A.L.R. 2d 574. See also *Failing v. People*, 98 P. 2d 865, 867, 105 Colo. 399. Thus, it would be our opinion that the owner of property who maliciously shot a dog hunting on his premises which dog was not in the act of worrying, chasing, maiming, or killing the property owner's livestock would subject himself to criminal prosecution under §717.1

The other question you have raised is whether or not a hunter who does not himself enter the premises of another but permits his hunting dog to do so would be guilty of a misdemeanor under §714.25 which provides:

"714.25 Hunting or fishing upon cultivated or inclosed land and waters. Any person who shall hunt with dog, bow and arrow, or gun upon the cultivated or inclosed lands of another, or who shall fish upon the inclosed or cultivated land containing or encompassing an artificially constructed pond or ponds of another which have been privately stocked with fish, without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than one hundred dollars and costs of prosecution, and shall stand committed until such fine and costs are paid."

We have been unable to find any prior opinions of this office or decisions of the Iowa courts or of the courts of other jurisdictions touching upon the precise point you raised. However, it would be our view that the use of the expression "with dog, bow and arrow, or gun" would require the physical presence of the hunter on the lands of another.

November 18, 1967

COUNTIES AND COUNTY OFFICERS: County hospital, title to land. §§332.3(13), 347.13. Title to land acquired or used for county hospital purposes should be in the name of the board of trustees of the county hospital and not in the name of the county (Haesemeyer to Burdette, Decatur County Attorney, 11/18/67) #67-11-21

Mr. Robert F. Burdette, Decatur County Attorney: By your letter of November 14, 1967, you have requested an opinion of this office with respect to the following:

"Our county hospital is planning a rebuilding program and has now purchased a 5-acre tract for the purpose of building our new hospital thereon. How should the title to this hospital tract be shown; should it be merely in the name of Decatur County, or should it be in the name of the Decatur County Hospital which, I suppose, would have the deed read, the Board of Trustees, Decatur County Hospital."

§347.13, Code of Iowa, 1966, relating to the powers and duties of the trustees of county public hospitals provides in relevant part:

"Said board of hospital trustees shall:

"1. Purchase, condemn, or lease a site for such public hospital, and provide and equip suitable hospital buildings.

* * *

"11. Accept property by gift, devise, bequest, or otherwise; and, if said board deems it advisable may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of hospital trustees, and apply the proceeds thereof, or property received in exchange therefor, to the purposes enumerated in subsection 12 hereof or for equipment.

"13. When it is determined by said board that all or a part of the facilities acquired under the provisions of this chapter and operated as a tuberculosis sanatorium are no longer needed for the uses provided or permitted under this chapter, the board may lease to the county or any political subdivision thereof for any public purpose, such facilities or such part thereof as the board deems proper."

It is clear from the foregoing that he trustees are given broad powers with respect to the purchase, condemnation, and leasing of sites for public hospitals as well as the construction of hospital buildings. Furthermore, subsection 11 authorizes the trustees to accept property by gift, devise, bequest, or otherwise and under certain circumstances to sell any such property. The power to purchase and sell ordinarily would carry with it the authority to take and convey title. It should be noted also that subsection 13 of §347.13 authorizes the board to lease to the county, or any political subdivision thereof, premises no longer needed for use as a tuberculosis sanatorium. If title to such property was already in the name of the county a lease to such county would appear to be superfluous.

Accordingly, it is our opinion that title to property acquired for county hospital purposes should be taken in the name of the board of trustees of the county hospital. This position is consistent with the opinion of the Iowa supreme court in *Phinney v. Montgomery*, 218 Iowa 1240, 257 N. W. 208 (1934), that statutes providing for operation of county hospitals placed entire control in management of hospitals in hospital trustees. While not directly in point further support for the position we have taken may be drawn from a 1941 opinion of the attorney general wherein it is stated that "the contracts to be made in connection with the construction of the new hospital building should be made in the name of the trustees of Broadlawns, Polk County Public Hospital, and not in the name of Polk County." 42 OAG 26.

In addition there is some reason to believe that the legislature intended that the property of county hospitals should be treated separately and differently than other county property. Thus, when §332.3(13) of the

code was amended by Acts 1945 (51 G. A.), chapter 158, section 2, by inserting the provisions which authorized the county board of supervisors, when property is no longer needed for the purposes for which it was acquired, "to convert the same to other county purposes" or to "lease" it, section 3 of such amending act provided that the act should not apply to county hospitals.

November 20, 1967

TAXATION: Penalties and interest on delinquent property taxes: §§445.36, and 445.37, Code of Iowa, 1966. A taxpayer is permitted 91 days from the date of certification of the tax list to the County Treasurer, within which to pay property taxes before he is subject to penalty and interest. (Griger to Edward N. Wehr, Scott County Attorney) (11-20-67) (#67-11-18)

Mr. Edward N. Wehr, Scott County Attorney: This is to acknowledge receipt of your letter of November 1, 1967, in which you requested an opinion as follows:

"I request an opinion relative to an interpretation of Sections 445.36 and 445.37 of the Code of Iowa (1966), as applied to circumstances presently existing in connection with the payment of Real Property Taxes.

"For various reasons, it was impossible to have the 1966 Tax books ready at the usual time in the early part of 1967, and as an accommodation to the taxpayers, the Scott County Treasurer fixed the payment date for the first installment as of June 27, 1967, rather than the usual March 31 (or April 1). It was his position that the first installment would not become delinquent until June 28, 1967.

"The problem relates to the question of delinquencies, in that the Treasurer has charged delinquencies for those payments made after June 28, 1967 back to April 1 under the provisions of 445.37.

"One major taxpayer contends that the delinquency charges should commence as of June 28, 1967, rather than April 1, 1967."

Enclosed please find a xerox copy of a prior Attorney General's Opinion found in 1940 O.A.G. 493 in which a similar problem was ruled upon. Also enclosed please find a xerox copy of a letter opinion dated March 26, 1962, and signed by the present Special Assistant Attorney General for the Iowa State Tax Commission, Mr. George W. Murray. We see no reason to depart from the rule enunciated in these opinions.

It is the opinion of this office that the taxpayer is permitted 91 days from the date of certification of the tax list to the County Treasurer, within which to pay property taxes, before he is subject to penalty and interest. The taxpayer is not to be penalized because of delays which originated in governmental bodies and are beyond his control.

November 20, 1967

APPROPRIATIONS. The discrepancy between the aggregate appropriation and the detailed appropriations shows upon the face of the Bill, a resort to the Journal is authorized, and the appropriation fixed at $97,500.00. (Strauss to Selden, State Comptroller, 11/20/67) #67-11-23.

Mr. Marvin R. Selden, Jr., State Comptroller: Reference is herein made to yours of the 31st ult., in which you submitted the following:

"Section 1, Senate File 860, Acts of the 62nd General Assembly, reads as follows:

" 'Section 1. There is hereby appropriated from the general fund of the state of Iowa for each year of the biennium beginning July 1, 1967, and ending June 30, 1969, to the superintendent of public buildings and grounds the sum of one hundred ten thousand five hundred (110,500) dollars, or so much thereof as may be necessary, to be used in the following manner:

" 'For salaries	$67,000.00
" 'For support, maintenance and miscellaneous purposes	30,500.00
" 'Grand total of all appropriations for all purposes for each year of the biennium for the superintendent of public buildings and grounds provided by this Act	$97,500.00'

"Please note that in paragraph one (1) the annual appropriation is stated as $110,500.00, while in the last paragraph the annual appropriation is stated as $97,500.00.

"I respectfully request an opinion as to the following:

"1. What is the total annual amount appropriated by Senate File 860?

"2. In the event that you should rule that the total amount is $110,500.00, for what purpose may the portion of the appropriation of $13,000.00 be used?"

In reply thereto I advise the following:

In a legislative situation comparable to the situation outlined in your letter, in an opinion of July 16, 1963, it was stated as follows:

"1. The State of Iowa is loyal to the rule that the enrolled bill, nothing to the contrary appearing on its face, is conclusive evidence of its textual content, and cannot be impeached by the journals or evidence extrinsic to the journals. *60 OAG 184*. In this case there is a contrary appearance on the face of the bill."

S.F. 860 as introduced in Section 1 thereof contained an appropriation to the superintendent of buildings and grounds in general terms of one hundred ten thousand five hundred (110,500) dollars and specifically divided the appropriation to be used:

1. For salaries	$80,000.00
2. For support, maintenance and miscellaneous purposes	30,500.00

aggregating as shown in line 13 of Section 1 the total of both appropriations in the sum of $110,500. In that form it passed the Senate. S.J. 2265. Upon reaching the House it was amended by striking in line 7 of the bill the figures $80,000.00 and inserting in lieu thereof the sum of $67,000.00 and by striking in line 3 of Section 1 "one hundred ten thousand five hundred (110,500) dollars" and inserting in lieu thereof the sum of ninety-seven thousand five hundred (97,500) dollars, which amendment was adopted by the House, and was passed in that form. H.J. 2385.

Upon reaching the Senate the foregoing House amendment was amended by the Senate by adding thereto a section which made the bill operate retroactively from July 1, 1967, and also attached a publication clause thereto.

The foregoing House amendment, which was amended by the Senate in the manner herein described, was concurred in by the Senate. S.J. 2479. Thereupon the bill S.F. 860 as amended was passed by the Senate. S.J. 2478 and 2479. Upon its return to the House the House concurred in the Senate amendment and as so amended it passed the House. H.J. 2514. In this legislative situation under the rule set forth herein the total appropriation contained in S.F. 860 is the sum of $97,500.00 and your question is so answered. There is no necessity for answering your question number two.

November 20, 1967

APPROPRIATIONS. The discrepancy between the aggregate appropriation and the detailed appropriations shows upon the face of the Bill, a resort to the Journal is authorized, and the appropriation fixed at $1,260,540.00. (Strauss to Selden, State Comptroller, 11/20/67) #67-11-24.

Mr. Marvin R. Selden, Jr., State Comptroller: Reference is herein made to yours of the 31st ult., in which you submitted the following:

"Section 1, Senate File 821, Acts of the 62nd General Assembly, reads as follows:

"Section 1. There is hereby appropriated for the state conservation commission from the general fund of the state of Iowa for each year of the biennium beginning July 1, 1967, and ending June 30, 1969, the sum of one million three hundred twenty-six thousand seven hundred fifty (1,326,750) dollars, or so much thereof as may be necessary, to be used in the following manner:

"'1. Lands and waters operations	
"'For salaries	$ 890,000.00
"'For support, maintenance and miscellaneous purposes of the office, maintenance of state parks, waters and forests	195,400.00
"'Total for lands and waters operation	$1,085,400.00
"'2. Prison labor program	
"'For salaries, support, maintenance, and miscellaneous purposes for utilization of prison inmates under the board of control	$ 103,090.00
"'3. State advisory board for preserves	
"'For salaries, support, maintenance and miscellaneous purposes for carrying out the duties of the board	$ 14,810.00
"'4. Planning and cooperation with federal agencies on conservation	
"'For salaries, support, maintenance and miscellaneous purposes	$ 57,240.00

"'Of the funds appropriated by this Act, there shall be included not more than three hundred eighty-six thousand three hundred (386,300) dollars of which shall be available for the administration fund in compliance with the provisions of section one hundred seven point seventeen (107.17), Code 1966, such funds being included in subsection one (1) of this section.

" 'Grand total of all appropriations for all purposes for each year of the biennium for the state conservation commission ..... $1,260,540.00'

"Please note that in paragraph one (1) the total appropriation is given as $1,326,750.00, while in the last paragraph the total appropriation is given as $1,260,540.00.

"I respectfully request an opinion as to the following:

"1. What is the total annual amount appropriated by Senate File 821?

"2. In the event that you should rule that the total appropriation is $1,326,750.00, for which purpose may the portion of the appropriation of $66,210.00 be used?"

In reply thereto I advise the following:

In a legislative situation comparable to the situation outlined in your letter, in an opinion of July 16, 1963, it was stated as follows:

"1. The State of Iowa is loyal to the rule that the enrolled bill, nothing to the contrary appearing on its face, is conclusive evidence of its textual content, and cannot be impeached by the journals or evidence extrinsic to the journals. 60 *OAG* 184. In this case there is a contrary appearance on the face of the bill."

S.F. 821 as filed on its face contained an annual appropriation of $1,326,750.00 separated in Section 1 into an appropriation for salaries of $942,010.00 and for support, maintenance and miscellaneous purposes of the office, and maintenance of state parks, waters and forests $209,600.00, making a total of $1,151,610.00. Section 2 contained an appropriation of $103,090.00 for the prison labor program. Section 3 contained an appropriation of $14,810.00 for the State advisory board for preserves. Contained in Section 4 was an appropriation of $57,240.00 for planning and cooperation with federal agencies on conservation. All appropriations in line 35 total $1,326,750.00 for each year of the biennium.

The bill passed the Senate as so constructed. S.J. 2163. Upon reaching the House a House amendment was offered to Section 1 substituting for the figures therein of $942,010.00 the figures $890,000.00, in line 12 thereof substituting for the figures $209,600.00 the figures $195,400.00, in line 13 thereof substituting for the figures $1,151,610.00 the sum of $1,085,400.00, and in line 35 thereof striking $1,326,750.00 and substituting $1,260,540.00.

This was adopted by the House. H.J. 2437. As so amended, after adopting an amendment not pertinent thereto, the bill passed in the House. H.J. 2437. Upon reaching the Senate, after amending the foregoing House amendment providing for operation of the bill retroactively and providing for its publication, the Senate adopted the Senate amendment to the House amendment and concurring in the House amendment as amended by the Senate, the bill passed the Senate. S. J. 2510. Upon return to the House, the House concurred in the Senate amendment to the House amendment, H. J. 2513, and thereupon the bill was passed by the House. H.J. 2513.

From the foregoing it appears that S.F. 821 passed both houses containing an appropriation to the state conservation commission in the

amount of $1,260,540.00. The enrolled bill on its face does not reflect this situation. Thereupon in answer to your question the appropriation to the conservation commission is the sum of $1,260,540.00. There is no necessity for answering your question number 2.

November 20, 1967

CITIES AND TOWNS: Initial disbursement of funds by other than warrants not authorized — the designation of the proper officer to sign warrants is a matter to be decided by resort to the particular municipality's ordinances. §§368A.1(10), 368A.4, 368A.14, Code of Iowa, 1966. Original disbursement of municipal funds may be made only by warrant. Upon presentation of this warrant by the payee, subsequent indorser or collecting bank, to the treasurer, the treasurer may pay cash or may draw a treasurer's check. Iowa Code contains no direction that a certain officer within a municipal corporation is to draw all warrants. In order to determine the matter of this authority, the municipality's ordinances must, therefore, be examined. A municipal treasurer's check must be signed by the municipality's treasurer. (Martin to Goeldner, Keokuk County Attorney, 11/20/67) #67-11-19.

Mr. Albert F. Goeldner, Keokuk County Attorney: This will acknowledge the receipt of your letter of October 3, 1967, in which you refer to a request of the city attorney of What Cheer as to the following two issues:

1. May the mode of disbursement of city funds be by check, or must it be by warrant?

2. May city funds be disbursed without the signature of the treasurer?

In answer to your first question, you are advised that the Iowa Code requires disbursement of municipal funds only upon receipt, by the municipal treasurer, of a warrant signed by the proper officer. Iowa Code §368A.4 (1966) provides in pertinent part as follows:

"In all municipal corporations the treasurer shall perform the following duties:

"1. He shall receive all money payable to the corporation, and disburse same only on warrants drawn and signed by the proper officer."

However, upon receipt of such a warrant, from the payee, subsequent indorser or collecting bank, the treasurer may pay cash or draw a treasurer's check, but the initiating instrument must be a warrant, "signed by the proper officer."

We cannot answer your second question. The Iowa Code does not require that any particular municipal officer or group of municipal officers sign warrants. In fact, the Code of Iowa appears deliberately devoid of any directions as to what officer is authorized to draw warrants. §368A.4(1), set out above, and §368A.14 indicate this design. §368A.14 provides as follows:

"The auditor, clerk, or other officer of cities and towns whose duty it is to draw the warrants thereof, shall not draw any such warrant except upon the vote of the council."

Since the matter of the authorization of the officer or officers empowered to draw warrants is not set forth in the Code, the issue must be

resolved by resort to the municipal ordinances of the city involved. Section 368A.1, Code of Iowa, 1966, empowers a city council to determine by ordinance what officer or officers shall have the authority to draw warrants. That section provides as follows:

"In all municipal corporations, except when otherwise provided by laws relating to a specific form of municipal government, the council shall: . . .

"10. Prescribe by ordinance the powers to be exercised and duties performed by officers insofar as such powers and duties are not defined by law."

If your second question assumes that a proper officer, directed by city ordinance has drawn a warrant, the question then becomes, can a treasurer's check be issued without the signature of the treasurer. The answer to this is clearly no. The treasurer under §368A.4, Code of Iowa, 1966, set forth above, is given the duty to receive and disburse all funds of a municipal corporation. He is, therefore, required to sign a treasurer's check.

November 20, 1967

TAXATION: Motor Vehicle Fuel Tax — §324 64, Code of Iowa, 1966. A licensee who submits the required remittance within the time prescribed by law, but who fails to submit the required report will be assessed a penalty only if his liability is greater than his payment. (Martin to Fullmer, Director, Motor Vehicle Fuel Tax Div., 11/20/67) #67-11-25.

Mr. Wayne J. Fullmer, Director, Motor Vehicle Fuel Tax Division: I have received your letter of October 19, 1967, in which you request the opinion of this office as follows: Must a late filed penalty be assessed against a motor vehicle fuel tax licensee who, before the due date, submits a required remittance, but fails to submit the required report?

Section 324.64, Code of Iowa, 1966, to which you refer requires, in part, as follows:

"If a licensee or other person fails to file a required report with the treasurer on or before the time fixed for the filing thereof or if a licensee or other person fails to pay to the treasurer an amount of fuel taxes when due, a penalty of two (2) percent of the tax unpaid and due to twelve (12) o'clock a.m. of the third (3rd) day after due date and an additional three (3) percent of the tax unpaid and due from twelve (12) o'clock a.m. of the third (3rd) day to twelve (12) o'clock a.m. of the tenth (10th) day after due date, and an additional five (5) percent of the tax unpaid and due after twelve (12) o'clock a.m. of the tenth (10th) day after due date shall be added, the unpaid tax and penalty shall immediately accrue and thereafter shall bear interest at the rate of one-half of one percent per month until paid." (As amended by Chapter 288, §20, Acts of the 62nd General Assembly)

The above cited section requires assessment of a penalty when the required report has not been submitted to the treasurer of state ". . . on or before the time fixed for the filing thereof. . . ." However, this section further provides that the amount of the penalty shall be ". . . two percent of the tax unpaid and due. . . ." According to the facts you present, the licensee has paid an amount of money which correctly reflects his tax liability for the month involved. It would, therefore, appear that there was no tax "unpaid and due" to which the two percent penalty could attach.

It is, therefore, the opinion of this office that when a licensee submits the required remittance within the time required by law but fails to submit the required report, a penalty will attach only if the licensee's liability is greater than his remittance.

November 20, 1967

JURY PANEL. S.F. 288, §§144, 147. The Clerk of the Court has the duty of notifying jurors that they have been drawn for the jury panel. The Sheriff has the duty of summoning such jurors for service upon the petit or grand juries. Discharge of the panel is the authority of the court. (Strauss to Elwood, Howard County Attorney, 11/20/67) #67-11-22.

Mr. Henry L. Elwood, Howard County Attorney: Reference is herein made to yours of September 12, 1967, in which you submitted the following:

"A question has been raised in our county concerning the interpretation of Section 144 of Senate File 288 which partially reads as follows:

" '. . . The Clerk shall notify the jurors thus drawn of their selection and of their obligation to report for service when called.'

"Section 609.31 was not repealed by the Iowa Legislature and provides that the Sheriff shall notify the jurors when they are to be summoned.

"There is a disagreement between the Sheriff and the Clerk as to who has the obligation to notify the jurors to appear when ordered to appear by the District Court Judge.

"The Clerk of Court inquires, whether it is possible for the Clerk, after the jurors have been selected, to notify them that they have been selected and if no immediate call is ordered to tell them not to report; and whether the Sheriff thereafter still has the obligation to notify the jurors upon the Order of Court?"

In reply thereto I advise the following:

I am of the opinion that the clerk and the sheriff in the summoning of petit juries occupy different areas of duty and therefor no conflict arises between them. Section 144 of Senate File 288, 62nd G. A., quoted by you and providing the following:

". . . The Clerk shall notify the jurors thus drawn of their selection and of their obligation to report for service when called."

imposes upon the Clerk the duty of notifying the jurors of their selection for the jury panel and this area of duty is possessed by the clerk only to the extent of acquainting such jurors that they are on the jury list and of their obligation to serve when called. Thereupon the duty of the sheriff is disclosed under the terms of §609.30 as amended by §147 of S.F. 288. This section as so amended provides:

"The clerk shall file a list or lists, and immediately upon order of the court issue his precept or precepts to the sheriff, commanding him to summon the persons so drawn to appear at the court house at such times as the court may prescribe, to serve as petit or grand jurors as the case may be."

The foregoing describes the separate obligations of the sheriff and the clerk insofar as notifying jurors of their duty to appear.

The clerk has no duty to summon the jurors to report or not to report. The duty of a juror to report is the obligation of the sheriff pursuant to

order of the court and insofar as any authority in the clerk to tell jurors not to report after a call it is to be said that the clerk has no such duty nor authority. Discharge of the panel is the power of the court. §609.37, Code of 1966, provides:

"Discharge of panel. The court may at any time discharge the panel of jurors, or any part of it, and order a new panel, or such number of jurors as may be deemed necessary to be drawn."

November 21, 1967

COUNTIES: ZONING ORDINANCES. Publication of zoning ordinances and regulations in full is required to make them effective. Such ordinances must be published as part of the proceedings of the meeting of the Board of Supervisors. (Nolan to Mansfield, Humboldt County Attorney, 11/21/67) #67-11-27.

Mr. John P. Mansfield, Humboldt County Attorney: In your letter of September 12, 1967, you requested advice as to whether or not it is necessary to publish county zoning regulations in full in an official newspaper of Humboldt County, and specifically you ask:

1. Is publication of the zoning regulations in full required in order to make them effective and to give full force and effect to the criminal provisions of such regulations?

2. Is publication of the ordinance in full required as part of the board proceedings, or could a digest of the ordinance, with reference to a printed copy being on file with the County Auditor, suffice?

The zoning ordinance or regulations must be passed by the board of supervisors. Since under §349.18 of the Code of Iowa all proceedings of each regular, adjourned, or special meeting of boards of supervisors . . . shall be published immediately . . . it appears that such ordinance must be published as a part of the proceedings of the meeting of the board of supervisors. In 1938 O.A.G. 414 it is stated that "subject to the excluded items the statute (§349.16) is mandatory" and requires that the proceeding be published. The purpose is to give the taxpayers information as to what is being done by their representatives.

Further, the publication of the zoning ordinance in full is a necessary requirement to the effectiveness of such ordinance. A county is a "municipal corporation" for the purpose of enacting zoning ordinances and comes within the purview of §366.1. *Wapello County v. Ward,* 257 Iowa 1231, 136 N. W. 2d 249, 1965. The manner of notice of passage, revision or amendment of ordinances which is required to be given to the public is set out in §366.7.

November 21, 1967

CONSTITUTIONAL LAW: **Judges retirement compensation** — Article V, §18, Constitution of Iowa, Ch. 605A, Code of Iowa, 1966. The constitutional requirement that the general assembly provide for adequate retirement for judges of the supreme and district courts is not satisfied by the contributory retirement system established by Ch. 605A. To comply with the constitutional mandate adequate retirement compensation must be provided wholly from public funds without contribution by the judges. (Turner to Hill, State Senator, 11/21/67) #S67-11-2.

The Hon. Eugene M. Hill, State Senator, Jasper County: In your letter of May 25, 1967, you have requested an opinion of the attorney general as to "whether or not it is in violation of the constitution of the State of Iowa for the legislature through enactment of Section 605A.4 to require" district and supreme court judges "to pay the indicated four per cent of former and future salaries" into a retirement fund. This question raises two problems: (1) whether the Constitutional Amendment of 1962 requires the State itself to provide supreme and district judges adequate retirement compensation, and if so, (2) whether Chapter 605A of the Code fulfills that requirement. Thus your basic question appears to be whether the General Assembly can fulfill the constitutional promise of "adequate retirement compensation" by a contributory system of pensions.

Chapter 605A, Code of Iowa 1966, was originally enacted by the Fifty-Third General Assembly in 1949. See Acts 1949, 53 G. A., Chapter 235. It creates and establishes a "Judicial Retirement System." It originally applied to district and supreme court judges, and is a voluntary system in that it does not apply to any of said judges "until he gives notice in writing of his purpose" to come under it.

The 1949 statute required a cash contribution of three per cent of salary for the total years of prior service, subject to certain limits, and thereafter a deduction from salary of three per cent monthly. However, the cash contribution for prior service has not been required until immediately preceding actual retirement. §§605A.4, 605A.5. The state was required to contribute a matching three per cent to the fund for the first two years and thereafter a sufficient sum to finance the system.

The statute was amended by a substitute enactment of the 58th General Assembly in 1959 which enlarged and re-enacted the statute to include judges of municipal and superior courts. Since the constitutional amendment you mention and your inquiry pertain only to district and supreme court judges, the changes affected by this re-enactment and amendment are not directly significant.

The 58th General Assembly in 1959 also changed the age and service eligibility requirements of §605A.6 from a minimum of six years service at an attained age of 67 to six years service at an attained age of 65, or service for 25 years irrespective of age, and provided that time served on any of the courts be included and added together in computing service. See Acts 1959 58th G. A., Chapter 356, Par 5.

The contribution requirements and amount of annuity provisions of §§605A.4 and 7 have been changed since the original enactment. The judges' required contribution rate was increased from three to four per cent in 1961. At the same time the annuity rate was changed. The original act, §605A.7, provided for an annuity computed on the basis of two per cent of the judge's average annual basic salary multiplied by his years of service, but not to exceed forty per cent of his current salary. This rate was increased to three per cent with a maximum of fifty per cent of salary (Acts 59th G. A. 1961, Chapter 284, §605A.7) and was again changed in 1963 to base the annuity compensation on the average annual basic salary for the past three years as judge instead of the

average basic salary for the judge's entire service. See Acts 60th G. A. 1963, Chapter 322, Par. 3.

Except for the amendment to §605A.7 in 1963, and some additional provisions to be hereafter noticed, no material changes have been made since 1961 when, as above stated, both the contribution and annuity rates were increased. The constitutional amendment mentioned in your letter was proposed in 1959 and 1961 by the 58th and 59th General Assemblies, and became effective upon approval by the voters at a special election on June 4, 1962. The present statutory retirement system was in effect substantially in its present form at the time the amendment was proposed and adopted.

While it is true that the judges have been contributing to the retirement system both prior to and since the constitutional amendment mentioned above and that there is a rule that administrative practices of long standing are entitled to great weight in construing statutes of doubtful meaning, the Iowa Supreme Court has held that an administrative practice in continuous effect for only six years is not of long standing. *Center Township School District v. Oakland Independent School District*, 1962, 253 Iowa 391, 112 N. W. 2d 665. The judges have been contributing less than six years since the constitutional amendment went into effect on June 4, 1962.

It is also true that the legislature has made no substantial change in the statutory retirement system since the constitutional amendment took effect, apparently recognizing that the judges have continued to contribute. Legislative action inaction and acquiescence are sometimes considered as extrinsic aids to statutory and constitutional construction. But courts do not resort to administrative practices, legislative acquiescence or other extrinsic aids to construction unless the meaning is doubtful. Ambiguity is a requisite to the application of these rules of construction. *Iowa Mutual Tornado Ins. Assn. v. Fischer*, 1954, 245 Iowa 951, 65 N. W. 2d 162; *Hoosier Cas. Co. of Indianapolis v. Fox*, DC Iowa, 102 F. Supp. 214. As will appear, there is no doubt or ambiguity about the plain meaning of the constitutional amendment here. Nevertheless, administrative practices and legislative acquiescence are never considered controlling, but only persuasive or entitled to weight or consideration. *Prudential Ins. Co. v. Green*, 1942, 231 Iowa 1371, 2 N. W. 2d 765, 141 A.L.R. 1401. Nor are these extrinsic aids altered as to their persuasive effect because judges are participating in the administrative practice; at least in absence of showing that they have given judicial consideration to the issues. Judges, like everyone, must follow the law until it has been determined to be unconstitutional.

The 1963 amendment to the judicial retirement system does not necessarily aid in construction of the constitutional mandate under consideration here. Ordinarily, a change in statutory language indicates intention of the legislature to change its meaning, but an amendment may be enacted so that the statute will correspond to what had previously been supposed was the law rather than to effect a change therein. *Anderson v. Hadley*, 1954, 245 Iowa 550, 63 N. W. 2d 234. And the same is obviously true with respect to the constitution, which the legislature cannot amend in any event. Where rights have vested before amendment or construc-

tion of an existing statute by the legislature, the Iowa Supreme Court is not bound by construction placed on a statute by the legislature. The legislature may say what the law shall be, but not what it is or has been. *Richardson v. City of Jefferson*, 1965, 257 Iowa 709, 134 N. W. 2d 528. The same is at least equally true with respect to the constitution. The legislature has power to enact any legislation it sees fit provided it is not clearly and plainly prohibited by some constitutional provision. *Becker v. Board of Ed. of Benton County*; 1965, ____Iowa____, 138 N. W. 2d 909. But it must also follow the mandates of the Constitution. As stated in *C. C. Taft Co. v. Alber*, 1919, 185 Iowa 1069, 171 N. W. 719:

"The people are sovereign, and speak through their Constitution, and, when they thus speak, its mandates are binding upon all people, and on the Legislature, which is but one of the agencies of government. The government is a fictitious entity, created by the people; a corporate entity, through which the people act. All departments of government and officers are only the instrumentalities through which the government acts. They are in one sense the agencies through which the government acts, and all the power and authority to act and the manner of acting is controlled by the fundamental law found in the Constitution. We start, then, with the proposition that the provisions of our Constitution are mandatory, and their mandates bind as closely and as firmly the legislative branch of the government as they do the citizens of the commonwealth. The legislative branch must obey the Constitution or fundamental law, and must follow and obey its requirements and directions. It is true some courts have held that constitutional provisions are not mandatory. This court, however, has held consistently that the provisions of the Constitution are mandatory and binding upon the Legislature, and that any act that contravenes the provisions of the Constitution, or fails to come up to the measurement of the constitutional requirements, is not binding upon the people or any of the agencies of government, because, when the people speak, it is vox populi, vox dei, so far as the agencies of government are concerned. (Citations)."

Section 18 of Article Five, as amended June 4, 1962, now provides:

"The General Assembly shall prescribe mandatory retirement for Judges of the Supreme Court and District Court at a specified age and shall provide for adequate retirement compensation."

Thus, while the present statutory system as to contribution and annuity rates applies to judges of all courts in Iowa above Justice of the Peace, only District and Supreme Court Judges must retire at an age to be fixed by the General Assembly. Moreover, the same section of the constitution provides that only these judges are prohibited from holding any other office of the state, except judge, during his tenure and for two years thereafter. Further than this, Article V, §4 of the constitution now provides explicitly that the supreme court shall "exercise a supervisory and administrative control over all inferior judicial tribunals . . ."; and §18 of such article provides that "Retired judges may be subject to special assignment to temporary judicial duties by the Supreme Court, ..."

The word "shall," when used in a statute, is generally construed as mandatory. It has a peremptory, imperative and mandatory connotation, as opposed to a permissive sense. This is its meaning in an ordinary usage. See *Consolidated Freightways v. Nicholas*, 1965, ____Iowa____, 137 N. W. 2d 900; *Hansen v. Henderson*, 1953, 244 Iowa 650, 56 N. W.

2d 59. In *City of Newton v .Board of Supervisors*, 1907, 135 Iowa 27, 112 N. W. 167, the Court said:

"Sometimes courts are justified in construing the word 'shall' as 'may' but, when used in a statute *directing that a public body do certain acts*, it is manifest that the *word is to be construed as mandatory and not permissive*. . . . The uniform rule seems to be that the word 'shall' when addressed to public officials, is mandatory and excludes the idea of discretion. . . . There are many reasons for this rule which need not be elaborated upon, as the cases cited fully present the grounds upon which it is based." (Emphasis supplied)

The command of the constitution is that the legislature shall provide a mandatory retirement. It is no less imperative that it provide adequate retirement compensation. The two phrases of the same sentence are connected by the conjuntion "and." Both are embraced within the imperative that the General Assembly *shall* act. Neither phrase can be treated separately or disjunctively without violence to the plain meaning of the words used. See *Consolidated Freightways v. Nicholas*, supra.

The constitutional provision commands the legislature to prescribe mandatory retirement for judges at a specified age. Since the age is not specified, this decision must necessarily be left to the sound discretion of the General Assembly. Concurrently, the legislature must provide for adequate retirement compensation, and since the amount of the compensation is not fixed, this decision must also rest in the sound discretion of the legislature. The only requirement is that, in an ordinary generally accepted sense, it be "adequate."

I have not been able to find any case in which the Supreme Court of this State has defined the word "provide" or the clause "provide for." Of course, it is a fundamental rule of construction that words in a statute or constitution are to be used in their ordinary sense and construed according to the context and the approved usage of the language. See §4.1, Code of Iowa 1966. The dictionary defines the word "provide" as (transitive); "(2) To look out for in advance; to procure beforehand; to prepare. (3) To supply for use; afford; contribute; yield. (4) To furnish; supply, stock. (5) To equip in preparation; fit out with means to an end." (Intransitive) as "(1) To take precautionary measures in view of a probable or possible need, with *against* or *for;* as to provide *against* a surprise attack; to *provide for* his child's education. 'Government is a contrivance of human wisdom to provide for human wants.' — Burke. (4) To supply what is needed for sustenance or support; as 'the Lord will provide'; a fund that will provide amply for the poor." See *Webster's New International Dictionary*, 2nd Edition, 1952.

In *Townsend v. Smith* (Ga.) 87 S. E. 1037, the Georgia Court held that the expression "provide for necessary sanitation" is sufficiently comprehensive to authorize the raising and expenditure of money for that purpose. The Missouri Court in *Whelchel v. Claxton*, 173 S. W. 1049, has held that a statute which requires a school district to "provide for an eight months school" means that the district must provide the revenue, teachers and school house. In *State v. City of Hiawatha* (Kan.) 53 Kan. 477, the Kansas Court held that a statute authorizing a city council to provide "for street" lighting necessarily included authority to purchase.

In *Eagerton v. Graves* (Ala.) 40 So. 2d 417, the Alabama court held that a constitutional requirement that no appropriation shall be made for employees unless employment and amount of salary had been "provided for" is complied with by a general statute which makes provision for their employment and salary.

The Iowa constitutional requirement cannot be met by providing "for" a retirement annuity to be derived either wholly or in part from voluntary or compulsory contributions or deductions from the judges' currently earned salary. Such a construction would create a direct conflict with the plain wording of the constitutional provision. The mandate is to provide for retirement "*compensation.*"

Definitions of compensation are: Compensation (L compensatio a weighing, a balancing of accounts) 1. Act or principle of compensating; also, an instance of this. 2. That which constitutes or is regarded as an equivalent or recompense . . . remuneration; recompense; . . . . *Syn.* Reward, indemnification, requital, satisfaction. *Webster's New International Dictionary.* The *Random House Dictionary* defines compensation as: 1. The act or state of compensating. 2. The state of being compensated. 3. Something given or received as an equivalent for services, debt, loss, injury, suffering, lack, etc., indemnity. *Syn.* Recompense, remuneration, payment, amends, reparation, requital, satisfaction, indemnification. To compensate means to reward or pay.

The salary or compensation of judges of the supreme and district courts is paid from state revenues. See §18, Article 5, Constitution of Iowa, as amended. It is quite unlikely that the word "compensation" in the constitution was intended to be given such a strained, anomalous and artificial definition as to mean a payment to himself by the person compensated. Retirement annuities furnished by the judges themselves are not "compensation," and the fact that some, but not all, of the cost is derived from state revenue is a persuasive reason to support the conclusion that the part provided by the state falls short of the constitutional requirement of "adequate" retirement compensation.

No cases have been found in which wages or salary have been held distinguishable from compensation. On the other hand, in the following cases wages or salary were held synonymous with compensation. *Friedman v. American Surety Co. of New York*, 151 S. W. 2d 570, 578 (Tex.); *Austin Co. v. Brown*, 167 N. E. 874, 876 (Ohio); *Bovard v. Ford*, 83 Mo. App. 498, 501; *Reynolds v. Reynolds*, 58 P. 2d 660, 661 (Cal.); *City of Sacramento v. Industrial Accident Commission of California*, 240 P. 792, 794 (Cal.); *Siegelbaum v. City of New York*, 291 N. Y. S. 275, 277, 249 App. Div. 153. In the following cases wages were held synonymous with compensation. *Glandzia v. Callinicos*, C.C.A.N.Y., 140 F. 2d 111, 113; *Sexton v. Baehr*, 3 N. W. 2d 1, 2 (Minn.); *Social Security Board v. Warren*, C.C.A. Minn., 142 F. 2d 974, 976; *Freeman v. Blake Co.*, D. C. Mass., 84 F. Supp. 700, 704; *Johnson v. Anderson-Dunham Concrete Co.*, 31 So. 2d 797, 798 (La.).

The conclusion must be that the constitutional phrase, "shall provide for adequate retirement compensation" contemplates that the State shall continue the compensation of retired judges at an amount which is ade-

quate. Applying these rules to the question here raised, it seems quite apparent that the obligation imposed upon the legislature by the constitutional provision is to provide for adequate retirement compensation by appropriation from state monies.

There are other basic policies stated and implicit in Article V of the Constitution as amended which lend further support to this conclusion. Judges of the district and supreme court are prohibited from holding office, except judge, for two years after their tenure is over. They are subject to recall for temporary service after retirement and, of course, they must retire at the mandatory retirement age and surrender their right to compensation as an active judge. The office is no longer politically oriented. The Judicial Article pertains only to judges of two courts. What this means is that judges must sever all political ties, forego any substantial hope of holding any political office and engage in no activity after retirement which could in any way disqualify them for temporary judicial service. (1) Although much remains to be done in the way of legislative implementation of the judicial article in areas indirectly related to the question here, the foregoing suggests some of those areas which call for legislative action and fortifies the conclusion that judicial office in Iowa is largely a lifetime tenure; that judicial personnel are to

(1) There is nothing in the constitution which implies that a judge can be recalled *only with his consent* as provided in §605.25, Code of Iowa, 1966. This provision may have been included in the statute because of the failure of the present retirement system to comply with the present requirements of the constitution. It appears to be a compromise between conflicting concepts, i.e., to permit a retired judge to practice law and at the same time hold himself ready to serve as judge.

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be carefully selected, remain reasonably stable, and that "retirement compensation" is in the nature of a deferred compensation earned during active service over a long period of time and payable afterwards. This view is strengthened by subsequent legislative action in providing for removal of judges for misfeasance in office and permanent physical or mental disability (§605A.26, Code 1966), for forfeiture of retirement benefits in event of the former (§605A.14), but not the latter (§605A.13); and the requirement that persons hereafter selected as judges must be able to serve one appointive and one elective term before attaining age seventy-two (§46.14).

I arrive at the conclusion on the first problem that Section 18 of Article Five of the Constitution requires the General Assembly to furnish adequate compensation to supreme and district court judges following retirement, *without contribution by them.*

The other problem is whether Chapter 605A of the Code fulfills the requirement of the constitutional amendment insofar as supreme and district court judges are concerned.

Absent a constitutional provision to the contrary, it is competent for a state legislature to provide a pension system for groups of public employees and to make the plan contributory by those employees. *DeWitt v. Richmond County,* 192 Ga. 770, 16 S. E. 2d 579; *Hughes v. Traeger,*

264 Ill. 621, 106 N. E. 431; *Sullivan v. Omaha*, 146 Neb. 297, 19 N. W. 2d 510, 21 N. W. 2d 510; *Allen v. Passaic Board of Education*, 81 N. J. Law 135, 79 Atl. 101, affd. 84 N. J. Law 402, 86 Atl. 1102; *Retirement Board of Allegheny County v. McGovern*, 316 Pa. 161, 174 Atl. 400. Thus if Iowa did not have the constitutional provision in question, it is clear that the General Assembly could, as it did prior to 1962, establish a contributory pension system for its judiciary.

Now, however, the constitution requires the State itself to pay state judges adequate retirement compensation. The State is thus duty bound to establish a system of retirement compensation which is both adequate and State supported. The State cannot fulfill that duty by a system which requires contribution by the judiciary in order to obtain retirement compensation, whether that system is optional on the part of the judges or is enacted before or after the effective date of the constitutional amendment. Since the pension system found in Chapter 605A is contributory, it does not fulfill the State's constitutional obligation.

The result is that the State has not yet carried out the mandate in Section 18 of Article Five of the Constitution, and Chapter 605A does not fulfill that mandate unless it should be determined by the legislature that it is, without any contribution from the judges, sufficient to provide for adequate retirement compensation.

Whether the State could, after providing adequate retirement compensation at State expense, also provide a supplemental pension system for judges which is contributory on the part of the judges is beyond the scope of this opinion. However, the State could not circumvent the requirement of "adequate" compensation through the device of such a supplementary system.

November 27, 1967

STATE OFFICES AND DEPARTMENTS: Real Estate Trust Account Law — Chapter 154, Acts 62nd G. A., 117.6, 117.3, 1966 Code of Iowa. Every individually licensed real estate broker is governed by the provisions of Chapter 154 and all monies incident to or received from the selling, exchanging, purchasing or renting of real estate must be deposited in an individual trust account or a common trust account. (F. Hendrickson to Clarkson, Director, Iowa Real Estate Commission, 11/27/67) #67-11-28.

Mr. George M. Clarkson, Director, Iowa Real Estate Commission: Your recent letter requesting an opinion of this office on certain questions relating to the interpretation and application of the Real Estate Trust Account Act is acknowledged.

You have requested the following:

"I have been deluged with telephone calls and letters with reference to the law which was enacted July 1, 1967, by the Sixty-Second General Assembly, An Act Relating to Trust Accounts to be Maintained by Real Estate Brokers.

"For clarification purposes I would like to have an Attorney General's opinion, and the following are a sample of the questions that I have received:

"1. Is a broker who is now operating as a salesman for another broker to be included in this Act?

"2. Should a broker engaged only in the appraisal business, either for himself, lending institutions or insurance companies be so included?

"3. Should a broker who is working for a bank or any other lending institution be so included?

"4. Should an attorney who is also a broker actively engaged in the real estate business be so included?

"5. Should a retired or inactive person who has a broker's license and, for all practical purposes, does not handle any real estate transactions be so included? (The only thought I have is that this individual likes to continue his broker's license.)

"6. In the event of a copartnership, association or corporation, do the officers of said organization who hold brokers' licenses have to have separate trust accounts plus a trust account for their organization?

"7. If a broker is collecting money on contracts, rental fees and management fees, is he to be included as a part of this Act?

"8. Is a broker collecting farm management fees to be included in this Act?

"I have been trying to follow the Act to the letter, stating that each and every broker must have a trust account regardless of his affiliation with the real estate business."

Senate File 261 (now Chapter 154, Acts of the 62nd General Assembly) entitled "An Act Relating to Trust Accounts to be Maintained by Real Estate Brokers" provides in part:

"Trust Accounts.

"(1) *Each broker* shall maintain a common trust account in a bank for the deposit of all down payments, earnest money deposits, or other trust funds received by the broker or his salesmen on behalf of his principal.

* * *

"(4) Each broker *shall only* deposit trust funds received on real estate or business opportunity transactions as defined in Section one hundred seventeen point six (117.6), Code 1966, in said common trust account and shall not commingle his personal funds or other funds in said trust account with the exception that a broker may deposit and keep a sum not to exceed one hundred (100) dollars in said account from his personal funds, which sum shall be specifically identified and deposited to cover bank service charges relating to said trust account." (emphasis supplied)

You are advised that this office also received a request for an opinion on the constitutionality of said trust account act from the Honorable Harold O. Fischer, Grundy County State Representative.

This office has researched the laws of other states and has been unable to find any cases where the constitutionality of such an act has been adjudicated. Most of the real estate trust account acts are of recent origin. There are at least forty states which have such a law. It is the opinion of this office that this act is a valid exercise of the police power of the state. It is designed to afford protection to the public against brokers who may resort to methods of using other people's funds for their own personal use.

Regardless of the difficulty which may arise in the application of the law, the term "each broker" can mean only what it says. Any exceptions

which would exempt certain brokers from complying with the trust account act would have to be expressly provided by statutory language. Neither the director nor the Real Estate Commission may exempt certain brokers from compliance with the statutory requirements through administrative regulation.

Question number 1 is therefore answered in the affirmative. It is possible, however, to have a common trust account provided the broker-salesman complies with Section 2 of the Act and notifies the commission of the name of the bank and the name of the account on the forms prescribed by the real estate commission. For example, Mr. X owns X Realty Company and maintains a trust account in the X Realty Trust Account. Mr. Y, who is a broker-salesman working for X Realty Company, could designate the same bank trust account on his form and call it Mr. Y, doing business as, X Realty Company. It would not be necessary that Mr. Y have authority to write checks on said common trust account.

Question number 2 is answered in the affirmative; however, only such funds as are defined in the statute must go through his trust account.

Questions 3, 4 and 5 are also answered in the affirmative.

The answer to question number 6 is the same as the answer to question number 1 as each individually licensed broker must have a trust account; however, it may be one common trust account. In such a case, the individually licensed broker on his real estate trust account form would complete it by providing Mr. Y, doing business as X and Y Realty Company, XYZ Realty Association or XYZ Realty Corporation, depending on what type of business entity is being utilized.

In answer to question number 7, the Acts states that only trust funds received on *real estate* or *business opportunity transactions* as defined by §117.6 shall be deposited in said account. Section 117.6 defines business opportunity transactions as, ". . . any single act or transaction contained in the definition of a real estate broker as set out in §117.3, whether said act be an incidental part of a transaction or the entire transaction. . . ."

Section 117.3, 1966 Code of Iowa, states that the term "real estate broker" is one who engages in the business of "selling, exchanging, purchasing, or renting of real estate for another for a fee, commission or other consideration."

It is difficult to give a blanket answer to question number 7, but essentially, all transactions or acts, dealing with the selling, exchanging, purchasing or renting of real estate would be included. The renting of real estate in many cases would include the management of real estate and therefore those funds received from the management of real estate which are directly related to the renting aspect of the management of real estate would have to be deposited in the trust account. Therefore, a general answer to question number 7 would be in the affirmative.

The answer to question number 8 would depend on more information; however, as was stated in the paragraph above, such farm management acts and transactions as would relate to the renting of property would have to go through the trust account fund.

Other transactions and activities of the broker such as the business of selling insurance would not come within the Act and insurance agencies run by a broker must be handled in another account. This does not mean that payments of insurance premiums on property may not go through the trust account as insurance may be involved in the selling and renting of property. For example, Mr. X may handle the sale of a house and included in the sales transaction is insurance coverage on the house. The buyer may deposit with Mr. X one down payment check which would include a separate amount for insurance, a separate amount for loan closing fees and expenses and part of it may also include the broker's commission. Mr. X would deposit the whole check in his real estate trust account and as the sales transaction is completed, the various amounts would be paid out of the trust account. One trust account check may go to the insurance agency for payment of the insurance premium, another trust account check covering the commission may be paid into his operating account and another trust account check for closing costs and expenses may be paid to the lending institution.

In summary, you are advised that each individually licensed broker must have a separate trust account or a common trust account, depending upon his individual situation. The trust account may be active or inactive, depending upon his individual situation. All monies resulting from the sale, exchange, purchasing or renting of property or other funds which may be deposited in the trust account is that amount up to $100 which by statute is limited to cover back service charges only.

This office is hopeful that this opinion may assist you in administering the trust account law and in helping the brokers to understand how the act works and applies to them.

November 27, 1967

BANKS AND BANKING. Fiduciary acts of national banks. National Banks are authorized to do trust business in this state under §532.5 and not required to obtain a permit under the Business Corporation Act or other chapter of the Code in order to comply with the provisions of §§633.63 and 633.64. (Nolan to Bianco, Director, Corporation Division, Secretary of State, 11/27/67) #67-11-29.

Mr. Frank D. Bianco, Director, Corporation Division, Office of Secretary of State: You have forwarded to this office a copy of the application for a certificate of authority by the First National Bank of Moline, together with supporting documents, for authority to do business in the state of Iowa as a fiduciary with the request for an opinion as to whether or not such certificate or authority may be issued under the Iowa Business Corporation Act or any other applicable statutes of the state of Iowa.

It is my understanding that the application by this bank was filed to comply with the provisions of Iowa Code §§633.63 and 633.64 which read as follows:

"633.63 Qualification of fiduciary. Any natural person of full age, and any corporation authorized to do business in this state and to act in a fiduciary capacity, is qualified to serve as a fiduciary in this state except the following:

1. One who is a mental retardate, mentally ill, a chronic alcoholic, or a spendthrift.

2. Any other person whom the court determines to be unsuitable.

"633.64 Nonresident fiduciaries. A nonresident of this state who is qualified under the provisions of section 633.63 may, upon application, be appointed fiduciary, provided a resident fiduciary is appointed to serve with such nonresident fiduciary; and provided further that the court, for good cause shown, may appoint such nonresident fiduciary to serve alone without the appointment of a resident fiduciary."

Further, an opinion dated August 10, 1966, from the office of the attorney general stated that:

". . . The Iowa law does not prohibit an Illinois state or national bank from qualifying as a fiduciary under §633.63 of the 1966 Code of Iowa, provided that such state or national bank procures a certificate of authority as required by Chapter 496A, 1966 Code of Iowa."

In a subsequent opinion dated June 30, 1967, this office issued an opinion advising that the provisions of Chapter 496A are not available to banks. The opinion further advised that state banks located outside the state of Iowa might be authorized to do fiduciary business under the provisions of §494.1 as foreign corporations, subject to the supervision and regulation of the superintendent of banking (§524.10)

Now the question arises as to whether or not a national bank located outside the boundaries of the state of Iowa must qualify as a foreign corporation in order to qualify as a fiduciary under the provisions of the probate code set out above. It is clear that national banks receive their capacity to act as fiduciaries from the federal government. The authority to act in a fiduciary capacity in a state either where the bank is located or in one other than that in which the bank is located is derived from the laws of that state. See Switzer, Eugene H., *Rights of Nonresident Banks and Trust Companies to Serve in Fiduciary Capacities Under the Laws of the Various States*, 1962, Library American Bankers Association, 12 East Thirty-Sixth Street, New York 16, New York.

It is well established that in the absence of unmistakably clear language it will not be assumed that a state has attempted to exercise a regulatory power over national agencies established in aid of governmental purposes under the laws of the United States. *Jeffries v. The Federal Land Bank of New Orleans*, 189 S. 557, 1939. Whatever may be the state law, national banks having the permit specified in Title 12, U.S.C., 92a, may act in a fiduciary capacity if trust companies competing with them have similar powers. *Missouri ex rel Burns National Bank v. Duncan*, 265 U. S. 17, 68 L. Ed. 881, 44 S. Ct. 427 (1924).

Further it is well established that even a national bank must be appointed by a state court to be able to serve as an executor. *Ex parte Worchester County National Bank*, 279 U. S. 347, 73 L. Ed. 733, 49 S. Ct. 368, 61 A.L.R. 987, 1929.

It is my opinion that national banks whether located within the state of Iowa or at some place outside the state are not required to obtain a permit as a foreign corporation to be authorized to do business in this state and to act in a fiduciary capacity. A national bank is not "any

corporation for pecuniary profit organized under the laws of another state, or of any territory of the United States, or of any foreign country," to which a permit may be issued under §494.1 of the Code of Iowa.

With respect to the power to maintain suits, I am of the opinion that §494.9 which provides that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such permit" was not intended to apply to national banking institutions since §24 of 12 U.S.C.A. includes among the powers of national banks the power "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." *Bank of America, National Trust and Savings Association v. Lima,* (Mass.) 103 Fed. Supp. 916, 918 (1952).

We come then to whether or not a national bank wherever located is authorized to act in a fiduciary capacity in this state. It is my opinion that §532.5 of the Code of Iowa provides sufficient authority for a national bank to comply with the provisions of §633.63 and §633.64 in this regard. §532.5 provides:

"When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by sections 532.1 to 532.4, inclusive, conferred upon trust companies, state and savings banks."

Since this section of the code makes no distinction between national banks located within the state and those located outside of the state there appears to be no need to attempt to classify any such national bank as a foreign corporation.

"We find nothing in the phraseology of the statute . . . which indicates an intention to classify national banks created by national law as foreign corporation. . . . and in the absence of unmistakably clear language, it will not be found that the state has attempted to exercise regulatory power over national agencies established in aid of governmental purposes." *Stewart v. Atlantic National Bank of Boston,* 27 Fed. 2d 224, 228 (1928)

I am returning the documents enclosed with your request.

November 28, 1967

COUNTY AND COUNTY OFFICERS: Drainage district employees, IPERS coverage — §§74.1, 74.2, 97B.11, 97B.41, 97B.42, 97B.43, 455.169. Drainage districts are employers the employees of which are covered by IPERS. Neither the doctrine of estoppel nor the statute of limitations may be raised to bar the Iowa employment security commission from collecting both the employers and employees share of such IPERS taxes for prior years from such drainage districts. (Haesemeyer to Altwegg, Harrison County Attorney, 11/28/67) #67-11-30

Mr. Gary J. Altwegg, Harrison County Attorney: You have requested an opinion of this office with respect to the following:

"The Board of Supervisors and the Drainage Clerk for Harrison County have been requested to compute and pay IPERS and Social Security for its employees for the years relating back to 1951. This request is based on the case of Iowa Employment Security Commission vs.

Des Moines County Drainage District #8, Iowa Supreme Court decision dated March 7, 1967, and undoubtedly the drainage districts all over the state are being faced with this problem.

"The question I raise is whether or not this new ruling under the above case is going to be retroactive or not?

"It would appear that the Employment Security Commission is acting prematurely at the present time since the case has not been resubmitted and it will possibly not answer the question of payment for previous years anyway.

"If the drainage district are forced to make payments for IPERS for previous years this will present many problems, a few of which are listed below which I would like to have answered.

"1. Will the districts be able to pay the amounts due with drainage warrants to be payable in the future?

"2. Who will pay the employee's share of the taxes?

"3. For how many years can the Employment Security Commission lawfully go back and collect IPERS considering past rulings of the commission and the statutes of limitations?"

The case you describe, *State ex rel. Iowa Employment Security Commission v. Des Moines County,* ..... Iowa ....., 149 N W. 2d 288 (1967), was a proceeding in mandamus to compel certain officers of a drainage district to perform statutory duties in regard to collection and payment of state retirement and social security taxes. The district court sustained the defendant's special appearance and dismissed the petition on the grounds that it had no jurisdiction of the subject matter since the defendant, drainage district, was not a political subdivision of the state and not a legal entity. The supreme court reversed and remanded holding that mandamus lies when a public officer fails to perform his statutory duties, and that under the statute it is an employer's duty to collect and pay state retirement and social security taxes. The court noted that an "employer" is defined by statute as meaning the state of Iowa or any of its political subdivisions and that an organized drainage district is a political subdivision of the county, a legally identifiable political instrumentality, and therefore, an "employer" within the meaning of the statute. Since mandamus was the proper remedy and a drainage district was in fact a political subdivision the supreme court held that the trial court had jurisdiction and remanded the case to the Des Moines county district court. Subsequently the defendant, drainage district, paid the taxes and interest alleged to be due by plaintiff thus disposing of the remaining issues raised by the pleadings and thereafter on October 5, 1967, judgement was entered by the district court.

Prior to this however, on April 19, 1967, in a similar case, *State ex rel, Iowa Employment Security Commission v. City of Boone, et al* (civil no. 27,107), the Boone county district court upon plaintiff's motion to adjudicate law points had rendered its order holding among other things that mandamus was a proper remedy, and citing *State v. Des Moines County,* supra, and that the state is neither estopped nor barred by the statute of limitations from collecting back IPERS taxes.

Thus, taking together the decision of the Iowa supreme court in *State v. Des Moines County,* supra, and the order of the Boone county district

court in *State v. City of Boone* it would appear to be evident that a drainage district is a political subdivision of the state and an employer within the meaning of the IPERS statute, that mandamus will lie to enforce the payment and collection of the tax by the trustees of such a drainage district and that neither the doctrine of estoppel nor the statute of limitations can be raised to prevent the Iowa employment security commission from collecting IPERS taxes for prior years.

§97B.11, Code of Iowa, 1966, as amended by chapter 121, section 3, Acts 62nd G. A., provides:

"Each employer shall deduct from the wages of each member of the system a contribution in the amount of three and one-half (3½) percent of the covered wages paid by the employer until the first of the month after the member's seventieth (70) birthday or his termination or retirement from employment, whichever is earlier. The contributions of the members shall be matched by the employer."

Prior to this amendment §97B.11 provided:

"In addition to all other taxes, there is hereby levied upon each employee, as defined in §97B.41, a tax equal to three and one-half percent of the wages paid by the employer to the employee for any service performed after June 30, 1953, while such employee is a member of the system."

An "employee" is defined by §97B.41 as any individual who is in the employment of the state except members of the general assembly, certain elected officials and such persons who are members of any other retirement system in the state which is maintained in whole or in part by public contributions. A "member" is an individual who is a member of the retirement system created by chapter 97B as defined in §§97B.42 and 97B.43. §97B.42 provides that each employee whose employment commences after July 4, 1953, or who has not qualified for credit for prior service rendered prior to July 4, 1953, shall become a member upon the first day in which such employee is employed.

Accordingly, it is our opinion that the employment security commission can go back all the way to July 4, 1953, to collect IPERS.

Except as noted above there does not appear to be any Iowa authority on the related questions of whether or not the drainage district has to make retroactive employer contributions to IPERS and whether the state or the employee should make retroactive employee contributions thereto. However, there appears to be authority from other jurisdictions which would indicate that retroactive employer contributions must be made. In *Taylor v. Abernathy*, 422 Pa. 629, 222 A. 2d 863 (1966) the Pennsylvania supreme court stated:

"From the date of the act directing cities of the third class to establish a pension plan for retiring policemen became the law of this Commonwealth, the city of Sharon was under a duty to enact an ordinance in compliance therewith. It would therefore follow that the city should be ordered to comply with the enabling act retroactively. However, the practicalities of the situation have, in the past, cautioned this court against the retrospective imposition of obligations which might have been incurred had mandatory legislation been followed. Thus it has been held that retroactive compliance with a mandatory act will not be compelled where the practical difficulties such compliance would engender would cause more inequity than the harm sought to be remedied. Under such

circumstances, this Court has sought the most propitious means of achieving future compliance with the legislative mandate while, at the same time, not unduly prejudicing the rights of those who would have benefited had the local governing body promptly complied with the statute.

"Applying this principle to the instant case, we direct that Taylor and others similarly situated shall be included in the new pension plan to be adopted, on the same basis as if the new ordinance had been in effect at the time they joined the police department of the city of Sharon. In this way, the more than 20 years which Taylor devoted to the city will not be ignored, and his salary and contribution therefrom will be utilized in the determination of the benefits to which he will be entitled. However, the city shall only be liable for such payments retroactive to the date that payments were discontinued under the invalid ordinance."

In *State v. Baker*, 169 Ohio St. 499, 160 N. E. 2d 262 (1959) the court held that the failure of the board of county commissioners to deduct from the salary of a deputy sheriff his contributions to the retirement system would not excuse the board from making employer's payments into the retirement funds. And in *State v. Board of County Commissioners*, ... N. M. ..... , 306 P. 2d 259 (1957) a writ of mandamus was granted to compel retroactive payment by the employer into the public employees retirement fund on the ground that compliance with the act was mandatory on the part of the employer. Moreover, in *State v. Baker* the employer was held to be liable for the employees' contributions as well.

In view of the foregoing it is our opinion that the drainage district would be retroactively liable for the employees' contributions.

On the question of the proper source of funds for the payment of IPERS taxes your attention is directed to §97B.9 which provides in relevant part:

"2. The employer shall pay its tax or contribution from funds available, and is directed to pay the same from tax money or from any other income from the political subdivision; provided, however, the tax shall be paid from the same fund as the employee salary.

"3. Every political subdivision is hereby authorized and directed to levy a tax sufficient to meet its obligations under the provisions of this chapter if any tax is needed."

§455.169, Code of Iowa, 1966, provides:

"455.169 Payment. All compensation for services rendered, fees, costs, and expenses when properly shown by itemized and verified statement shall be filed with the auditor and allowed by the board in such amounts as shall be just and true, and when so allowed shall be paid on order of the board from the levee or drainage funds of the district for which such services were rendered or expenses incurred, by warrants drawn on the treasurer by the auditor."

§§74.1 and 74.2 provide:

"74.1 Applicability. This chapter shall apply to all warrants which are legally drawn on a public treasury, including the treasury of a city, and which, when presented for payment, are not paid for want of funds.

"74.2 Indorsement and interest. When any such warrant is presented for payment, and not paid for want of funds, or only partially paid, the treasurer shall indorse the fact thereon, with the date of presentation, and sign said indorsement, and thereafter said warrant or the balance

due thereon, shall draw interest at four percent per annum on state and county warrants, and four percent per annum on city, drainage, and school warrants, unless the treasurer arranges for the sale of said warrant at par at a lower rate of interest."

In view of the foregoing provisions of law it is our opinion that the drainage district could issue chapter 74 warrants in payment of the back contributions to IPERS.

November 28, 1967

COUNTY AND COUNTY OFFICERS — Workman's Compensation — §85.61. Members of county boards such as county zoning commissioners, board of adjustment and all other boards which are official county boards are employees under the definition of §85.61, Code of Iowa, 1966. (Turner to Fenton, Polk County Attorney, 11/28/67) #S67/11/3.

Mr. Ray A. Fenton, Polk County Attorney: This replies to your letter of November 3, 1967, requesting an opinion on the following:

"As Polk County is considering the possibility of arranging for liability insurance for its officers and employees, they have asked me to obtain your interpretation of Section 85.61 of the 1966 Code of Iowa as amended by Senate File 508 of the 62nd General Assembly. Section 1 of which reads as follows:

"Section 1. Section eighty-five point sixty-one (85.61) subsection two (2), Code 1966, is hereby amended by inserting after line four (4) thereof the following: every executive officer elected or appointed and empowered under and in accordance with the charter and by laws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, county boards of education, municipal corporations or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers.

"Section 2. Section eighty-five point sixty-one (85.61), Code 1966, is hereby further amended by striking all of subparagraph c of subsection three (3) thereof.

"As you know, Polk County and all other counties have Boards where members receive no compensation whatever, such as County Zoning Commissioners and Boards of Adjustment. Other Boards, such as County Board of Social Welfare and local County Boards of Health receive a nominal compensation of $3.00 per diem, and necessary expenses, but such compensation shall not exceed $120.00 in any one year.

"This poses the question whether such *Board Members* are to be considered as employees under Section 85.61 of the Code of Iowa as amended by Senate File 508 of the 62nd General Assembly and entitled to the benefits of Chapter 85."

Since the definitions contained in §85.61 are expressly limited in their application to those instances where the terms defined are used in Chapters 85, 86 and 87, which chapters deal respectively with workmen's compensation, the industrial commissioner and compensation liability minimums, I assume that when you speak of liability insurance you have in mind only workmen's compensation liability insurance.

In determining whether or not board members may be considered employees under §85.61 of the code of Iowa it is necessary to determine whether or not they are executive officers elected or appointed or persons whose employment is "purely casual and not for the purpose of the employer's trade or business." Senate File 508 of the 62nd General Assembly imposes no limitations on the amount of time which a person holding an

official position is required to serve nor compensation to be received. This act merely states that it includes "a person holding an official position, or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, . . ." Such act appears to be broad and all inclusive; therefor we must conclude that members of county boards such as county zoning commissioners, boards of adjustments and all other boards which are official county boards are now to be considered employees under the definition of §85.61 of the Code of Iowa.

November 29, 1967

NATIONAL GUARDSMEN ARRESTS: §29A.41, Code of Iowa, 1966 — (1) A member of the National Guard is exempt from civil arrest or violation of a traffic ordinance or a statute while returning from a regular weekly drill. (2) A National Guardsman violating a traffic statute within a period allowed by statute is guilty of breach of the peace and subject to arrest therefore after he arrives home. (Strauss to McCauley, Dubuque County Attorney, 11/29/67) #67-11-31

Mr. Michael S. McCauley, Dubuque County Attorney: Reference is made to your letter in which you submitted the following:

"Your opinion is respectively requested on the interpretation of Section 29A.41 of the 1966 Code.

"The pertinent portion of said Section reads as follows:

". . . 'No member of the National Guard shall be arrested or served with any summons, order, warrant, or other civil process after having been ordered to any duty, or while going to, attending, or returning from, any place to which he is required to go for military duty. Nothing herein shall prevent his arrest by order of a military officer or for a felony or breach of the peace committed while not in the actual performance of his duty.'

"A prior Attorney General's Opinion, which has some bearing on the problem, is found in 1964 O.A.G. at Page 404.

"Specifically, my questions are:

"1. Can a National Guardsman, while returning home from his regular weekly drills, be arrested for a traffic violation and found guilty if he claims the exemption under the aforesaid Section 29A.41?

"2. If a National Guardsman commits a traffic violation within the periods allowed in the statute and is arrested after he arrives home, in other words, while he is "off duty," can he then claim the exemption under 29A.41?"

In answer to your first question I advise:

In the absence of a constitutional provision or statute to the contrary, every person, except a diplomatic representative of a foreign government is subject to arrest on a criminal charge. 5 Am. Jur. 2d, Arrest §96, p. 781. However, under federal statutes, enlisted members of the armed services are exempt from civil arrest while on active duty. See 10 U.S.C. §§3690, 6158 and 8690. Similarly, most states have granted statutory exemption from civil arrest to members of the militia while going to, remaining at, or returning from military duty. §29A.41, 1966 Iowa Code, in its pertinent part states as follows:

"Exemption from jury duty and other exemptions. . . . No member of the national guard shall be arrested, or served with any summons, order, warrant, or any other civil process after having been ordered to any duty, or while going to, attending, or returning from, any place to which he is required to go for military duty. Nothing herein shall prevent his arrest by order of a military officer or for a felony or breach of peace committed while not in the actual performance of his duty. . . ."

The first question under consideration is whether a National Guardsman, while returning home from his regular weekly drills, can be arrested for a traffic violation and found guilty if he claims the exemption under the aforesaid §29A.41.

Naturally, provisions such as §29A.41 are founded on public policy, having due regard for administration of affairs, and are not intended to shield those guilty of criminal offenses. 6 C.J.S., Arrest §3, p. 573. The Iowa Vehicle Code contains rules of the road in the interest of safety to minimize the possibility of an accident and should apply to all persons for their own general welfare. On the other hand, the Military Code contains exemptions from arrest because of military necessity for the preservation of the peace. Common sense would therefore dictate that in the absence of military necessity, military personnel should observe the same rules of safety as civilians are forced to observe. The Supreme Court of Rhode Island, in *State v. Burton*, 1918, 41 R. I. 303, 103 Atl. 962, promulgated the rule that a person in the military service in time of war may be prosecuted for violating a state law regulating the rate of speed of motor vehicles, where violation thereof was not a military necessity. The court in that case also stated:

"The mere fact that when the acts by him done were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state; nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

Consequently, as far as public policy is concerned, military personnel should not be immune from arrest for violation of the Iowa Vehicle Code.

However, under the statutory exemption quoted above if the guardsman violated a civil law while in the performance of his military duty he is exempt from civil arrest. There is precedent for this conclusion in the case of *Commonwealth v. Matthews*, 34 D & C 2d 479. There a statute of Pennsylvania provided:

"No . . . enlisted man shall be arrested on any warrant, . . . while going to, . . . a place where he is ordered to attend for military duty."

A member of the Pennsylvania Guard was arrested for speeding in violation of the Pennsylvania Vehicle Code. His arrest was deemed unlawful under the foregoing statute, the court stating:

"The vehicle code enacted by our legislature contains rules of the road in the interest of safety to minimize the possibility of accidents and should apply with equal force to all persons for our own general welfare.

"The Military Code enacted by our legislature contains the above quoted exemptions from arrest because of military necessity for the preservation of peace.

"It is true, that common sense dictates military personnel should observe the same rules of safety as civilians; however as stated in the Weber Case, supra, this is a legislative problem and not a judicial function.

"A National Guardsman is an 'enlisted man' in military service and the exoneration section of the Military Code above quoted plainly states, 'no enlisted man shall be arrested on any warrant . . . while going to . . . a place where he is ordered to attend for military duty.' This language is so broad and general that we are forced to conclude it covers the facts of this case."

A prior case of this character under the same statute drew this from the Pennsylvania court in the case of *Commonwealth v. Weber*, 30 D & C 2d 287, in referring to the case of Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. 165, where it was said:

"This opinion clearly demonstrates the distinctions between military law during actual conflict, martial law for actual preservation of peace and civil law during peace time. It also deals at length with the power of the State to exercise its sovereign prerogatives for the general welfare to the detriment of private rights. Therefore, it would seem to follow that the legislature possesses the power to grant the exemption here involved and, by the general wording of the act, it is applicable in peace time as well as in time of conflict without a determination of the question of necessity."

* * *

"Likewise, in the present case, defendant's orders merely told him 'to proceed as quickly as possible.' This did not mean exceed the speed limit. He received his orders at 4 a.m. at Gettysburg, which gave him plenty of time to get to Wilkes-Barre and carry out his commission without traveling 65 miles per hour. There was no emergency or military necessity which obligated defendant to drive as the policeman says he did, but in Pennsylvania this seems immaterial.

"Our view of the act in question exempts this defendant from arrest under the facts outlined above. Any problems that might arise from our conclusion is a legislative problem and not a judicial one."

Therefore, the answer to your first question is in the negative.

Insofar as your second question is concerned, the foregoing statute authorizes the limits of this immunity in these words:

"Nothing herein shall prevent his arrest by order of a military officer or for a felony or breach of peace committed while not in the actual performance of his duty."

"Breach of peace" is defined in the case of *Town of Neola v. Reichart*, 131 Iowa 492, 109 N. W. 5, as follows:

"By 'peace,' as used in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right among all persons in a political society, and any intentional violation of that right 'is a breach of the peace.' See Davis v. Burgess, 54 Mich 514 (20 N. W. 540, 52 Am. Rep. 828)," where it was held that the use of indecent and profane language on a public street constituted a 'breach of the peace.' The court there said that 'actual personal violence is not the essential element in the offense. If it were, communities might be kept in a constant state

of turmoil, fear, and anticipated danger, and conduct of a guilty party, not only destructive of the peace of the city, but of the public morals, without the commission of the offense. The good sense and morality of the law forbids such a construction.' In State v. Benedict, 11 Vt. 236 (34 Am. Dec. 688), public peace is defined as that 'invisible sense of security which every man feels so necessary to his comfort and for which all governments are instituted.' In City of Corvallis v. Carlile, 10 Or. 139 (45 Am. Rep. 134), it is said that the word 'peace,' in its legal significance, means 'quiet, orderly behavior of individuals to another' and 'toward the government, which is said to be broken by acts of a certain kind. . . . Any riotous, forcible, or unlawful conduct or procedure is a breach of the peace. Offenses against the public peace include all acts affecting the public tranquillity, such as assault and battery, riots, routs, and unlawful assemblies, forcible entry and detainer,' etc. 4 Blk. Com. 142. What happened was in a place to which the public generally was invited, and in the presence of numerous citizens who had a right to be there, and was clearly a disturbance of the peace of that community and the persons present."

This arrest is not under order of a military officer nor is it an offense amounting to a felony. Arrest for the violation of an ordinance constitutes a breach of the peace. Specifically, whether the violation of an ordinance concerning highway traffic is a breach of the peace, affirmative authority is not wanting.

Ex parte Emmett, 1932, 120 Cal. App. 349, 7 P 2d 1096 (Dicta):

"It is not necessary for us to decide that a violation of the ordinance referred to herein constitutes a breach of the peace as defined by our criminal codes, as the cases which we have cited show that the words of the Constitution are taken in their generic sense and include all crimes known to the common law. Misdemeanors are crimes known to the common law. We may state, however, that violations of the traffic ordinances would necessarily lead to disorder, and in large measure impair personal peace and security."

Akron v. Mingo, 1959, 169 Ohio St. 511, 160 N. E. 2d 225: Discussing U. S. Const., §6 of Art. I dealing with the privilege of immunity given to U. S. Congressmen:

"The words 'treason, felony, and breach of the peace' were used by the framers of the Constitution in Section 6, Art. I, and should be construed in the same sense as those words were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases.

" 'Now as all crimes are offenses against the peace, the phrase "breach of peace" would seem to extend to all indictable offenses, as well as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.' "

Defendant was returning home from a trial when he was arrested on the charges of driving an automobile under the influence of alcohol, driving through a red light and driving without a driver's license in violation of the ordinances of the city of Akron. Defendant's claim of privilege was denied in that he committed a breach of the peace as defined in *Williamson v. U. S.*, 207 U S. 425.

As far as statutes concerning highway traffic see *City of Troy v. Cummins*, 1958, 107 Ohio App. 318, 159 N. E. 2d 239, wherein the offense of operating a motor vehicle while under the influence of intoxicating liquor

was a "breach of peace" within statute constituting an execption to privilege-from-arrest statutes and excepting therefrom an arrest on Sunday for a breach of the peace.

In addition to the foregoing case authority supporting the rule insofar as violation of an ordinance constitutes a breach of the peace Chapter 321, Code of 1966, provides for violations of the traffic statutes and while there appears to be no statutory penalty for such violation it constitutes a misdemeanor under the provisions of §687.6, Code of 1966, which provides as follows:

"Prohibited acts — misdemeanors. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor."

It therefore constitutes a public offense.

Therefore, in answer to your second question a national guardsman is subject to arrest after he arrives home. A claim for exemption is then unallowable.

December 12, 1967

COST OF FOSTER HOME CARE. H.F. 152, 62nd G. A. Interpreting H.F. 152, 62nd G. A. providing for payment of costs of foster home care by the state is unconstitutional as violative of Art. III, Sec. 29, Constitution of Iowa, because the title is at variance with the subject of the bill. (Strauss to Selden, SC, December 12, 1967) #67-12-4

Mr. Marvin R. Selden, Jr., State Comptroller: Reference is herein made to yours of the 8th ult. in which you submit the following:

"House File 152, Acts of the Sixty-Second General Assembly reads as follows:

"An Act

"Relating to the cost of foster home care for certain children of veterans.

"Be It Enacted by the General Assembly of the State of Iowa:

"Section 1. Section two hundred thirty-two point fifty-three (232.53), Code 1966, is hereby amended by adding the following:

"'The county charged with the cost of foster home care for a child may recover the cost of such care from the general fund of the state if the child would otherwise have been eligible for admission to the Iowa juvenile home or the Annie Wittenmyer home under the provisions of subsection one (1) of section two hundred forty-four point three (244.3) of the Code. The county shall make claim to the state treasurer who shall approve or disallow the claim.'

"We respectfully request your opinion as to the following:

"1. Does House File 152, Acts of the 62nd G. A. make an appropriation?

"2. If your answer to one (1) above is in the affirmative, to whom is the appropriation made?

"3. If your answer to one (1) above is in the affirmative, is the amount of the appropriation limited?"

In reply thereto I withhold answers to your questions in view of the following:

H.F. 152, Acts of the 62nd G. A. as filed provided the following:

"A Bill for

"An act relating to the cost of foster home care for children of deceased veterans.

"Be It Enacted by the General Assembly of the State of Iowa:

"Section 1. Section two hundred thirty-two point fifty-three (232.53), Code 1966, is hereby amended by adding the following?

" 'The county charged with the cost of foster home care for the child of a deceased veteran as defined in chapter two hundred forty-four (244) of the Code may recover the cost of such care from the general fund of the state. The county shall make claim to the state treasurer who shall approve or disallow the claim.' "

However, the foregoing numbered House bill as it appears in its enrolled form provides the following:

"An Act

"Relating to the cost of foster home care for certain children of veterans.

December 12, 1967

WITHHOLDING FROM SALARIES OF STATE OFFICERS AND EMPLOYEES. §§79.1 and 8.6(2), Code of 1966. Deducions from the salaries of state officers and employees may be made only by legislative authority. (Strauss to Robinson, Secretary, Exec. Council, 12/12/67) #67-12-3

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of the 28th ult. in which you stated the following:

"The Executive Council, in meeting held this date, took no action on the request from the State Employees' Association for a withholding system to be set up whereby a state employee may have his dues in the Association deducted from his paycheck, pending an opinion from you as to the legality of such procedure. Please advise."

In reply thereto I advise that officers and employees of the state are entitled to be paid their respective salaries twice each month. §79.1, Code of 1966. Such payment is effected by means of an appropriate warrant issued by the comptroller. §8.6(2). Payment of anything less than an officer's or employee's salary is not payment of salary. Application for a deduction from a salary does not provide authority in the comptroller to comply with the application. Authority by way of legislation to make a deduction from a statutory salary is required. Legislative policy in this regard is shown by §514.16, Code of 1966, which authorizes deduction from wages of the cost of hospital insurance. S.F. 677, §3, 62nd G. A., authorizes a deduction from wages of the contribution of each employee member of IPERS. §97C.6, Code of 1966, provides for the deduction of the employee's contribution to the social security system. This request should be denied.

December 12, 1967

COUNTIES AND COUNTY OFFICERS — Members of County Boards of Supervisors — mileage expense allowance — §§79.9 and 331.22, Code of Iowa, 1966. In counties with population over 40,000 attendance at adjourned meetings of the boards of supervisors thereof are official duties of members of such boards and such members are entitled to compensation for mileage for attendance at such meetings under §79.9. (Haesemeyer to Peterson, Black Hawk County Attorney, 12/12/67) #67-12-8.

Mr. Roger F. Peterson, Black Hawk County Attorney: You have requested our advice as to whether or not in light of our opinion of May 18, 1967, addressed to Representative James T. Klein, members of the board of supervisors in a county having a population in excess of 40,000 are entitled to draw mileage for attendance at adjourned meetings of the board of which they are members.

In its pertinent part, relating to cities with a population in excess of 40,000, §331.22 provides in the last paragraph that "these (enumerated) salaries shall be in full payment of all services rendered to the county by said supervisors except statutory mileage while *actually engaged in the performance of official duties.*" As interpreted by this office in our opinion dated May 18, 1967, the provision in §331.22 which allows seven cents for every mile traveled in "going to and from the regular, special and adjourned sessions thereof . . ." did not apply to members of the board of supervisors in counties having a population in excess of 40,000. Instead, it was decided that these members would be allowed the statutory rate as set forth in §79.9 which is not to be "in excess of 10 cents per mile of actual and necessary travel" while actually engaged in the performance of official duties.

The question therefore necessary for determination is whether attendance at an adjourned meeting is an official duty. The official duties of a public office have been defined as those duties lying squarely within the scope of the office, those essential to the accomplishment of the main purpose for which the office was created, and those incidental duties which serve to promote accomplishment of principal purposes. *Nesbitt Fruit Products v. Wallace,* 17 F. Supp. 141, 143 (1936). The powers and duties of the county boards of supervisors are enumerated in Chapter 332 and it is to be observed that §332.3 provides among other things:

"332.3 General powers. The board of supervisors at any regular meeting shall have power:

* * *

3. To adjourn from time to time, as occasion may require.

* * *"

Attendance at an adjourned session accomplishes or at least is incidental to the accomplishment of the purpose for which the office was created. Therefore, attendance at an adjourned session is as much an official duty of a member of the board of supervisors as is attendance at a regular or special meeting. Consequently, a member of the board of supervisors is entitled to claim compensation for mileage for attendance at adjourned meetings at the county court house. It should be noted how-

ever, that an adjourned session is to be distinguished from a continuous session. As stated in 34 OAG 136:

"A continuous session is one in which the work of the regular or special session was not completed on the first day on which the Board met. If this Board met on Monday and did not complete its regular business on that day, then adjourned until Wednesday, and did committee work on Tuesday, it would be entitled to mileage for one day of session work and one day of committee work.

". . . An adjourned session is one to which the Board adjourned at the close of its regular session, and after the work of the regular session was completed."

December 12, 1967

CRIMINAL LAW — Sale of tear gas pens — §§695.19, 732.10, 732.11, Code of Iowa, 1966. Tear gas pen guns may be legally sold over the counter in Iowa without the vendor securing a dealer's permit. (Sell to Opheim, Webster County Attorney, December 12, 1967) #67-12-5

Mr. David A. Opheim, Webster County Attorney: This is in reply to your letter dated November 8, 1967, wherein you requested an opinion as to whether tear gas pen guns may be legally sold over the counter in Iowa. More specifically, the question might be whether a dealer's permit must be obtained by those who intend to sell such weapons.

The pertinent statute in this regard is section 695.19 (Iowa Code, 1966) which provides:

"It shall be unlawful for any person, firm, association, or corporation to engage in the business of selling, keeping for sale, exchange, or to give away to any person within the state, any revolver, pistol, or pocket billy, or other weapons of a like character which can be concealed on the person, without first securing a permit from the proper officials having authority to issue such permit."

The statute does not include tear gas pen guns, but does include revolver, pistol, pocket billy, or weapons of the like character. Therefore, the question turns on whether a tear gas pen gun can be considered a type of weapon the legislature sought to regulate by enacting section 695.19.

My research on this problem disclosed that the New Jersey Supreme Court in *State v. Seng*, 89 N. J. Super. 58, 213 A. 2d 515 (1965), was faced with almost exactly the same question that you have proposed. There it was held that the selling of tear gas pen guns was not within the New Jersey provision which is very similar to the Iowa act.

In reaching this conclusion, emphasis was placed on whether the particular object in question will or will not propel a shot through explosive energy. The tear gas pen gun was found to be operated by a release of gas, and did not discharge a projectile, thus it could not be considered a firearm.

In *United States v. Decker*, 292 F. 2d 89 (6th Cir. 1961), it was held that a tear gas gun capable of firing a shot gun shell was a firearm within the meaning of the National Firearms Act, 26 U.S.C.A., §§5841, 5851. In that case, however, experiments showed that the tear gas gun in ques-

tion could fire a .410 gauge shotgun shell without rupturing or causing any structural damage to the barrel. In so holding, the court distinguished this type of gun from the conventional tear gas pen gun. The difference was that the tear gas pen gun discharged a much smaller container of gas, and was capable of only discharging tear gas.

The New Hampshire Supreme Court in *State v. Umbrello*, 106 N. H. 336, 211 A. 2d 400 (1965), held that a tear gas pen gun could not be included within the New Hampshire statute proscribing the carrying of a loaded, concealed pistol. In *United States v. Tot*, 42 F. Supp. 252 (D.C.N.J. 1941), the defendant was found guilty of receiving firearms shipped in interstate commerce in violation of the Federal Firearms Act of 1938. In considering the extent of the act's coverage, the Court said:

"The air gun and possibly the tear gas gun were the only ones intended to be excluded presumably because air is not an explosive and tear gas is not a projectile."

The maxim *expressio unius est exclusio alterius* is applicable to the subject under discussion. The weapons listed in section 695.19, with the exception of the pocket billy, might be characterized by the ability to fire a projectile by means of an explosive charge. The tear gas pen gun does not have these characteristics, and is thus excluded from the class. Therefore in my opinion, tear gas pen guns may be legally sold over the counter in Iowa without the vendor obtaining a dealer's permit.

It should be mentioned in passing, that sections 732.10 and 732.11 deal with devices resembling tear gas pen guns. Section 732.11 provides:

"It shall be unlawful to manufacture or prepare, or to possess any stench bomb, tear bomb, liquor, gaseous, or solid substance, or matter of any kind which is injurious to person or property, or is nauseous, sickening, irritating, or offensive to any of the senses with intent to throw, drop, pour, explode, deposit, release, discharge, or expose the same in, upon or about any theater, restaurant, car, vessel, structure, place of business, place of amusement, or any other place of public assemblage."

Presumably, this provision encompases devices capable of permeating a large, public area with offensive gaseous substances, which would not include the tear gas pen gun. Since the tear gas pen gun is primarily a defensive weapon, designed to ward off attack or molestation on the streets, I don't believe it falls within the regulatory scope of the above provision.

Significance should also be attached to the fact that the sections in question are penal statutes and demand strict construction. Therefore, I believe that until the Iowa legislature develops a more comprehensive definition of what weapons are to be regulated, the tear gas pen gun may be sold over the counter without the seller obtaining a dealer's permit.

December 12, 1967

STATE OFFICERS AND DEPARTMENTS — State printing board copyrights — Ch. 17, U.S.C.A. The state printing board may not without the consent of the copyright owner reproduce or print a copyrighted map or other piece of printed matter. (Haesemeyer to Moore, Supt. of Printing, December 12, 1967) #67-12-6

Mr. J. C. Moore, Superintendent of Printing: By your letter of September 18, 1967, you have requested an opinion of this office on the question of whether or not the state printing board may reproduce and print a copyrighted map or other piece of printed matter.

Pursuant to Art. I, §8 of the United States Constitution, the Federal Copyright Law was enacted "to promote the progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

From the very beginning of the copyright legislation, maps have been specifically enumerated and the copyrighting thereof has been authorized under 17 U.S.C.A. §5(f). Therefore, when the copyright is secured in accordance with the terms and provisions of the statute, the rights of the author are reserved from the public domain for the effective period of the copyright. 18 Am. Jur. 2d, Copyright §22, p. 322. Furthermore, under the provisions of 17 U.S.C.A. §3, "the copyright provided . . . shall protect all the copyrightable component parts of the work copyrighted." For example, all maps bound into an atlas are protected by a single copyright. Although maps as such are entitled to protection, that protection is limited to new and original contributions of the author. *County of Ventura v. Blackburn*, 362 F. 2d 515 (1966); *Axelbank v. Rony*, 277 F. 2d 314 (1960). Concerning the problem of originality, the court in *Marken & Bielfield, Inc. v. Baughman Co.*, 162 F. Supp. 561 (1957), set forth the rule that "while it is not required that the compilation be the sole product of the maker, it is clear that something more than the compilation of information procured by others is required to make a map copyrightable. There must be originality resulting from the independent effort of the maker in acquiring a reasonable substantial portion of the information." Thus, in order for a map to be copyrightable, its preparation must involve a modicum of creative work. *Amsterdam v. Triangle Publications*, 189 F. 2d 104 (1951). In the *Amsterdam* case it was held that one who merely compiled a master map from various other maps which he had assembled largely from government sources, and did no original surveying, calculating, or investigating himself, was not entitled to a copyright on such map even though he had spent considerable time in assembling it and no other map contained all of the information to be found on his.

Another problem involved in interpreting the copyright law is determining what constitutes an infringement of copyrighted material. "Infringement consists in the doing of any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by the statute on the owner of the copyright." 18 C.J.S., Copyright §90, p. 212. As stated in *Orgel v. Clark Boardman* Co., 301 F. 2d 119 (1962), the test is whether one charged with infringement made an independent production or made a substantial and unfair use of the plaintiff's work. In addition, there must be a copying of a substantial *or* material part of the work. *Toksvig v. Bruce Pub. Co.*, 181 F. 2d 664 (1950).

In determining whether a substantial and material part of the copyrighted work has been copied, circumstances to be considered include the value of the part appropriated, relative value to each of the works in controversy, purpose it serves in each, and how far copied material will

tend to supersede the original or interfere with its sale. *Carr v. National Capital Press, Inc.*, 71 F. 2d 220 (1934). Naturally, an essential element necessary in proving infringement is "copying." Copying, in order to constitute infringement, must be able to be recognized by ordinary observation as having been taken from the work of another. *Dynow v. Bolton*, 11 F. 2d 690 (1926).

Therefore, if the plaintiff in an action for infringement can meet the test and prove that there has been a copying, and the defendant cannot prove lack of originality or consent on the part of the plaintiff, damages will be awarded and an injunction granted under 17 U.S.C.A. §101.

Accordingly, it is our opinion that the state printing board may not without the consent of the copyright owner reproduce or print a copyrighted map or other piece of printed matter.

December 12, 1967

COUNTY ZONING — Commercial feed lots — §358A.2, 1966 Code of Iowa. A former gravel pit currently used as commercial cattle feeding lot is not land which is primarily adapted, by reason of nature and area for use for agricultural purposes and therefore is not exempt from county zoning regulations. A commercial cattle feeding lot upon farmland exempt from county zoning is an agricultural purpose and does not change the exempt status of said farmland. (D. Hendrickson to Letz, Hardin County Attorney, 12/12/67) #67-12-7.

Mr. Carl R. Letz, Hardin County Attorney: This will acknowledge your letter of August 11, 1967, in which you request an opinion of this office. Your questions are here setforth as presented:

"The Board of Supervisors of Hardin County, Iowa, pursuant to the provisions of §358A have enacted regulations for Hardin County, Iowa.

"In the said Hardin County zoning regulations provisions have been made for the regulation of commercial feed lots within the boundaries of Hardin County. Hardin County has been zoned into six different zoning districts as follows: conservation district, rural district, suburban district, urban district, restricted district and unrestricted district. In rural districts commercial feed lots may be permitted upon application to the Hardin County Board of Adjustment and the obtaining from them of a conditional use permit.

"Two problems have arisen in Hardin County involving this particular regulation, they are as follows:

"a. An Iowa corporation has purchased a small tract of land just west of the unincorporated town of Gifford, Iowa, which said area is classified as rural area. They have constructed a commercial feed lot on this small tract of land which consists of pens for the feeding of cattle. Approximately 1,700 to 2,000 head of cattle are present in the feed lot. The corporation has no farming operation in connection with the feed lot operation and to the best of my knowledge, furnishes none of the feed. Any person who puts any cattle into said feed lot contracts with a local feed company to provide the feed for the animals placed in the feed lot itself. This operation constitutes the sole corporate activity.

"b. The Hardin County Board of Adjustment has received an application from a local farmer whose farm is located in a conservation area for a permit to construct a feed lot on his farm. This operation will differ from the operation described in paragraph a above in that all of the rest of the farm ground, consisting of 160 acres, will be farmed and all crops will be fed by the farmer to the cattle placed in the feed lot.

Some of the cattle in the feed lot will be owned by the farmer and some of the cattle will be owned by outside individuals who will contract for pen space and feed with the farmer.

"Based upon the above stated facts and circumstances, I wish to submit the following questions for opinion by your office:

"1. May either or both of the above operations be regulated by zoning in view of the exemptions granted 'agricultural purposes' in §358A.2 of the 1966 Code of Iowa?

"2. May the Board of Adjustment grant an exemption and issue a permit for a commercial feed lot based upon the circumstances set forth in paragraph b, above, or generally stated, in an area which is classified as conservation and in which no provision is made by zoning regulations for commercial feed lots. I realize that the zoning ordinance may be amended changing the classification of this area to rural, but I wish to know whether the adjustment board may avoid the procedures of amendment by granting an exemption under §358.10?

"3. Is any distinction to be drawn between the two operations as above described in paragraphs a and b?"

To answer the situation outlined in point "a" of your request, we are advised by your supplemental letter of November 21, 1967 as follows:

". . . the land was used as a gravel pit. This is one of the problems peculiar to this feed lot. The feed lot has been constructed in a basin and there is no opportunity for the filth and offal to wash and drain away."

Your attention is invited to Chapter 358A.2, 1966 Code of Iowa, which states:

"Farms Exempt. No regulation or ordinance adopted under the provisions of this Chapter shall be construed to apply to land, farm houses, farm barns, farm outbuildings or other buildings, structures, or erections *which are primarily adapted, by reason of nature and area,* for use for agricultural purposes, while so used; provided, however, that such regulations or ordinances which relate to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream shall apply thereto." (emphasis added)

The purpose of the statute is obviously directed at the protection of the farming community, to give freedom from possible restrictive county zoning. The intent of the statute is thus clear. What is necessary is the determination of what is meant by the words, *"which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used."*

Chapter 358A.2 was amended by Chapter 218 of the 60th General Assembly by eliminating from Chapter 358A.2 the words "as a primary means of livelihood." Prior to this amendment, the Attorney General had ruled in 1954 OAG at pages 96 and 98 that:

"The exemption provided by §358A.2, Code of 1950, is determined by the facts as to whether the land is used for agricultural purposes as a primary means of livelihood and not by the area of land with certain boundaries designated as a farm."

Since the test of use as a primary means of livelihood appears to now be withdrawn from determining whether the land in question is exempt from the county zoning regulations, it is then necessary to concentrate

on the words, "which are primarily adapted by reason of nature and area for use for agricultural purposes."

Your letter informs us that the land in question was, in fact, a gravel pit and not a farm or land primarily adapted by reason of nature and area for use for agricultural purposes.

Therefore, it is our opinion that the situation presented in point "a" of your letter as supplemented by the facts outlined in your letter of November 21, 1967, may be regulated by county zoning regulations and does not come within the exemption of §358A.2, 1966 Code of Iowa.

In regards to point "b" of your letter, the circumstances are changed for as we understand it, the land was by reason of nature and area primarily adapted for use for agricultural purposes. The fact that a proposed commercial feed lot is to be joined together with the farming operations does not in our opinion alter the fact that Chapter 358A.2 exempts this commercial venture.

Since the land is adapted for use for agricultural purposes the issue then becomes whether an operation of a commercial feed lot on such land in conjunction with the farming operation removes this land from the exemption of Chapter 358A.2, 1966 Code of Iowa.

An examination of §358A.2 of the 1966 Code of Iowa reveals that for the purposes of this issue the key term is "agricultural purposes" and whether a feed lot is an agricultural purpose by its nature within the meaning of this statute. The terms "agriculture," "agricultural," and "agricultural purpose" are generally given very broad meanings, including farming of all types and nearly anything reasonably associated with farming pursuits.

However, the term is broader than farming. In *Forsythe v. Village of Cooksville*, 356 Ill. 289; 190 N. E. 421 (1934), a controversy arose over a statute giving owners of tracts containing ten acres or more and used for agricultural purposes, on boarders of municipalities, the right to have them disconnected therefrom. The act was found unconstitutional on the basis of special legislation, because the term "agricultural purposes," being so broad, lead to unfair results. The court said at page 422:

". . . 'agriculture' is another indefinite word which in its broad sense 'includes farming, horticulture, and forestry, together with such subjects as butter and cheese making, sugar making, etc. Unless restricted by the context, the words 'agricultural purposes' have generally been given this comprehensive meaning.' If this definition is adhered to (and we observe no reason why it should not be), the owner of a tract of land on which there is located a creamer, a cheese factory, or one for sugar making, and otherwise within the provisions of the act, is entitled to have his land disconnected from the municipality. The owner of another tract in the same municipality, on a small portion of which there happens to be located a filling station, a wayside restaurant, a small store, an elevator, or any other nonagricultural enterprise common to suburban activity but otherwise within the terms of the act, has no such privilege."

In *Fairview Inv. Co. v. Lamberson*, 25 Idaho 72; 136 P 606 (1913), a corporation, formed for the purpose of making agricultural exhibits, and exhibiting horses and cattle and livestock, and giving exhibition of the speed of horses, was found to come within the purview of the law, and

be for agricultural purposes. In *Binzel v. Grogan*, 67 Wis. 147, 29 N. W. 895 (1886), it was said that "agricultural purposes" includes (among other things) the feeding of live stock. See also *Crouse v. Lloyd's Turkey Ranch*, 100 N. W. 2d 115, 251 Iowa 156 (1959); *Montgomery County v. Alsop*, 192 A 2d 484, 232 Md. 188 (1963); *McColeb v. Greer*, 267 S. W. 2d 543, 241 MA 736 (1954); *Fidler v. Zoning Bd. of Adjustment*, 182 A 2d 692, 408 Pa. 260 (1962); *Reedy v. Trummell*, 410 P 2d 654, 90 Idaho 318, 1966) where "agricultural purposes" or "agriculture" generally were held to include feeding of livestock. The scope of the term "agriculture" was setforth in *People v. City of Joliet*, 321 Ill. 385, 152 N. E. 159 (1926), where it was found to be the science and art of production of plants and animals useful to man, including, to variable extent, preparation of these products for man's use. See also *Miller v. Dixon*, 127 N. W. 2d 203, 206, 176 Neb. 659 (1964). Furthermore, the court added that the term is descriptive of the nature of use to which the land is put, and not the quantity of land involved.

It seems that, at least generally, it makes no difference if the activity is commercial in nature, it still may be an "agricultural" pursuit. *Cook v. Massey*, 38 Idaho 264, 220 P 1088 (1923); *Bonham & Young Co. v. Martin*, 18 N. J. Misc. 129, 11 A 2d 371 (1940). In determining whether a certain activity was agricultural, the United States Supreme Court, in *Farmers Reservoir & Irrig. Co. v. McComb*, 337 U. S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949), said:

"Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract."

And the test to be used was said to be:

"The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity."

In this particular case the statute in question supplied a definition of "agriculture":

"The definition is contained in §3(f) of the Fair Labor Standards Act. It says:

"Sec. 3(f). 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.'

"As can be readily seen this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning.

Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations."

Since "agricultural purposes" is not defined in §358A.2, the above definition is of little value except to show that even when defined, agriculture is given a broad meaning.

An appropriation annotation appears in 97 ALR 2d 697, 702, titled "Construction and application of terms 'agriculture,' 'farm,' 'farming,' or the like, in zoning regulations." On page 704 it is said, "The terms 'agriculture' or 'farming' or their derivatives have been construed or defined in a number of cases involving the use of such terms in zoning regulations. While the terms are more or less synonymous, there is authority for the view that an exemption for agricultural purposes is much broader than one for farms." See *Lincoln v. Murphy*, 314 Mass. 16, 49 N. E. 2d 453 (1943); *Fidlar v. Zoning Board of Adjustments*, supra. Examination of the annotation reveals that "agricultural purposes," "agriculture," etc., includes all of the farming process taken in the broadest sense. The cases are practically unanimous in holding that the breeding, raising, and feeding of cattle for preparation to market is an integral part of agriculture. This point is exemplified in *Rocky Mountain Metropolitan Recreation District v. Hix*, 136 Colo. 316, 316 P 2d 1041 (1957), where the state statute exempted land used for agricultural purposes from being included in recreation districts. The controversy arose on whether the use of uncultivated lands for the grazing of livestock was an agricultural purpose. The court held:

"The testimony, in its entirety, reveals that the only use to which the land in question has ever been put, or is now being put, is 'agricultural.' Testimony as to suitability of the land for subdividing or for mountain cabin sites and the like, does not change the character of its use. A sole use is certainly a primary use. In *Zeigler v. People*, 109 Colo. 252, 124 P 2d 593, 596, this court said:

" '. . . the term 'agriculture' includes the rearing, feeding and management of livestock. *Davis v. Industrial Commission*, 59 Utah 607, 206 P 267; 2 CJ, p. 988 §1; 3 CJS, Agriculture, §1. Webster defines 'agriculture' as: 'The art or science of cultivating the ground . . . including also feeding, breeding and management of livestock.' See also *De Fontenay v. Childs*, 93 Mont. 480, 19 P 2d 650; *Melendez v. Johns*, 51 Ariz. 331, 76 P 2d 1163; and *Hight v. Industrial Commission*, 44 Ariz. 129, 34 P 2d 404, all holding that the term 'agriculture' includes the raising of livestock.'

"It would appear then that fifteen years use of the land as grazing land has contributed in some part to the feeding, breeding and management of the cattle thereon. Range-fed livestock comprises a goodly share of the state's over-all production. *The grazing of livestock on uncultivated lands is just as much agricultural as fattening them in feed lots.*" (emphasis added)

Dicta by the court indicates that they were willing to take notice that the fattening of cattle in feed lots is an agricultural purpose. If that seems too presumptive, it must be conceded that the court thought it was settled that feed lot operations were part of the agricultural process. An interesting point in conjunction with this Colorado holding is that although feed lot operations are big business in Colorado, Iowa is the lead-

ing state in this livelihood. *Weed v. Monfort Feed Lots Inc.*, 156 Colo. 577, 402 P 2d 177 (1965). Being a leading agricultural state it only seems logical that the Colorado conclusion is reached; remembering the words of Chief Justice Vinson in the *McComb* case, supra, 337 U. S. 755, 760, 761:

"Whether a particular type of activity is agricultural depends, in large measure, upon the way in which the activity is organized in a particular society."

It seems that "agricultural purposes" is a broad enough term to include the operation of a feed lot as a part thereof. A fair summary statement appears in 3 Am. Jur. 2d 751, Agriculture §1:

"In its broad and commonly accepted sense, 'agriculture' may be defined as the science of art or cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account. 'Agriculture' is broader in meaning than 'farming'; and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, and, more recently, 'ranching.' More specifically, however, it refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied, products."

Section 358A.2 of the Iowa Code (1966), furnishes no definition of the term "agricultural purposes," neither does Chapter 358A. Therefore, the ordinary accepted meaning of the term is the one that must be used for our purposes. Webster defines agriculture as follows:

"The science or art of cultivating the soil, harvesting crops, and raising livestock: Tillage, Husbandry, Farming. (also) The science or art of the production of plants and animals useful to man and in varying degrees the preparation of these products for man's use and their disposal." *Webster's Third International Dictionary of the English Language Unabridged*, 1961.

The Iowa Court in *Crouse v. Lloyd's Turkey Ranch*, supra, was faced with the difficult question of when processing items of agriculture ceases to be an agricultural enterprise and becomes a commercial enterprise.

The question was whether the slaughtering of turkeys for sale was an agricultural pursuit within the exclusions of the Iowa Workman's Compensation Act. The Court indicated that the raising and marketing of livestock is certainly an agricultural pursuit within the purview of the Workman's Compensation Act while the slaughtering and processing of the livestock is a commercial enterprise as opposed to an agricultural pursuit.

The facts, as you have indicated in your letter to this office, reveal that the primary function of the feed lot operator is the raising, managing and feeding of cattle for marketing. The determination of what is an agricultural purpose and what is a non-agricultural purpose is not easy. However, the above cases attempt to arrive at a workable definition. It is our opinion that the definition of "agricultural purpose," as indicated by a combination of the above authority, is broad enough to include the

operation of a commercial feed lot such as you have described.

Therefore, since farm land as described in your letter, is specifically exempt from county zoning regulations by virtue of Chapter 358A.2, it is our opinion that the use of this land for a commercial feed lot does not remove said land from the exemption provided by Chapter 358A.2, 1966 Code of Iowa.

However, as pointed out above, land formerly used for a gravel pit does not gain exemption from county zoning regulations by virtue of the fact that said gravel pit is used for a commercial feed lot. Thus, it is our opinion that the gravel pit as described in your correspondence to this office is subject to county zoning regulations.

We must emphasize that the facts of each situation must be analyzed for other commercial enterprises might change the status of the land. We also emphasize the fact that Chapter 358A.2, 1966 Code of Iowa, does not exempt said commercial operations from meeting standards as established by health authorities or preclude said operations from constituting nuisances under Chapter 656, 1966 Code of Iowa.

December 12, 1967

DEPARTMENT OF HEALTH: §147.3, 1966 Code of Iowa — Good moral character: §147.3, 1966 Code of Iowa, cannot be interpreted to mean that a person, once convicted of a felony, can never show good moral character solely because of his conviction. (Seckington to Brown, Board of Control, 12/12/67) #67-12-2

Mr. M. J. Brown, Director, Division of Administrative Services, Board of Control: Receipt of your letter of November 8, 1967, is hereby acknowledged. In that letter, you ask this office for an opinion on the following question:

"Does the fact that an applicant for a license required under Section 147.2 who has been accused and convicted of a felony at one time in his or her life, disqualify him or her from being issued such a license because of the reflection of such a conviction on the 'good moral character' of the applicant under Section 147.3, providing such applicant meets all other qualification requirements?"

Section 147.3, 1966 Code of Iowa, relating to qualifications for licenses to practice various professions, reads in part as follows:

"No person shall be licensed to practice a profession under this title until he shall have furnished satisfactory evidence to the department that he has attained the age of twenty-one years and is of good moral character . . ."

Good moral character is not a phrase which is easy to define. The opinion from this office dated November 7, 1966, to Father Cyril F. Engler quotes some cases which dealt with this point under the federal immigration and naturalization laws. Those laws are not exactly analogous because the applicant must show good moral character for a period of five years prior to the application for citizenship. Those statutes recognize the fact that a mistake or violation of law does not forever imprint the badge of bad moral character on a person.

Although §147.3, 1966 Code of Iowa, does not have a time limit on the showing of good moral character, it would seem unreasonable to say that

a conviction of a felony at one time in a man's life bars him forever from showing himself to be of good moral character.

The Iowa Supreme Court in the case of *Madsen v. Town of Oakland*, 219 Iowa 216, 257 N. W. 549 (1935), in construing a statutory requirement of "good moral character" for a person applying for a Class "B" beer permit said:

"There is perhaps, no perfectly accurate or comprehensive definition of moral character. The term must be interpreted in the light of the purpose to be served."

See also the Iowa case of *Lehan v. Greigg*, 257 Iowa 823, 135 N. W. 2d 80 (1965), which dealt with the same topic as the *Madsen* case, above.

On August 30, 1951, this office issued an opinion to Mr. Clark O. Filseth, which opinion dealt with the question of good moral character. A copy of that opinion is enclosed for your reference.

In determining whether a person who has been convicted of a felony is of good moral character, a question of fact within the discretion of the licensing authority, consideration should be given to the nature and degree of the offense; the age and circumstances of the applicant at the time he committed the offense; the punishment imposed; whether probation, parole, reprieve, pardon, commutation or restoration of citizenship has been granted; the injuries suffered as a consequence of the crime; the history of the applicant before and after the crime; his reputation in the community; his family and social relationships and his apparent influence thereon; and all such other data as may be relevant to that issue.

As stated in *Words and Phrases*, Vol. 18A, page 20, supplement, in summarizing the language of the Court in *State ex rel McAvoy vs. Louisiana State Board of Medical Examiners*, 115 So. 2d 833, 238 La. 502:

"Under statute requiring that applicant for license to practice medicine be of 'good moral character,' while quoted term is ambiguous and may be defined in many different ways, it may be broadly defined to include elements of simple honesty, fairness, respect for right of others and for laws of state and nation, but any standard of qualification must have a rational connection with applicant's fitness and capacity to practice his profession."

If, therefore, the licensing authority finds that an applicant meets the tests set forth in the *McAvoy* case, above, taking into consideration also the data suggested by this office, then the licensing authority would be entirely within their rights to issue the license. I do not believe that §147.3, 1966 Code of Iowa, can be read to say that a conviction of a felony is conclusive proof of bad moral character for the duration of the applicant's life, and therefore the department would not be reasonable in denying a person a license merely because of a former conviction.

It is therefore the opinion of this office that a conviction of a felony at some time during a person's life does not necessarily bar him forever from holding a license to practice his profession, for which he is otherwise qualified.

December 12, 1967

BOARD OF CONTROL — Proceeds of sale of Clive Prison Honor Farm — §218.94, 1966 Code; Chapter 3, §2, 61st G. A. All funds received at closing of sale, including those in excess of contract price, are "proceeds" and to be credited pursuant to acts set out. (Ivie to M. J. Brown, Board of Control, 12/12/67) #67-12-1

Mr. M. J. Brown, Administrative Assistant, Board of Control of State Institutions: You have requested an opinion as to whether the additional funds paid by the purchasers of the Clive Prison Honor Farm in excess of the amount originally bid for said purchase should be credited to the General Fund of the State or whether said additional funds are to be credited as directed by Chapter 3, §2, Acts of the 61st General Assembly and Chapter 218.96, 1966 Code of Iowa.

In your letter of November 29, 1967, you discuss the terms "penalty" for delayed closing, and "interest." I conclude that the terminology applied to those funds received over and above the original bid price is not determinative of the question you raise, whether they result from "penalty" or "interest."

What is determinative of the question are the words "proceeds to be derived" as they appear in Chapter 3, §2, 61st General Assembly, and "the proceeds thereof" as they appear in Chapter 218.94, 1966 Code of Iowa.

Webster's Seventh New Collegiate Dictionary defines "proceeds" as "the total amount or the profit arising from an investment, transaction, levy or business; return."

While it is certain that the 61st General Assembly did not anticipate the two year delay in closing the sale of the prison farm, it is also certain that the act passed by that assembly, being Chapter 3, §2, contains the word "proceeds." Such terminology as "sale price," "bid price" or "contract price" would have restricted the funds made available to the Board of Control by virtue of their enactment.

All funds received upon the formal closing of the sale of the Clive Prison Farm are to be credited as set out in Chapter 3, §2, 61st General Assembly and Chapter 218.94, 1966 Code of Iowa.

December 13, 1967

COUNTIES AND COUNTY OFFICERS — **Compatibility of office, Clerk of court and chairman of soldiers relief commission** — §§340.1, 342.1, 342.2, 1966 Code of Iowa. There is neither incompatibility nor conflict of interest involved in an elected clerk of court holding the additional office of chairman of the soldiers relief commission and such clerk may retain the pay and expenses drawn by him for serving on such commission. (Haesemeyer to Smith, State Auditor, 12/13/67) #67-12-9.

The Hon. Lloyd R. Smith, Auditor of State: Reference is made to your letter of November 8, 1967, in which you request an opinion of this office as to whether or not an elected clerk of court can legally serve as chairman of the soldiers' relief commission and draw pay and expenses for being on the commission.

An examination of prior opinions of the attorney general do not disclose that the precise question you present has been raised before. However, it has been determined in the past that an employee of the state department of agriculture may be a member of the soldiers' relief commission, OAG 10/13/55, and that a member of a city council may be appointed secretary of a soldiers' relief commission, OAG 2/4/52. On the other hand in an opinion of the attorney general issued on December 11, 1962, it was stated that the offices of county attorney and member of the soldiers' relief commission are incompatible. However, in the latter case the disqualification stemmed in large part from the fact that the county attorney would have as one of his duties advising the members of the soldiers' relief commission which in effect would mean that he would be advising himself.

It seems clear that both elected clerk of court and chairman of the soldiers' relief commission are public offices as that term is defined in *Hutton v. State*, 235 Iowa 52, 16 N. W. 2d 18 (1947). However, a public officer other than a legislator may hold an additional public office or employment so long as there is no incompatibility between the two offices held. Guidelines for determining whether or not incompatibility exists between two offices have been laid down by the Iowa Supreme court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965) as follows:

'The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

Applying the foregoing tests or criteria to the situation you describe we find that there is neither incompatibility nor a conflict of interest involved in an elected clerk of court holding the additional office of chairman of the soldiers' relief commission.

There remains, however, the added question of whether or not a clerk of court who serves as chairman of the soldiers' relief commission may retain the pay and expenses drawn by him for serving on such commission. §340.1, Code of Iowa, 1966, provides in part:

"The annual compensation of the . . . clerk of the district court shall be computed from the following table:"

Following this statement such section 340.1 sets forth a table of salaries based upon the population of the county in question. §§342.1 and 342.2 provide:

"342.1 Fees belong to county. Except as otherwise provided, all fees and charges of whatever kind collected *for official service* by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county. (Emphasis added)

"342.2 Record of fees. Each such officer shall keep a record to be known as the 'fee book' of the office to which it relates and shall be kept in such office as a part of the permanent county records. It shall be ruled in appropriate columns for the date, kind of service, for whom rendered, and the amount of fee collected, and when the charge is for recording an instrument, the names of the parties thereto. All said items shall be entered upon said record at the time the service is rendered."

It is clear from the foregoing that the clerk of court must turn over to the county all fees and charges of whatever kind collected by him for "official service." The only question thus remaining is whether or not the words "official service" as used in the above quoted statute refer only to fees and charges received by a clerk *qua* clerk or for any official service whether or not related to his capacity as clerk of court. In *Moore v. Mahaska County*, 61 Iowa 177, 16 N. W. 79 (1883) and *Baldwin v. Stewart, et al*, 207 Iowa 1135, 222 N. W. 348 (1928), the same question was before the Iowa supreme court for determination; namely, whether or not the clerk of a district court was entitled to retain compensation received as a member of a county commission of insanity. In both cases the court held that all amounts received by the clerk for service on the insanity commission had to be turned over to the county. However, these cases may be distinguished from the present case in that the clerk of court was required by law to be both a member and clerk of the insanity commission, whereas he has no corresponding statutory duty to serve on the soldiers' relief commission. As noted by the court in *Baldwin v. Stewart, supra:*

"The statute imposes upon him as clerk of the district court the duties of a member and clerk of the commission of insanity, and he is as much bound to perform such duties as he is those in his official capacity as clerk."

Thus, in *Burlingame v. Hardin County*, 180 Iowa 919, 164 N. W. 115 (1917), it was held that a clerk of the district court, where appointed as referee to examine reports of executors, guardians, etc., is not bound to pay into the county treasury sums received as compensation for such services since such services were not a part of his official duty. In its decision, the court in *Burlingame*, stated:

"The right of the county to demand and recover money received by the clerk depends solely upon the question whether such money has been received by him in his official capacity. A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county. 'His duties are fixed by statute, and when these are performed he is not required to do more.' Polk County v. Parker, 160 N. W. 320, L.R.A. 1917 B., 1176.

"If for example he receives payment or fees as a witness in a civil action, or for service as one of the board of arbitrators, or as clerk of an election board, or as laborer in the harvest field, or indulges in liter-

ary work for which he receives more or less in royalties, or being a merchant, or banker, or mechanic, wins profits wholly disconnected with the duties placed upon him by statute, no one would soberly contend that the county or any of its officers could rightfully lay claim to any part of the income or earnings so accruing. In each and every case cited and relied upon by the appellee the right of the county to compel an accounting by the clerk has been exercised solely upon the admitted or proved fact that the moneys in question were received by him in his official capacity. In Moore v. Mahaska County, 61 Iowa 177, 16 N. W. 79, the fees earned by the clerk for serving upon the insane commission were held to come within this desscription because the statute expressly imposed that duty upon him in his official capacity."

Since a clerk of court has no statutory duty or obligation to serve on a soldiers' relief commission but may accept or reject such appointment in his discretion it is our opinion that service by a clerk of court on such a commission is not "official service" within the meaning of §342.1, and that pay and expenses drawn by a clerk from a soldiers' relief commission need not be paid over to the county. *Burlingame v. Hardin County, supra;* 42 OAG 193; Cf. 40 OAG 12, 40 OAG 381, 38 OAG 208, 28 OAG 252; Contra. OAG Strauss to Atwell, September 15, 1967.

December 13, 1967

SCHOOLS: COUNTY BOARD. There is no statutory authority for a county board of education to take title to real estate to be used for board of education offices and related purposes. (Nolan to Allen, State Representative, 12/13/67) #67-12-10.

The Hon. Laurence Allen, State Representative: This replies to your letter of November 29, 1967, in which you requested a formal opinion on the following:

"Does the law of Iowa permit a county Board of Education, i.e.: The Pottawattamie County Board of Education, to take title, in the name of said board, to a tract of improved land, i.e.: a former military base.

"May the Pottawattamie County Board of Education hold its meetings, and maintain its offices and the offices of the County Superintendent of Schools, in a rural area, beyond the corporate limits of the county seat, and in fact, closer to the corporate limits of another town not the county seat."

In answer to your first question I find no authority in Chapter 273 relating to the powers and duties of the county board of education or elsewhere for the county board of education to take title to real estate to be used for board of education offices and other purposes incidental to the duties of the county board of education. Where county boards of education of two or more adjacent counties by concurrent action have merged into one school system, such joint board has the authority to provide office facilities by renting or leasing the same for a period of not to exceed ten years under authority provided in §273.22(7). In such a case the board must designate a central office and may designate branch offices without the statutory limitation that such offices be maintained at the county seat of any or all participating counties. In all other instances, the office space for the county superintendent and for the officers of the county board of education is to be furnished by the board of supervisors pursuant to §§273.11 and 332.9.

While it is clear that the county board of supervisors has authority "to

purchase, for the use of the county, any real estate necessary for county purposes; to change the site of, or designate a new site for any building required to be at the county seat, when such site shall not be beyond the limits of the city or town at which the county seat is located at the time of such change, and to change the site of and designate a new site for the erection of any building for the care and support of the poor" §332.2(12), this authority does not appear to be available for the purchase of the tract of land because the office of the county superintendent of schools is to be located at the county seat (§332.9) and such offices must be maintained at the county seat. 1919-20 O.A.G. 526.

The answer to your second question is included in that given for the first.

December 20, 1967

SCHOOLS: AREA SCHOOL FUNDS. Area schools are not limited to the two funds specified by §291.13 but may establish additional funds reflecting moneys to be received and expended pursuant to §280A.18. (Turner to Smith, State Auditor, 12/20/67) #67-12-11.

The Hon. Lloyd R. Smith, Auditor of State: This is in answer to your letter dated December 4, 1967, which contains the following request:

"Section 291.13, Code of 1966, states: 'The money collected by a tax authorized by the electors or the proceeds of the sale of bonds authorized by law or the proceeds of a tax estimated and certified by the board for the purpose of paying interest and principal on lawful bonded indebtedness or for the purchase of sites as authorized by law, shall be called the schoolhouse fund and, except when authorized by the electors, may be used only for the purpose for which originally authorized or certified. All other moneys received for any other purpose shall be called the general fund. The treasurer shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied.'

"The Area Schools' Uniform Accounting System Advisory Committee members want to know if this specifically limits the area schools to the two funds, or if additional funds may be established?"

It is my opinion that the provision quoted above relates only to revenue derived by tax levy and other sources in districts other than area schools. The tax levies authorized for area schools are determined by §§280A.17 and 280A.22, 1966 Code of Iowa as amended by Chapter 244, Section 12, Acts of the 62nd General Assembly (S.F. 616). Senate File 616 in pertinent part provides:

"It is the policy of this state that the property tax for the operation of area schools shall not in any event exceed three-fourths (¾ths) mill, and that the present and future costs of such operation in excess of the funds raised by such three-fourths (¾ths) mill levy shall be the responsibility of the state and shall not be paid from property tax. The general assembly in 1971 shall review the need for and the advisability of such three-fourths (¾ths) mill levy."

Section 280A.18 as amended by S.F. 616 provides in pertinent part as follows:

"In addition to revenue derived by tax levy, a board of directors of a merged area shall be authorized to receive and expend:

"1. Federal funds made available and administered by the state board, for such purposes as may be provided by federal laws, rules, and regulations.

"2. Other federal funds for such purposes as may be provided by federal law, subject to the approval of the state board.

"3. Tuition for instruction received by persons who reside outside the area, or by persons twenty-one years of age or over or who are high school graduates residing within the area.

"4. State aid to be paid in accordance with the statutes which provide such aid.

"5. State funds for sites and facilities made available and administered by the state board.

"6. Donations and gifts which may be accepted by the governing board and expended in accordance with the terms of the gift without compliance with the local budget law."

In view of the above it is my opinion that the area schools are not limited to the two funds specified by §291.13 of the Code and that additional funds reflecting the moneys received and expended under the authority of §280A.18 may be established.

December 26, 1967

STATE OFFICERS AND DEPARTMENTS — H.F. 718, 62nd G. A., §19.15 — Executive Council. The executive council has implied power under H.F. 718 and Chapter 19, 1966 Code, to negotiate contract for moving state offices into Valley Bank Building. (Turner to Stephen C. Robinson, Sec. Executive Council, 12/26/67) #67-12-12

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: By your letter of December 6, 1967, you have requested an opinion of the attorney general as to whether the executive council has authority to enter into an agreement with the Des Moines Transfermen's Association "to accomplish the relocation moves of various state departments."

As I understand it, the purchase of the Valley Bank Building under the provisions of House File 718, Acts of the 62nd General Assembly, has been accomplished. Under the provisions of §3 thereof, it is stated in part "the state executive council may assign space to state agencies, boards, and commissions as though the property were located upon the capitol grounds" and that the provisions of §19.15, Code of Iowa, 1966, relating to the executive council's power to control the assignment of rooms in the capitol building and all buildings upon the capitol grounds, "shall apply when applicable."

While there appears to be no specific or express power in the Council relating to contracts of the character in question, it is necessarily and fairly implied from the aforesaid laws and the appropriation made to the Council with reference thereto, that the Council has power to execute contracts with reputable and reliable persons or corporations regularly engaged in the moving business for the moving of the furniture, equipment, files and other paraphernalia of such state agencies, boards, and commissions, particularly in absence of the power, authority and appropriation to these agencies so that they could accomplish these moves on their own. This construction is consistent with other provisions of Chapter 19 of said Code, including §§19.29 and 19.30, the provisions of which should be observed and followed in negotiating the necessary contract or contracts.

It is also my understanding that no one Des Moines mover has the equipment or experienced manpower necessary to undertake all of the

moves contemplated in a prompt and efficient manner but that the association in question is composed of several Des Moines corporations engaged in the moving business, to wit: A-1 Moving and Storage, Blue Line Storage, Bruce Transfer and Storage, Des Moines Transfer and Storage, Merchants Transfer and Storage, and White Line Transfer and Storage, all of which, together, will undertake the project on the basis outlined in the Association's proposal dated December 1, 1967, a copy of which is attached to your request.

In my opinion, the Council has authority to enter an agreement on the basis of the proposal provided that each of said moving corporations (and any other movers employed) is a party thereto with the requisite officer or officers thereof executing said agreement in writing on terms similar to those outlined. In this connection, I would suggest that the agreement or agreements contain a provision that each of said movers be jointly and severally liable and financially responsible to the state for damages occasioned by the negligence or failure of performance of any of said movers.

As I recall it, their tariffs ordinarily include certain minimum insurance coverage about which you may wish to inquire, considering that any records lost by the state in transit, by fire or otherwise, might be irreplaceable and an incalculable damage to the people.

December 30, 1967

COUNTY AND COUNTY OFFICERS — Township trustees — §359.42, Code of Iowa, 1966. The power to sell the township's fire station is indispensably essential to providing the township with effective fire protection. (Martin to Fenton, Polk County Attorney, 12/30/67) #1-1-68

Mr. Ray Fenton, Polk County Attorney: I am in receipt of your letter in which you inquire as to the authority of township trustees to sell and convey real estate presently used for the purpose of housing fire fighting equipment belonging to the township. You submit the following factual situation in conjunction with your request:

Several years ago the township purchased the premises in question under authority of §359.42, Code of Iowa, 1966, which in pertinent part reads as follows:

"359.42 Authorization. The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and *provide housing for same* and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa. . . ." (Emphasis added)

The township in recent years has experienced tremendous residential and commercial growth which in turn has resulted in the continued growth and expansion of its volunteer fire department with respect to both personnel and equipment. The fire station located on the premises in question is inadequate in terms of space for housing of the equipment presently owned by the township and due to the growth previously described, in order to maintain a standard of fire protection necessary and desirable, the township in the near future must purchase two additional pieces of fire equipment.

The present premises are located just off a major exit of Interstate 80, north of the city of Des Moines, and the location of the fire station has become undesirable because of access problems caused by the routing of the traffic past the front of the fire station. While this has created a

dangerous situation as far as use of the facility, it has made the site valuable from the standpoint of commercial usage and, in fact, the township has been offered a price for the premises that many times exceeds the original cost of the land and the fire house facility itself.

The trustees are then faced with this dilemma: The present structure is inadequate for proper storage of fire fighting equipment and the location of the structure presents a hazard, not only to the Saylorville Fire Department, but to persons exiting off Interstate 80 who must pass directly in front of the building.

The Iowa Supreme Court in the case of *Wapello County v. Ward*, ... Iowa....., 136 N. W. 2d 249, discussed and defined the nature of a township in the following terms:

"This means that a county, or school district, or township or similar governmental creation is, in fact, a municipal corporation in carrying out the purpose, generally limited, for which it was formed, or with which it may be later endowed. . . .

"Our holding is limited to the specific point that they may, in some respects and for the limited purposes for which they are organized or which they may be later given, be in fact municipal corporations and for those purposes are to be treated as such."

The Iowa Supreme Court has stated that municipal corporations possess the following powers: (1) those expressly granted to them by the legislature; (2) those necessarily or fairly implied in or incident to powers expressly granted; (3) those indispensably essential and not merely convenient, to the declared objects and purposes of the municipality. *Bd. of Water & Light Trustees of City of Muscatine v. City of Muscatine*, 253 Iowa 558, 113 N. W. 2d 260 (1962); *Kane v. City of Marion*, 251 Iowa 1157, 104 N. W. 2d 626 (1960); *Gritton v. City of Des Moines*, 247 Iowa 326, 73 N. W. 2d 813 (1956); *City of Mason City v. Zerble*, 250 Iowa 102, 93 N. W. 2d 94 (1959).

When these cases are read together with the Wapello County case, it becomes apparent that in examining an authority question involving a township, the authority of the township is broader than the statute and includes not only the express language of the statute but also any power which may be implied or any power which is indispensably essential.

Section 359.42, Code of Iowa, 1966, set forth above, gives township trustees authority to house fire equipment. The Code is silent as to what the trustees are to do once the fire station becomes obsolete.

However, as discussed above, if a power is indispensably essential to the declared object and purpose of a township, the township has the power. An example of this may be seen in the case of *City of Des Moines v. Reiter*, 251 Iowa 1206, 102 N. W. 2d 365 (1960). There the court held that a statute conferring upon municipalities express power to install and operate parking meters, implied power to enforce parking meter restrictions by imposing resonable penalties upon violations. It appears to us that it is just as reasonable to imply the power to sell an intiquated and non-functional facility in order to carry out the statutory function of providing adequate housing for township fire equipment. To say otherwise is to rule that once a township purchases property for housing its fire equipment, it must continue to use the same property despite its inadequacies.

It is therefor the opinion of this office that the Saylorville township trustees do have the power to sell and convey real estate presently used for the purpose of housing fire fighting equipment belonging to the township but no longer suitable for that purpose.

January 4, 1968

SCHOOLS: Bus Transportation — §§285.1, 26.6, Code of Iowa, 1966. A school board has discretion in the matter of providing transportation for any elementary pupils and for high school pupils residing more than 2 miles from school regardless of the population of the city or town. (Nolan to McCray, State Representative, 1/4/68) #68-1-2.

The Hon. Paul B. McCray, State Representative: Your letter of November 20, 1967, referred to your previous request for an opinion on the question of whether §285.1 permits a school board to provide transportation to pupils residing within the city limits who live four miles from school. Your letter states that your inquiry concerns Bettendorf, Iowa, and further asks how the population is to be determined.

Section 285.1 provides:

"1. The board of directors in every school district shall provide transportation or the costs thereof for all resident pupils attending public school, kindergarten through twelfth grade, who reside more than one mile from the school designated by the board for attendance, except as hereinafter provided:

"a. Elementary pupils residing within the limits of a village, town, or city of less than twenty thousand population . . . must live more than two miles from the school . . .

"b. Elementary pupils residing in a district wherein is located a city of twenty thousand or more in population must live more than two miles from the public school designated for attendance . . .

"Boards at their discretion may provide transportation for resident elementary children attending public school who live less than the distance at which transportation is required.

"d. High school pupils residing within the limits of a village, town, or city of less than twenty thousand population wherein the designated school is located are not entitled to transportation.

"e. High school pupils residing in a district containing a city of twenty thousand population or over must live more than three miles from high school designated for attendance to be entitled to transportation thereto.

"Boards at their discretion may provide transportation for all high school pupils residing inside the corporate limits of any town, village, or city, and more than two miles from designated high school."

The above quoted provisions clearly authorize the school board *it its discretion* to provide transportation for any elementary pupils and for high school pupils residing more than two miles from a designated high school regardless of whether the population of the city or town is more or less than 20,000.

In answer to your question concerning how the population is to be determined I call your attention to §26.6 of the 1966 Code of Iowa as amended, which provides:

"Whenever the population of any county, township, city or town is referred to in any law of this state, it shall be determined by the last certified, or certified and published, official census unless otherwise provided. However, the population figure disclosed for any city or town as the result of a special federal census shall be considered for no other purposes than the application of sections 123.50 and 312.3. Whenever a special federal census is hereafter taken by any city or town, the mayor and council shall certify the said census as soon as possible to the secretary of state and to the treasurer of state as otherwise herein provided, and failing to do so, the treasurer of state shall, after six (6) months from the date of said special census, turn over such moneys as authorized by sections one hundred twenty-three point fifty (123.50) and three hundred twelve point three (312.3) to the general fund of the state, and continue to do so until such time as certification by said mayor and council is made, or until the next decennial federal census. If there be a difference between the original certified record in the office of the secretary of state and the published census the former shall prevail."

January 5, 1968

COUNTY OFFICERS: Term of Supervisors — §§331.1, 331.2, 331.7 and 39.18 as amended by S.F. 297. Where nomination paper specified three year term, in absence of charge that voters were misled by fact that ballots stated only the date when the term commenced and not the length of the term, it must be presumed tha the term is one for four years as provided by statute. (Nolan to Greenfield, Guthrie County Attorney, 1/5/68). #68-1-4.

Mr. C. F. Greenfield, Guthrie County Attorney: I have your letter of November 20, 1967, in which you raise several questions concerning the election of supervisors. In your letter you stated that in 1964 "one of our supervisors ran for the office which term commenced January 1, 1966, and was elected. The ballot merely stated that this was a term commencing January 1, 1966. The petitions for election stated this was a three-year term."

I agree with your conclusion that in spite of the designation on the petition, the term commencing January, 1966, was a four year term. The reason for this conclusion is that §331.1 of the Code of Iowa provides for four year terms for the office of supervisors. Section 4 of Chapter 77 of the Laws of the 60th General Assembly contained a temporary provision with respect to the terms of supervisors taking office in January, 1963, whereby the office should be refilled by election for a succeeding three year term in 1964. This law was held by this office to be inoperative and of no force and effect. 1964 O.A.G. 6-22.

Sections 331.2 and 331.7 of the Code require that when the electors vote to increase or reduce the number of supervisors the "length of term for which any person is a candidate and the time when the term begins shall be indicated on the ballot." There must be substantial compliance with specific requirements as to form and contents of ballots since they are mandatory. If there was such a radical failure to substantially comply with the law as to lead to the conclusive presumption that damage, detriment and prejudice unavoidably followed the election is a nullity. *Honohan v. United Community School District*, 258 Iowa 57, 137 N. W. 2d 601, 1965.

However, in the absence of any charge that voters were misled by the fact that the ballot stated only the date when the term commenced and

not the length of the term, it must be presumed that the term is one of four years as provided by statute. §§39.18 and 331.1.

Under the provisions of S.F. 297 which amends §39.18, no term of office is shortened, however when the term of certain supervisors now in office has expired such term shall be "refilled by a member elected to a three year term or a five year term, to be specified on the ballot as determined by the board, so that the terms of no more than a bare majority of the board will expire in the same year." The board of supervisors has the option to determine for this purpose whether a three year term or a five year term is most suitable to the county.

January 5, 1968

STATE OFFICERS AND DEPARTMENTS — **State printing board — purchase of new equipment** §§15.38, Code of Iowa, 1966; H.F. 771, S.F. 853 (62nd G. A.). Funds appropriated by H.F. 771 may not be used for the purchase of "copy center" equipment for centralized printing although the funds appropriated to the printing board by §37 of S.F. 853 could be used for that purpose. (Haesemeyer to Robinson, Secy., Executive Council, 1/5/68) #68-1-16.

Mr. Stephen C. Robinson, Sec., Executive Council: Reference is made to your letter of December 19, 1967, in which you request a formal official opinion of this office with respect to a request from the state printing board that the executive council take bids for the purchase of "copy center" printing equipment for centralized printing with the cost of such equipment to be paid from funds available in the "centralized revolving fund."

By the expression "centralized revolving fund" I take it you refer to the funds appropriated by H.F. 771, 62nd G. A. This act of the last general assembly provides:

"Section 1. There is hereby appropriated from the general fund of the state to the state printing board for the biennium beginning July 1, 1967 and ending June 30, 1969 the sum of one hundred ten thousand (110,000) dollars, or so much thereof as may be necessary, to be used for necessary printing and binding.

"Sec. 2. Funds appropriated for printing and binding by this Act, in the discretion of the printing board, may be used in supplying paper stock, multigraph or mimeograph work, and original payment of printing and binding claims for any of the states departments, bureaus, association, and institutions. Any sum so used shall be reimbursed to the printing board and returned to the credit of the appropriation made for printing and binding. The payments shall be made to the printing board in the same manner as other claims against such departments are paid."

It is to be observed that Sec. 2 of H.F. 771 is quite specific in describing the use to which the funds appropriated by such act may be put. The purchase of new presses and printing equipment is not among the permissible uses of these funds and this is true notwithstanding the fact that in the past such funds have been used to purchase new machines.

Nevertheless, the printing board has the authority to acquire machinery and equipment necessary to its efficient functioning. §15.38, Code of Iowa, 1966, as amended by H.F. 92, 62nd G. A., provides in part:

"The state printing board is hereby authorized and directed:

1. To possess itself of all such presses, and other printing equipment, inventory all of such described equipment, and through the executive council sell such of the above described machinery and equipment as is no longer necessary or is unfit for use.

2. To maintain such machinery and equipment and in its discretion, when such equipment is outmoded and becomes obsolescent, to purchase machinery and equipment for replacement purposes.

3. * * *"

However, there would have to be a sufficient appropriation to the printing board to enable it to purchase such equipment and, as indicated above, funds appropriated under H.F. 771 would not be available for that purpose. Nevertheless, there is appropriated to the printing board by Sec. 37 of S.F. 853 the sum of $58,090.00 for support, maintenance and miscellaneous purposes for each year of the current biennium. Assuming that this latter appropriation would provide the printing board with sufficient funds to purchase the copy center equipment the proper procedure would, in our opinion, be for the executive council to take bids for and acquire the equipment following the procedures outlined in chapter 19, Code of Iowa, 1966, pay for the same from the funds appropriated by §19.28 and thereafter be reimbursed out of the printing board's appropriation for support, maintenance and miscellaneous purposes.

January 5, 1968

MOTOR VEHICLES — Police and Emergency Vehicles, Compliance with traffic laws and regulations — §§321.1(26), 321.230, 321.231, 321.232 and 321.236, Code of Iowa, 1966. A law enforcement officer must abide by the state or local laws regulating the operation of a motor vehicle when parking on or off the traveled portion of the highway except in emergency cases or when in immediate pursuit of an actual or suspected law violator. A government or law enforcement official may not park contrary to state and local laws regulating parking while looking for a prospective law violator. The driver of an authorized emergency vehicle when responding to an emergency call upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety but may proceed cautiously past such red or stop sign or signal. At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal. (D. B. Hendrickson to O'Malley, State Representative, 1/5/68) #68-1-3

Hon. Bernard J. O'Malley, State Representative: Reference is made to your letter of August 15, 1967, wherein you requested an opinion of this office on the following:

"May a member of the law enforcement division of the State, the Highway Patrol, sheriff, or police, particularly on highways and primary roads and highway extensions through cities and Towns or roads over which the Highway Commission has sole or concurrent jurisdiction, illegally park or park in a manner that a normal or average citizen of this State or this Country would be arrested for doing? The particular instances I have in mind are as follows:

"1. In parking of a motor vehicle on the travelled portion of a highway or off on the portion of a highway for periods other than for an emergency, does an officer or other person of like nature have any more authority to illegally park, unless making an immediate arrest, than any other individual?

"2. May a government official, whether law enforcement or otherwise, park his automobile on the public parking, on a sidewalk in front of a

person's house, or on the grass on a public parkway for any long period of time (one-half hour or longer)? If he is looking for a prospective speed violator, who may or may not come along, can he do such?

"The reason for this question is the result of complaints concerning officers disturbing, ruining, and cutting up the parking in front of individual's houses, who have the responsibility of seeing that it is kept up, and consequently, this does not aid the appearance of the property.

"Secondly, they park their vehicles on the sidewalks, which are not made for the travelling of automobiles of any kind or nature nor for parking, and when the cement cracks or is destroyed, then, of course, it is the property owner who must pay to have them fixed, or it is assessed if the City does it.

"In addition to this, it obstructs pedestrians in use of the sidewalk or causes them to proceed on the private property of those individuals in front of whose house the sidewalk exists.

"Also, a vehicle going up and over the curb causes destruction to the curbing, and any repair of this, when and if ever repaired by the proper authorities, is again assessed against the property owner.

"An additional safety hazard in this area is the fact the officers often leave or suddenly open their doors as traffic is pursuing on the travelled highway or roadway, thereby causing an immediate obstruction and safety hazard, and particularly in those cases in which they park close to the curb.

"3. May a law enforcement officer run through a red light or run through a stop sign when not in apparent pursuit of a law violator; by this I mean that no siren or light is on and apparently no one is in front of him, at least in visible sight?"

Your attention is invited to the following statutes which generally regulate public officers in the operation of motor vehicles upon the streets and highways in Iowa.

Chapter 321.230 of the Iowa statutes regulating motor vehicle operation states:

"The provisions of this chapter applicable to the driving of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state or any county, city, town, district or any other political subdivision of the state, subject to such specific exceptions as are set forth in this chapter with reference to authorized emergency vehicles."

Chapter 321.232, 1966 Code of Iowa, further states:

"No driver of any authorized emergency vehicle shall assume any special privilege under this chapter except when such vehicle is operated in response to an emergency call or in immediate pursuit of an actual or suspected violater of the law."

An authorized emergency vehicle is defined in Chapter 321.1(26) as:

". . . vehicles of the fire department, police vehicles, ambulances and emergency vehicles owned by the United States, this state or any subdivision of this state or any municipality therein, and such privately owned ambulance, rescue or disaster vehicles as are designated or authorized by the commissioner."

The above statutes seem to be very explicit in stating that law enforcement officials are to abide by all laws regulating the operation of motor vehicles. The only exception is when the official is in the immediate pur-

suit of an actual or suspected violator of the law or in response to an emergency call.

It is our opinion that the phrase, "immediate pursuit of an actual or suspected violator of the law," means when the officer's attention is focused on a particular violator based upon some act that has occurred and does not mean observing traffic in general for a potential violator.

Therefore, to come within any exception to the general rule proposed by this opinion that law enforcement officers must abide by all traffic regulations, the officer must be in immediate pursuit and not observing traffic generally.

Chapter 321.236, 1966 Code of Iowa, gives local authorities power to regulate traffic upon streets and highways within their jurisdiction. However, local authorities may not adopt provisions inconsistent with the provisions of the Code of Iowa regulating the operation of motor vehicles. Therefore, it is our opinion that law enforcement officials are required to abide by local regulations pertaining to operation of motor vehicles except at such times as they are excused from doing so as previously pointed out in this opinion.

Specifically answering your questions, it is our opinion that:

1. A law enforcement officer must abide by the state or local laws regulating the operation of a motor vehicle when parking on or off the travelled portion of the highway except in emergency cases or when in immediate pursuit of an actual or suspected law violator.

2. A government or law enforcement official may not park contrary to state and local laws regulating parking while looking for a prospective law violator.

3. The only authority for a law enforcement officer to travel through a red light or through a stop sign without obeying the signal is found in Chapter 321.231, 1966 Code of Iowa, which states:

"The driver of an authorized emergency vehicle when responding to an emergency call upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety but may proceed cautiously past such red or stop sign or signal. At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal."

The above provision clearly indicates that law enforcement officials who are, by definition, operating authorized emergency vehicles, must obey traffic signals unless responding to an emergency call. We would further conclude that an immediate pursuit of a law violator constitutes an emergency authorizing the law enforcement official to proceed through traffic signals with caution.

January 8, 1968

EXECUTIVE COUNCIL. §§19.25 and 19.23, Code of Iowa, 1966, The Executive Council under §19.25 furnishes non-military articles and supplies to the Adjutant General and in so providing is not authorized to turn in the 1953 Model Dearborn Loader in part payment of a Ford Model 730 Loader. (Strauss to Robinson, Sec., Executive Council, 1/8/68) #68-1-5

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa Reference is herein made to yours of December 19, 1967, in which you submitted the following:

"The Executive Council, in meeting this date, deferred the request from the Adjutant General to purchase a Ford Model 730 Loader and Model 19-333 67½" 16 cubic foot bucket, and to turn in a 1953 Model Dearborn Loader in part payment, pending an official opinion from you as to the Council's authority over purchases of non-military items made by the Adjutant General. Please advise."

The council's authority over non-military purchases by the adjutant general is contained in §19.25, Code of 1966, providing as follows:

"The council shall, unless otherwise provided, furnish the following officers and departments with all articles and supplies required for the public use and necessary to enable them to perform the duties imposed upon them by law:

"33. Adjutant general."

However there is no authority in the Council to turn in the 1953 Model Dearborn Loader in part payment of any purchases made by the council for the adjutant general. The authority of the council to dispose of used personal property of the state is contained in §19.23, Code of 1966, providing the following:

"Said council may dispose of any personal property when the same shall, for any reason, become unnecessary or unfit for further use by the state."

The power vested in the council under the foregoing section is to dispose of state personal property. The power to dispose does not include the power to use the state's personal property in the manner described. For a definition of the word "dispose" as used in the statute see Opinion of the Attorney General appearing in the Report for 1962 at page 370, a copy of which is hereto attached

January 8, 1968

DRAINAGE WARRANTS AND DRAINAGE IMPROVEMENT CERTIFICATES: §§74.2 and 455.77, Code of 1966. Drainage Warrants bear interest at four percent per annum. Drainage Improvement Certificates bear interest at five percent per annum. (Strauss to Atwell, Sup. of County Audits, 1/8/68) #68-1-6

Mr. H. E. Atwell, Supervisor of County Audits: Reference is herein made to yours of the 18th in which you submitted the following:

"In some counties Drainage Certificates are presented to the County Treasurer by the holder, for payment. If there is no money to make payment the County Treasurer is stamping the certificates and they are drawing 5% interest.

"There appears to be a conflict between Sections 74.2 and 455.57, as to whether or not the stamped certificates should draw 4 or 5% interest.

There is no conflict between the interest payable on stamped drainage warrants where funds are not available for their payment as provided by Chapter 74, Code of 1966, and the stamping of a drainage improvement certificate issued by the board of supervisors to bearer or a contractor

in payment of work performed in the drainage improvement. §455.77. (§455.57 refers to interest payable on assessments and has nothing to do with this question.) Interest on warrants is not involved in their issue. Interest thereon is payable only when money is not available for their payment. The amount of interest thereon is fixed by statute at four percent payable by the state, county, city, drainage district or school district as the case may be. §74.2, Code of 1966. On the other hand drainage certificates are issued under the provisions of §455.77 by the board of supervisors and payable as heretofore stated to bearer or to the contractors who have constructed a drainage improvement in payment for their work. Interest on such certificates is fixed by §455.79, where it is provided:

"Such certificates shall bear interest not to exceed five percent per annum, payable annually, and shall be paid by the taxpayer to the county treasurer, who shall receipt for the same and cause the amount to be credited on the certificates issued therefor."

As will be noted such 5% interest is payable by the taxpayer and such interest is not dependent upon stamping of the certificate by the county treasurer, but is due and payable from the time of issuance. See §§455.77, 455.78, 455.79 and 455.80. In short, drainage warrants bear interest at 4% per annum and drainage improvement certificates bear interest at 5%.

January 8, 1968

IOWA DEVELOPMENT COMMISSION. PATENTS ON INVENTIONS. §28.8, Code of Iowa, 1966. Patent rights acquired by the development commission cannot be disposed of without express statutory authorization. (Nolan to Touchae, Acting Dir., Iowa Development Comm., 1/8/68) #68-1-7.

Mr. Pat Touchae, Acting Director, Iowa Development Commission: This is in reply to Mr. Worlan's letter of September 25, 1967, which requested information concerning the acquisition of patent rights to certain agricultural products developed as a result of research by private laboratories under contract with the Iowa Development Commission. Specifically you inquire:

1. Should the contract be amended to assign these properties to the state of Iowa rather than the Iowa Development Commission?

2. Who, or what agency of the state should be responsible for the disposition of these patents in the form of outright sale, licensing or royalty payments?

I find no express authority for the Iowa Development Commission to acquire and hold such patent rights, however, §28.7 of the 1966 Code of Iowa requires the commission to do "such other and further acts, as shall in the judgment of the commission, be necessary and proper in fostering and promoting the industrial and agricultural development and economic welfare of the state of Iowa."

The contract in question provides:

"Any developments or technics resulting from such co-operative research project, whether patentable or not, will belong exclusively to the Iowa Development Commission providing and excepted, however, that with respect to all patentable inventions relating to instrumentation,

analytical, and/or testing methods developed under this co-operative research project, the institute shall have the exclusive right to said inventions, relating to instrumentation, analytical, and/or testing methods, to use and to license to others on such terms as it shall deem desirable and shall further grant to the Iowa Development Commission a nonexclusive, royalty-free license under said patentable inventions. The Iowa Development Commission shall have the right to reassign said licenses granted pursuant to this provision."

It is my opinion that the language of §28.8, which empowers the commission to "make and enter into contracts, and to generally do all such things as in its judgment may be necessary, proper and expedient in accomplishing its duties" is sufficiently broad to permit the commission to hold such patent rights as may be acquired as property of the state without assigning such rights to another state agency. In this connection, it must be observed that §262.9(10) controls only patents on inventions of students, instructors and officials at institutions under the control of the board of regents and there appears to be no other provision in the Code to give further clarification to this matter. Except that §28.12 prohibits any corporation formed by the development commission from becoming involved "in any way with the acquisition by applicants of letters patent in the carrying out of the provisions of sections 28.11 to 28.16 inclusive;" this section does not preclude the commission from obtaining such rights by a contract authorized under §28.8.

Inasmuch as the patent rights which may be acquired by the development commission are property of the state, it is also my opinion that express statutory directive is required before the commission may dispose of such property rights. Further, it appears that the commission has no express or implied power to grant any company the right to utilize such patents under a license at this time.

You have also asked whether this state can discriminate against non-Iowa companies in disposing of these patents under more favorable licensing agreements which would induce the companies to do the processing in Iowa. This question was partially answered above. The Iowa Development Commission has the power and duty to encourage industrial enterprises to locate in Iowa by "legitimate, educational and advertising mediums directed to point out the opportunities of the state as a commercial, industrial, and agricultural field of opportunity, and by solicitation of industrial enterprises." §28.7(3).

I am unable to see at this time how a plan to encourage companies to process their products in this state would create a discrimination against non-Iowa companies. However, further information concerning your intent in this matter is required before a more definite answer can be given on this question.

I am returning the enclosures which you supplied.

January 8, 1968

ELECTIONS — Nomination papers, signatures required, candidates for office from senatorial and representative "subdistricts" — §43.20, Code of Iowa, 1966; H.F. 736, Acts 62nd G. A. Where a county has been subdivided to form new single member senatorial or representative districts (subdistricts), candidates for office from such districts shall

obtain signatures of 2% of the electors of the district from which they are running regardless of the provisions of §43.20 since such §43.20 does not contemplate a situation where an office is to be filled by the voters of less than an entire county. (Turner to Gaudineer, State Senator, 1/8/68) #S68-1-1

The Hon. Lee H. Gaudineer, State Senator: By your letter of August 29, 1967, you have requested an opinion of the Attorney General as follows:

"House File 736, Acts of the 62nd G. A. divided Iowa's multimember senatorial and representative districts into districts which will be represented by one senator or representative. I cannot determine if this Act simply divided existing districts into subdistricts or if it established totally new single member districts. Subsections 3 and 4 of Section 2 refers to them as 'single member senatorial (representative) sub-districts.' This double type of reference certainly leads to confusion.

"Candidates for these offices are required to obtain signatures of electors of their 'district' equal to 2% of the vote of their party's candidate for governor. Therefore, I request your opinion upon the following questions: May a candidate for senator or representative from a new single member sub-district established by House File 736, Acts of the 62nd G. A. obtain the required signatures from electors of the whole or parent district or must he obtain such signatures only from his new single member sub-district?"

H.F. 736, Acts of the 62nd General Assembly, is an act to provide for representation in the senate and house of representatives in the 63rd General Assembly. It was enacted as a consequence of the case of *Kruidenier v. McCullough,* 1965, 257 Iowa 1315, 136 N. W. 2d 546, and *Kruidenier v. McCullough,* 1966, ____ Iowa ____, 142 N. W. 2d 355. These cases required so-called "subdistricting" of a single county in apportioning the senatorial and representative districts of the legislature to insure equal protection of the laws by providing that each senator and each representative shall represent a district consisting, as nearly as practicable, of the same number of constituents.

While the bill refers to subdistricts in those counties entitled to more than one senator or more than one representative, I have previously said this is a misnomer. See O.A.G. 6-13-67, an opinion to Senator Ely which holds that the so-called "subdistricts" are, in actuality, "districts."

At all times prior to this new law, each senator and each representative represented a district consisting of at least one whole county. Unfortunately, apparently due to legislative oversight, §43.20, Code of Iowa, 1966, with reference to signatures required on nomination papers, was not amended in this new law. It provides in part as follows:

"*Signatures required — more than one office prohibited.* Nomination papers shall be signed as follows:

"1. If for a state office, or United States senator, by at least one percent of the voters of the party of such candidates, in each of at least ten counties of the state, and in the aggregate not less than one-half of one percent of the total vote of his party in the state, as shown by the last general election.

"2. If for a representative in Congress, senator or representative in the general assembly in districts composed of more than one county, by at least two percent of the voters of his party, as shown by the last general election, in each of at least one-half of the counties of the dis-

trict, and in the aggregate not less than one percent of the total vote of his party in such district, as shown by the last general election.

"3. If for an office to be filled by the voters of the county, by at least two percent of the party vote in the county, as shown by the last general election.

"In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for governor."

There appears to be no problem with respect to nomination papers for those legislators representing a district equivalent to or greater than a county because the former situation (equivalent to a county) is covered by subsection 3 and the latter (greater than a county) by subsection 2 of the above statute. But no provision was made by the legislature which specifically covers nomination papers for a senator or representative from a district (so-called subdistrict) smaller than a county. Does this mean that in such a district the candidate must acquire the signatures of two percent of all of the party voters who reside in the county or only two percent of those who reside in his district (subdistrict)?

Considering §43.20 in its entirety and construing it in pari materia together with this new redistricting law and the other election laws and practices of this state, and under the requirements of the "one man, one vote" principle required by the United States Supreme Court in *Reynolds v. Sims*, 1964, 377 U. S. 533, 84 S. Ct. 12, 13 L. Ed. 2d 506, it may be necessarily and fairly implied that signatures of electors residing outside of the district (subdistrict) and who do not otherwise participate in the selection of the candidate or vote for him in either the primary or general election, are not requisite to the validity of his nomination papers. While an amendment to §43.20(3) could have better clarified the problem where the district is less than a county, outsiders have never historically participated in the selection of candidates except in their own districts and for whom they are entitled to vote. See O.A.G. 6-13-67, mentioned above, and the cases cited therein. Thus, in a district (subdistrict) smaller than a county, it is not necessary that the number of signers be equal to two percent of the party vote in the whole county but the nomination papers will be sufficient if signed by two percent of the party vote in the district (subdistrict).

January 8, 1968

ELECTIONS — Nomination papers, signatures required, candidates for office from senatorial and representative "subdistricts" — §43.20, Code of Iowa, 1966, H.F. 736 Acts 62nd G. A. In determining by party the vote cast for governor at the last general election for the purpose of determining the number of signatures required on the nomination papers of candidates running from senatorial and representative districts, comprising less than an entire county, records of the vote cast in each precinct and in the office of the county auditor may be used. If one or more precincts have been divided in creating the new district and there is no way of determining the number of voters who resided in the portions of such precincts included in the new districts, the entire party vote cast in each of said precincts could, as a practical matter, be included in computing the total party vote in the new district. (Turner to Synhorst, Sec. of State, 1/8/68) #S68-1-2

The Hon. Melvin D. Synhorst, Secretary of State: Reference is herein made to yours of December 28, 1967, in which you submitted the following:

"In those counties with subdistricts, what will the requirements be in signing nomination papers and filing them in behalf of candidates for members of the General Assembly for the 1968 Primary election?

"The more specific questions are: How many signatures will a candidate from such a subdistrict for State Senator or Representative in the General Assembly be required to have? Who will be entitled to sign the nomination papers for candidates for these offices?

"I should like to point out that the Canvass of the Vote cast at the last General election for the office of Governor was made on a countywide basis by the State Executive Council. There appears to be no requirement that the vote by precincts be submitted to the State Executive Council."

The questions you raise are similar to those raised by Senator Gaudineer and which are answered in an opinion to him, dated today, a copy of which is herewith enclosed.

Section 43.20(3), Code of Iowa, 1966, provides as follows:

"3. If for an office to be filled by the voters of the county, by at least two percent of the party vote in the county, as shown by the last general election.

"In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for governor."

Under the Gaudineer opinion and my opinion dated June 13, 1967, a copy of which is also enclosed, it is implied that no signatures of electors residing outside of the district (subdistrict) are requisite under the provisions of H.F. 736, Acts of the 62nd General Assembly, to nomination papers of candidates to the legislature therefrom, nor may such be counted as a part of the percentage of signatures required. Such nomination papers must be signed by at least two percent of the party voters of the district (subdistrict), as shown by the last general election. This percentage may be determined by the vote cast in each precinct within said district (subdistrict) for governor. If one or more precincts have been divided in creating the new district (subdistrict), and there is no way of determining the number of voters who resided in the portions of such precincts included in the new districts, the entire party vote cast in each of said precincts could, as a practical matter, be included in computing the total party vote in the new district to be used in arriving at the requisite minimum number of signatures.

Regardless of whether the canvass of the vote cast at the last general election for the office of governor was made on a countywide basis, there is an official list of the vote cast for governor in each precinct, and if such list as is customarily printed in the Iowa Official Register is not accurate, the precinct votes can be obtained from the County Auditor of each county.

January 9, 1968

CONSTITUTIONAL LAW — Primary Road Fund, expenditures from — Art. III, §§1 and 24, Constitution of Iowa; §§313.4, 313.5, Code of Iowa, 1966; S.F. 864, 62nd G. A. §313.4 is a standing appropriation of the primary road fund for the purposes specified therein. §313.5 and S.F. 864 together do not constitute an appropriation act in conflict with such standing appropriation and the executive council, pursuant to §313.5 may authorize the highway commission to expend primary road funds in excess of those budgeted by S.F. 864 without drawing in question

the constitutionality of §313.5 and S.F. 864. (Turner to Selden, State Comptroller, 1/9/68) #S68-1-4

The Hon. Marvin R. Selden, Jr., Comptroller, State of Iowa: You have requested an opinion with reference to the authority of the Executive Council to authorize expenditure of funds from the primary road fund in excess of those funds authorized by Senate File 864, 62nd General Assembly. Any authority to so authorize, as you point out, is set out in that portion of §313.5, Code of Iowa, 1966, which reads as follows:

"Any unexpended balance at the end of any year in the amount so authorized for said year shall revert to the primary road fund. If the amount authorized by the general assembly for any year shall prove to be not sufficient to meet the commission's needs during said year, *the executive council may on proper showing by the commission authorize such additional amount for said year as may appear to the council necessary to meet the commission's needs* for the remainder of said year." (Emphasis added.)

This provision raises fundamental questions regarding our system of expending money from the state treasury and the distribution of power under the Iowa Constitution. First, does this provision violate or empower the Executive Council to violate Article III, §24 which provides:

"No money shall be expended from the treasury but in consequence of appropriations made by law."?

Second, is this provision either an unconstitutional delegation of legislative power or an unconstitutional attempt by the legislature to exercise the power of the executive department by legislative restrictions on the appropriations to be used by the highway commission? These latter issues involve Article III, §1 relating to distribution of powers and Article III, §1 relating to the legislative department.

In answering these questions, or indeed in determining whether it is necessary to answer them, it is necessary to consider the legislative history of the primary road fund.

The primary road fund was first established in 1919 as Chapter 237, §4, 38th General Assembly, and was originally apportioned to the various counties. Several amendments through the years have affected the definitions and allocations of the original enactment but for the most part are not pertinent to our inquiry. The important thing to note is that the primary road fund has historically been the subject of what appears to be a so-called "standing appropriation." §313.4, Code of Iowa, 1966, with various amendments regarding what is included in the primary road system and maintenance thereof, has specifically appropriated the entire primary road fund to the establishment, construction and maintenance of the primary road system, at least since 1939. Like other standing appropriations, it is printed in the Code rather than merely in the session laws as is the case with most ordinary appropriations.

Of course standing appropriations are common. In compliance with §8.6(10), Code of Iowa, 1966, you submitted to the 62nd G. A. a list of them exceeding one hundred in number. Furthermore, the Supreme Court has long recognized that standing or continuing appropriations may be properly established by the legislature. *Prime v. McCarthy*, 1894, 92 Iowa 569, 61 N. W. 220; *O'Connor v. Murtaugh*, 1938, 225 Iowa 782,

281 N. W. 455; *Graham v. Worthington*, 1966, ...Iowa....., 146 N. W. 2d 626. The latter case made reference to words commonly used in standing appropriation statutes "to be paid out of funds not otherwise appropriated" and held they, in themselves, constitute the appropriation.

Having thus appropriated the entire primary road fund, the legislature then attempted to limit the appropriation by a budget system set up under what is now §313.5, Code of Iowa, 1966, and under which the highway commission has operated since 1939. This system requires implementation by what the Code editor has designated in a footnote to that secion of the Code a "biennial appropriation act." Such an act has been passed to implement §313.5 in every regular session since 1939. The most recent of these, Senate File 864, 62nd General Assembly, like its predecessors, is identical in form to other biennial appropriation acts except that instead of using the ordinary and usual words "there is hereby appropriated" it says the commission "is hereby authorized to expend from the primary road fund," and is entitled "An Act Authorizing Expenditures By the State Highway Commission" rather than "An Act to Appropriate."

Does Senate File 864, together with §313.5, thus become the appropriation by law required by Article III, §24, and thereby supersede §313.4, the old standing appropriation? If so, the words of §313.5 quoted and underscored at the outset of this opinion appear to give the Executive Council power to appropriate, in violation of the constitutional requirement, more funds than the legislature provided in S.F. 864.

On the other hand, if the standing appropriation is not superseded, and the council may provide the necessary needs of the commission in excess of the legislative budget therefrom, what is to prevent the legislature from appropriating excessively large amounts to every department of government and creating a similar budgetary system, governed only by the council or some other executive or agency? If such can be done, it would appear that the legislature may circumvent the constitutional prohibition against drawing funds from the treasury other than by appropriations and delegate its own prerogatives to others.

These problems were considered in an article entitled "The Executive Council and Power to Allot Appropriations," 14 Iowa Law Review 369 (1929), which says:

"The legislature cannot delegate legislative power, but it can grant fact-finding and administrative authority to boards and commissions, and make the operation of statutes conditional upon the findings of these bodies. *If the appropriations made by the legislature are not absolute, the power of redistribution given to the council and budget director is akin to the power of appropriation itself; but if the appropriation of the legislature is absolute subject to be used only upon the council's and budget director's determination of the existence of a necessity, then it may be said that only ministerial power has been delegated and the power placed in the Executive Council and budget director is entirely proper.* As it is obvious that a deficiency cannot be foreseen, and that when it arises legislative action is likely to be impossible, it seems entirely proper that some agency should be provided to remedy the situation. One of the primary functions of the Executive Council being the conduct of the affairs during the adjournment of the legislature, the delegation of the power to it seems entirely appropriate *unless other constitutional restrictions intervene.*

"If we assume that no unconstitutional delegation of legislative power has been made, it is still necessary to determine whether the statute provides a method of appropriation consistent with that provided by law. The constitution provides that 'No money be drawn from the treasury but in consequence of appropriation made by law.' It further provides that 'No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered . . . nor shall any money be paid on any claim the subject matter of which shall not have been provided for by preexisting law. . . .'

"To test the budget statute by the constitutional provisions above quoted raises the question whether an appropriation which is subject to being diverted from one purpose to another by the Executive Council and budget director is an appropriation made by law, and whether if diverted it may not be in effect paid out as extra compensation after service rendered. In view of the provisions relative to appropriations 'made by law' appearing in article III of the constitution dealing with the legislature, there can be little doubt but that appropriations 'made by law' mean legislative appropriations. Indeed, the Indiana court cited with approval by our own court has said, 'Appropriations . . . may . . be defined to be an authority from the legislature given at the proper time and in legal form to the proper officers to apply sums of money in a given year to specified objects or demands against the state.'

"A concrete example may illustrate more effectively the character of this statute. Let it be supposed that the insurance commission and the railroad commission are each given a biennial appropriation of $100,000 under the budget act. And let us suppose that the railroad commission spends the greater portion of its funds the first year and is in need of additional funds, while the insurance commission's expenditures do not fall due until near the close of the biennium so that at the end of the first year it has a large surplus on hand. The Executive Council thus finds a balance in one department and a deficit in the other. It therefore transfers a substantial amount from one department to the other. Can it be said that the appropriation, examined retrospectively, was one made by law for a specified purpose? The legislature declared that each department should receive $100,000, but at the same time provided that the council and budget director might allow one department to receive a sum in excess of that amount and the other less. Difficult as it may appear, it might be possible to justify this delegation of power, if merely the determination of facts were left to the Executive Council and budget director, but the statute goes further. It allows the council to determine the facts and then within its discretion, subject only to the approval of the director of the budget, to make such allotment of funds as it sees fit. *If the council and budget director can be given authority to determine the amount of funds to be used by a department, they have in effect the power to make appropriations or at least to amend or in effect to repeal the action of the legislature in making appropriations. The power of appropriation, however, is a legislative power and constitutionally should be exercised only by the General Assembly.*" (Emphasis added.)

While these questions and the law review article, including the authorities cited therein, cast grave doubt upon the constitutionality of the underscored portion of §313.5 quoted at the beginning, it must nevertheless be remembered that this limitation on the primary road fund appropriation has been recognized and permitted by the General Assembly for almost 30 years. The long continued and unquestioned exercise of a given power by the legislature is a weighty consideration in favor of the constitutionality of such exercise of authority provided such acts have been uniform. *Carlton v. Grimes*, 1946, 237 Iowa 912, 23 N. W. 2d 883.

Furthermore, as I noted in an opinion to Representative LeRoy Miller 6/10/67, regarding the alcoholism project:

"Declaring an act of the legislature unconstitutional is a 'delicate function.' *Miller v. Schuster*, 1940, 277 Iowa 1005, 289 N. W. 702. It is well settled that a statute is presumed to be constitutional. The presumption is strong and the courts will not declare an act of the legislature unconstitutional unless the conclusion is unavoidable. They will do so then only when the violation is clear, plain, palpable and free from doubt. The Iowa court has even gone so far as to say that a person challenging the constitutionality has the burden of negativing every conceivable basis which might support it. *Dickinson v. Porter*, 1948, 240 Iowa 393, 35 N. W. 2d 66. Where a statute is fairly open to two constructions, one of which will render it constitutional, and the other doubtful, or unconstitutional, the construction upon which it may be upheld will be adopted. *Eysink v. Board of Supervisors of Jasper Co.*, 1941, 229 Iowa 1240, 296 N. W. 376. If any reasonable state of facts can be conceived which will support constitutionality, it will be sustained. An attacker must negative every possible hypothesis of constitutionality. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118."

Senate File 864 purports to authorize the commission to expend the primary road fund in a carefully delineated manner which specifically sets out, in detail, the salaries, support and maintenance in eight separate divisions of the commission's organizational structure. It also provides a "contingent appropriation" and allows for use and expenditure of refunds and reimbursements, including federal funds. If §313.5 is unconstitutional, it is likely that S.F. 864 would fall with it since this act is obviously in implementation thereof, although it specifically provides that it shall not be deemed to be in conflict therewith. *Smith v. Thompson*, 1934, 219 Iowa 888, 258 N. W. 190; *Kruidenier v. McCullough*, 1966, ...Iowa...., 142 N. W. 2d 355; *Davis v. Synhorst*, 1964, USDC (Iowa) 225 F. Supp. 689.

If both §313.5 and S.F. 864 are unconstitutional, the standing appropriation found in §313.4 would in effect leave to the untrammeled discretion of the highway commission the expenditure of the entire primary road fund, subject only to the limitations contained in the statutes and the constitution. It would then be solely within the sound discretion of the commission to fix the salaries of the employees of the commission and otherwise decide how the primary road fund was to be expended. But the executive council has exercised the authority contained in §313.5 on many occasions since June 23, 1942, which I understand was the first time it authorized expenditure of funds in excess of these budget laws.

If §313.5 and S.F. 864 do not violate Article III, §24, as an appropriation other than by law, does §313.5 contain an unconstitutional delegation of legislative authority? This depends upon whether or not the guidelines therein contained are sufficient. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118. §313.5 authorizes, but does not direct, the executive council to allow additional expenditures of funds already appropriated "on proper showing by the commission" that it is "necessary to meet the commission's needs for the remainder of the year." Are the commission's needs an adequate guideline? Or isn't it the legislature's prerogative to determine those needs? Isn't the legislature simply telling the council not to let the commission spend more than it needs? There is nothing to indicate how this determination of need is to be made. In *Graham v. Worthington*, 1966, ...Iowa...., 146 N. W. 2d 626, 635, the Supreme Court said:

"It is for the General Assembly to enact laws governing expenditure of state funds including the appropriation of moneys for payment. But once this is constitutionally done the procedures, the mechanics, the fact finding process upon which payment shall be made, may, with reasonably proper guides or standards, be delegated to judicial or quasi judicial bodies."

But whether such guides exist, here, is extremely doubtful.

As I have noted, if §313.5 and S.F. 864 are unconstitutional, the Executive Council would have no authority to limit expenditure of the primary road fund. The commission could expend it within its discretion and the limits of the fund, restricted only by the constitution and other statutes. No proper showing would be required and no necessity for action by the council would exist. Accordingly, it appears that no violence can be done to constitutional mandates or prohibitions by virtue of the council's authorization of additional funds from the primary road fund. The Supreme Court has repeatedly held that constitutional issues will not be determined unless their determination is essential. *McClure v. Owens*, 1866, 21 Iowa 133; *Town of Mechanicsville v. State Appeal Bd.*, 253 Iowa 517, 111 N. W. 2d 317.

For these reasons, it is unnecessary for me to render an opinion as to the constitutionality of §313.5 and S.F. 864 at this time, it being indicated in your letter of November 16, 1967, and the Governor's letter of January 9, 1968, that the council desires to authorize, rather than disapprove, the expenditure of primary road funds pursuant to §313.5. Therefore, in response to the specific question you ask, I would advise that the council may make the authorization.

To the extent this opinion may conflict with an advisory opinion from this office to Stephen C. Robinson, August 25, 1967, dealing with a similar problem involving the board of medical examiners, that opinion is hereby withdrawn.

January 10, 1968

MOTOR VEHICLES: Registration, farm tractor, trailer, grain bin. §§321.1, 321.18, 321.122, 321.123, Code of Iowa, 1966; Senate File 681, §13. Farm tractor may not be licensed to haul a trailer and grain bin on the highway. §13, Senate File 681 applies to both (1) tractor pulling the load and (2) the trailer and its load. (Zeller to Ferguson, U. S. Dept. of Agriculture, 1/10/68) #68-1-12.

Mr. Walter C. Ferguson, State Executive Director, Iowa ASCS State Office: Reference is made to your letter of November 14, 1967, dealing with the requirements for hauling a grain bin. Your letter proposes three questions as follows:

"Does Iowa Law permit a farmer to pull with a farm tractor a trailer designed for agricultural purposes and properly licensed to haul a grain bin used exclusively by the owner in the conduct of his agricultural operations?

"Does Section 13 of Senate File 681 prohibit a farm trailer properly licensed 'with a farm to market license' from hauling farm supplies which might include a grain bin under permit if the trailer is pulled by a farm tractor?

"Does Section 13 of Senate File 681 when referring to any vehicles traveling under permit apply to both (1) the vehicle and the load and (2) the vehicle pulling the loaded vehicle?"

Several sections of the law may control in dealing with these questions. §321.1(16), Code of Iowa, 1966, reads as follows:

"'Implement of husbandry' means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations * * *."

§321.1(7), Code of Iowa, 1966, provides as follows:

"'Farm tractor' means every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry."

§321.18, Code of Iowa, 1966, provides as follows:

"Every motor vehicle, trailer, and semitrailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except: * * *

"3. Any implement of husbandry."

Iowa law does not permit a farmer to license and use a farm tractor for the purpose of hauling a grain bin. The farm tractor is not equipped according to safety standards required by §321.381, §321.409 and §321.437 for moving freight upon the public highways. Also, the trailer to which you refer does not appear to have been designed for agricultural purposes, although it may have been used for hauling farm supplies.

§321.122(1) states as follows:

"The annual registration fee for a truck tractor or road tractor drawing or designed to draw a * * * trailer, shall be based on the combined gross weight of such combination, and the amount of such annual registration fee shall be:

"For a combined gross weight of six tons or less, forty dollars. * * *"

§321.123, Code of Iowa, 1966, provides as follows:

"All trailers * * * shall be subject to a registration fee to be fixed in accordance with the following schedule. * * *:

"1. When equipped with pneumatic tires:

"Wagon box trailers used by a farmer in transporting produce, farm products or supplies hauled to and from market, five dollars.

"Trailers with a gross weight of one thousand pounds or less, three dollars.

"Trailers with a gross weight exceeding one thousand pounds and not exceeding two thousand pounds, ten dollars."

§13 of Senate File 681 so far as pertinent reads as follows:

"Any vehicle traveling under permit shall be properly registered for the gross weight of the vehicle and load."

§321.1(24), Code of Iowa, 1966, provides as follows:

"'Gross weight' shall mean the empty weight of a vehicle plus the maximum load to be carried thereon."

In answer to your first question, the Iowa law does not permit a farmer to pull with a farm tractor a trailer hauling a grain bin on the highway.

In answer to your second question, §13 of Senate File 681 prohibits a farm tractor from hauling a trailer which carries a grain bin. This is for three reasons. A farm tractor cannot be licensed for this purpose. If it is a road tractor, it must be properly licensed for the gross weight of the tractor, trailer and load. The trailer hauling the grain bin is not a wagon box trailer used by the farmer for the purpose of transporting supplies to and from the market. Hauling a grain bin is not hauling supplies from the market.

In answer to your third question, §13 of Senate File 681 applies to both the tractor and the trailer which carries the load. In other words both vehicles, the tractor and the trailer, must be properly registered for highway operation as above provided, and must pay the specified registration fees.

January 10, 1968

EXECUTIVE COUNCIL — BIDDING AND CONTRACT. §19.20, Code of Iowa, 1966. Acceptance by the executive council of a low bid that complies with specifications is a contract and the council therefore is without power to consider any other bid. (Strauss to Robinson, Sec., Executive Council, 1/10/68) #68-1-10

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of December 28, 1967, in which you submitted the following:

"Enclosed please find copies of the complete file regarding the request by the State Department of Health to purchase three mechanized card files.

"The Executive Council, in meeting held December 26, 1967, directed that I submit same to you for your official opinions as to whether or not the reasons to accept other than the low bid as stated by the Department of Health in their letter of December 14, 1967, to the Council are legally adequate to reject the low bid. Please advise."

The attached file shows the following:

On October 26, 1967, the executive council invited sealed bids to be received at the office of the secretary of the council for mechanized card filing equipment. The offering described the specifications for such equipment. Remington Rand Office Systems' tendered a bid therefor and the Diebold company also tendered a bid. Minutes of the meeting of the council as of December 19, 1967, show this record:

"2. Page 5, #14 (Health Department): The Health Department proposes to accept other than the low bid on three power files, and to purchase from Diebold, Inc. at a cost of $23,716.75.

"Moved by Governor Hughes and seconded by Mr. Liddy that the Council direct the Health Department to accept the low bid from Remington Rand, on the basis of the information presented.

"The vote: Ayes — Governor Hughes, Mr. Synhorst, Mr. Smith, Mr. Franzenburg, Mr. Liddy.

Nayes — None.
Absent — None.

Prior thereto, and on the 14th day of December, the Board of Health, by Henry Hicks, Jr., addressed a letter to the council advising the council of its desire to take other than the low bid for reasons set forth in the letter. On December 20, 1967, the council advised the Board of Health as follows:

"The Executive Council, in meeting held December 19, 1967, after a review of the reasons advanced in your letter of December 14, 1967, in which you sought authorization to purchase other than the low bid submitted for three (3) Mechanized Card Files, has directed that you be advised that they will not approve your request unless it can be substantiated by more valid reasoning than has been presented.

"This directive is based on the fact that the low bid does meet the specifications as set forth in the 'Invitation to Bid' and there is a sizeable price differential."

On this record it appears that the public offering was made by the executive council under the authority of §19.20, Code of 1966, and it appears from the record made at the meeting on December 19, 1967, the executive council gave direction to the Board of Health to accept the bid of Remington Rand which constituted a contract between the council and Remington Rand, although such acceptance not appearing to have been known to the Remington Rand Company was not binding upon them until notice thereof. This is text book and case law. 43 Am. Jur., page 782 states:

"The rule that no obligation is created by an offer until it is accepted according to the terms upon which it is made, without qualification or departure, applies, and the contractor may withdraw his bid unless it is accepted on the terms made.

* * *

"However, the mere determination of a public official or board to accept the proposal of a bidder does not constitute a contract; the decision must be communicated to the bidder."

See *Pennington v. Sumner*, 222 Iowa 1005, 270 N. W. 629, 109 A.L.R. 355; *Cedar Rapids Lumber Co. v. Fisher*, 129 Iowa 332, 105 N. W. 595, 4 L.R.A. (NS) 177.

Communication of the executive council's acceptance of the Remington Rand bid will constitute a binding contract between the council and the Remington Rand Company. In view of the foregoing legal situation and the fact that the low bid complies with the specifications, I advise that the reasons assigned by the Department of Health in its letter of December 14, 1967, for acceptance of any other than the low bid may not now be entertained and considered by the council.

January 10, 1968

COUNTY OFFICERS — Errors and Omissions Insurance — The county officers to be covered by insurance pursuant to S.F. 779, 62nd G. A. can be determined from the official directory compiled by the secretary of state in accordance with §333.10. (Turner to Worthington, Commissioner of Insurance, 1/10/68) #68-1-9

The Hon. Lorne R. Worthington, Commissioner of Insurance: This replies to your letter of October 18, 1967, requesting a determination as to the definition of "county officers" as used in S.F. 779 passed by the 62nd General Assembly. You asked specifically whether this includes all employees of the respective officers.

S.F. 779, an act relating to errors and omissions insurance for county officers and deputies and employees of county officers, provides as folows:

"Section 1. Chapter three hundred thirty-two (332), Code 1966, is hereby amended by adding thereto the following new section:

" 'The board of supervisors shall purchase and pay premiums on insurance covering and insuring county officers, including sheriffs and their employees, which insurance shall insure against personal liability as a result of errors and omissions in the performance of official duties. The premiums shall be paid from the county general fund. Minimum liability limits for such insurance shall be fixed by the attorney general. In the event that the liability of any county officer for any error or omission is not fully indemnified by insurance, the board of supervisors may elect to pay any loss, for which any county officer may be found liable, from the general fund of the county.' "

Approved June 19, 1967.

County officers may be determined from the Iowa Official Directory issued by the secretary of state which is compiled pursuant to §333.10 of the Code of Iowa, which provides:

"The county auditor shall report to the secretary of state the name, office, and term of office of every officer elected or appointed, within ten days after their election and qualification, and the secretary of state shall record the same in a book to be kept for that purpose in his office."

The 1967-1968 Iowa Official Directory of county officers includes the following: Auditor, clerk of court, treasurer, recorder, sheriff, medical examiner, county attorney, superintendent of schools, engineer, county home steward, assessor, and board of supervisors.

It is the view of this office that S.F. 779 does not contemplate covering the deputies of the county officers and also does not include employees other than the employees of sheriffs. It should be noted that the title of the act does include the word "deputies" but the legislature did not enact a provision covering deputies in the body of the act. However, there is a principle of law which applies here to the effect that where a person who is neither an officer nor a deputy is in sole charge of an office, transacting the business with the recognition of the officer or deputy, such person is an officer de facto. The de facto doctrine is utilized in the law as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in the strict sense of the law. 43 Am. Jur. 224, §§469 and 470. Insurance covering county officers may be written to include coverage for de facto officers under this theory of the law.

January 11, 1968

COUNTY OFFICERS: Board of Supervisors, §111A. Board of Supervisors cannot make a loan or temporary transfer of funds from general

fund to the county conservation board although it can make one direct appropriation. (Nolan to Blum, Franklin County Attorney, 1/11/68) #68-1-11

Mr. Lee B. Blum, Franklin County Attorney: This replies to your request dated December 21, 1967, for an opinion on the following:

". . . whether or not the County Board of Supervisors is permitted to make a temporary transfer from the general fund of the County to the Conservation Board fund under Section 111A.6 Iowa Code (1966) which temporary transfer is to be transferred back from the Conservation Board fund to the County general fund when money is available. Also, may the County Board of Supervisors make a loan to the Conservation Board fund in any manner or by any means?"

Under the provisions of the section cited above the County Board of Supervisors is authorized to make one appropriation of money from the general fund upon the adoption by the county of the provisions of chapter 111A. This appropriation may be used for the payment of expenses incurred by the county conservation board in carrying out its powers and duties. Thereafter the county board of supervisors "may levy or cause to be levied an annual tax, in addition to all other taxes, of not more than one mill on the dollar of the assessed valuation of all real and personal property subject to taxation within such county, upon proper certification by said county conservation board made pursuant to and in compliance with all of the provisions of chapter 24, which tax shall be collected by the county treasurer as other taxes are collected, and shall be paid into a separate and distinct fund to be known as the county conservation fund, to be paid out upon the warrants drawn by the county auditor upon requisition of the county conservation board for the payment of expenses incurred in carrying out the powers and duties of said conservation board." The section further provides:

"The county conservation board shall have no power or authority to contract any debt or obligation in any year in excess of the moneys in the hands of the county treasurer immediately available for such purposes."

It is my opinion in view of the above that the board of supervisors has no authority to make a temporary transfer of funds to the conservation board from the general fund although it may make one direct appropriation to get the board started upon the adoption of the provisions of this chapter by the county. Further, since the act specifically prohibits the county conservation board from incurring any indebtedness the county board of supervisors would thereby be precluded from making a loan of any kind to the conservation board.

January 11, 1968

SCHOOLS—Matching funds. S.F. 869, 62nd G. A.—Funds are not available for operation of an educational program for migrant or seasonal agricultural workers. (Nolan to Edgren, Ass't. Sup't., Dept. of Public Instr., 1/11/68) #68-1-14.

Mr. W. T. Edgren, Assistant Superintendent, Department of Public Instruction: In your letter dated November 28, 1967, you asked for an interpretation of S.F. 869, 62nd General Assembly, which appropriated certain moneys to the Department of Public Instruction for each year of the biennium beginning July 1, 1967 and ending June 30, 1969, to be

used for Title II B — adult basic education and Title III B — assistance to migrants

"provided that the funds appropriated by this Act are to match to the extent required, the federal funds to be expended by the United States Treasury, for the Economic Opportunity Act of 1963, as amended."

Your letter states:

"There are currently present, in Muscatine County, certain migrant workers for whom the merged area is willing to provide instruction in basic communicative skills, pursuant to subsection 7 and 9 of section 280A.1, Code 1966, if the cost thereof will be met by federal and state funds.

"A local community agency in Mason City has Title III B money which it is willing to apply to such a subject if the money appropriated under the aforesaid provisions of Senate File 869 is also applied thereto.

"The result thereof would be that the merged area would operate an educational program for migrant workers in Muscatine County with Title III B funds received from the local community agency and state funds disbursed under Senate File 869 through the State Department of Public Instruction.

"The problem, as we see it, arises from the construction to be placed upon the phrase "match to the extent required" as the same appears in section 1 of Senate File 869. The law is not specific as to what agency, authority, or circumstances serve to impose the condition of "required" matching. Your opinion is requested as to whether matching must be provided for in the federal law or regulations in order to make the appropriation item lawfully available for disbursement by the state department or, whether actual need for funds in addition to available Title III B money in order to provide a workable educational program for the migrant worker is sufficient to authorize disbursement of the Senate File 869 appropriation in the described situation."

It is my opinion that the language of S.F. 869 requires that the funds appropriated by this act are to be used as matching funds for federal money made available under the Economic Opportunity Act of 1963, as amended, and are to be used only for such purpose. Inasmuch as Title III B does not require the matching of funds by states for grants to be made under §2861 of Title 42, the funds appropriated under S.F. 869 should not be regarded as available at this time. §2861 of Title 42 provides as follows:

"The Director [of the Office of Economic Opportunity Program] is authorized to develop and implement a program of loans, loan guarantees, and grants to assist State and local agencies, private nonprofit institutions, and cooperatives in establishing, administering, and operating programs which will meet, or substantially and primarily contribute to meeting, the special needs of migratory workers and seasonal farm laborers and their families in the fields of housing, sanitation, education, and day care of children." Pub. L. 88-452 Title III §311, Aug. 20, 1964, 78 Stat. 525. (As amended Pub. L. 89-253 §23, Oct. 9, 1965, 79 Stat. 977)"

The regulation authorized by the federal act have been studied and with the exception of 45 C.F.R. 80 which pertains to nondiscrimination there appears to be no regulation controlling the program or grant to be made under Title III B.

The operation of an educational program for migrant or seasonal agricultural workers in the Muscatine area should be formulated without

attempting to utilize S.F. 869 funds. Funds which may be available in the Mason City local community agency office may be used if the program under which they were granted permits. See §103, Public Law 89-750, November 3, 1966, 80 Stat. 1192. Otherwise, it would appear that an application for an Adult Education Act of 1966 grant for the Muscatine Area could be submitted under §304 of Public Law 89-750, 80 Stat. 1217 if the requirements of §307(b) can be met. In any event, I find no indication in S.F. 869 that the appropriation was intended to supplement federal funds already granted to the state under Title III B, or its agencies, or that the State Department of Public Instruction could legally draw upon such funds to "match" funds granted for the education of children of migrant workers, now held in the Mason City office, for the purpose you have outlined.

Although your inquiry did not ask for an opinion concerning the appropriation made to match Title II B funds I wish to call your attention to the fact that the Congress by Public Law 89-750 Title III, §315, 80 Stat. 1222, on November 3, 1966, repealed the provisions of the adult basic education program commonly known as Title II B programs formerly enumerated as §§2801-2807 of Title 42, U. S. Code. Consequently, any appropriation made by the 62nd G. A. for the purpose of matching federal grants for Title II B Programs ($20,000.00 for each year of the biennium beginning July 1, 1967) would not be "necessary" and should not be regarded as being available.

Further, we note that there is a technical error in the S.F. 869 reference to the Economic Opportunity Act of 1963. There was no Economic Opportunity Act until 1964. See Public Law 88-452, August 20, 1964, 78 Stat. 508. In the enactment of statutes reasonable precision is required and where there is uncertainty a statute may be declared by the courts to be inoperative and void. 50 Am. Jur. 484 §472. Consequently, there may be no appropriation at all under S.F. 869 and if this is the case, it would be improper to use any sums specified therein as "unexpended appropriations" under §8.39, Code of Iowa.

January 11, 1968

CERTIFICATE OF TITLE OF MOTOR VEHICLE — §321.45(2), Code of 1966. While the sheriff in his official capacity, making a levy under an attachment or general execution, may generally effectuate a security interest in personal property, he acquires no lien in such property until and unless he has complied with the provisions of Rule 260, Rules of Civil Procedure, as revised by Chapter 475 of the Acts of the 62nd General Assembly. (Strauss to Letz, Hardin County Attorney, 1/11/68) #68-1-13

Mr. Carl R. Letz, Hardin County Attorney: This acknowledges receipt of your letter of November 30, 1967, in which you submitted the following:

"Mr. Jack Leverenz of the State Motor Vehicle License Department has delivered a memorandum to the County Treasurer; a copy of which is enclosed herein.

"If you will note said memorandum states that before a sheriff's levy may be entered on the title to a motor vehicle, an application must be signed by the vehicle owner.

"I think Mr. Leverenz's interpretation of 321.50 is in complete ignorance of the law of levy as under 260(b), Rules of Civil Procedure. A sheriff's levy is quite different from security interest as referred to in Section 321.50. I cannot see where the legislature could possibly have meant to require the assent of an owner before a judgment lien could be placed upon the title to a motor vehicle. Such an interpretation would in practical effect preclude the Plaintiff from ever getting a judgment lien on a motor vehicle pursuant to the 260(b) rule.

"The Hardin County Sheriff has been directed to perfect a levy under 260(b) on a motor vehicle and the Treasurer is somewhat apprehensive and has refused to enter the lien based upon Mr. Leverenz's memorandum. Attorney for Plaintiff is threatening suit against the Treasurer if the motor vehicle in question escapes his lien. For this reason your immediate reply to this request would be greatly appreciated."

The acquisition of a security interest in a certificate of title by a sheriff as described by Mr. Jack Leverenz in the memorandum referred to is as follows:

"A sheriff's levy may be noted as a security interest on a certificate of title, and in the event the sheriff desires to do so, the following procedure shall be followed: It will be the responsibility of the sheriff to obtain the certificate of title from the owner for the purpose of noting his security interest unless there be a previous security interest of record, in which case the county treasurer will follow the procedure set out in this section under the heading 'subsequent security interest.' The sheriff shall present the completed 'Request for Notation of Security Interest' with the title certificate (in the event there is no prior security interest). The county treasurer shall then follow the procedure as outlined under the subheading in this section entitled either 'Security Interest Procedures,' or 'Subsequent Security Interest,' the security interest shall be cancelled in the manner outlined in this section under 'Cancellation of Security Interest.' This procedure is optional and is to be followed only in the event the sheriff so desires."

"*Please note that all applications for security interests, including such applications accompanying sheriff's levies and federal tax warrants, must be signed by the vehicle owner.*"

While the sheriff in his official capacity, making a levy under an attachment or general execution, may generally effectuate a security interest in personal property, he acquires no lien in such property until and unless he has complied with the provisions of Rule 260, Rules of Civil Procedure, as revised by Chapter 475 of the Acts of the 62nd General Assembly.

However, such general power in the sheriff is ineffective to acquire a security interest in a motor vehicle because of the provisions of §321.45 (2), Code of 1966, providing as follows:

"No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to him for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to him for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable consideration except in case of

"a. the perfection of a lien or security interest by notation on the certificate of title as provided in section 321.50, or

"b. the perfection of a security interest in new or used vehicles held as inventory for sale as provided in Uniform Commercial Code, chapter 554, Article 9, or

"c. a dispute between a buyer and the selling dealer who has failed to deliver or procure the certificate of title as promised, or

"d. except for the purposes of section 321.493.

"Except in the above enumerated cases, no court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued or assigned in accordance with the provisions of this chapter."

This same numbered section appears in its same form in the 1962 Code as far as the subject matter of this opinion is concerned. In that form it was the subject of an opinion of this department appearing in the Report of Attorney General for 1962 at page 275. There a county treasurer received an application for a transfer of title by one claiming a right as purchaser at a sheriff's sale on execution. In upholding the priority of a chattel mortgage upon a motor vehicle and denying the priority of the purchaser it was said:

"By the provisions of §321.45(2), the purchaser at the sale could not acquire any interest in such a vehicle except by virtue of a certificate of title issued or assigned to him. Section 321.50 provides that no lien shall be valid against creditors of the mortgagor, subsequent purchasers, mortgagees or other lienholders or claimants unless noted on the certificate of title. Thus, as stated by the Texas court in interpreting a substantially similar statute:

" 'Since no valid sale of the vehicle could be made without the certificate of title and since no lien is valid unless shown on the certificate, a purchaser could not be deceived by failing to learn of the existing encumbrance.' Id. at 838.

"In the situations presented herein, the notation upon the certificate of title by the chattel mortgagee is sufficient to protect his interest, and the purchaser takes the motor vehicle subject to the chattel mortgage."

The method described by Mr. Leverenz in his memorandum to acquire a security interest in a motor vehicle is erroneous and the county treasurer should disregard the underscored paragraph of Mr. Leverenz's memorandum quoted above.

January 12, 1968

BOARD OF PAROLE — Confidential Communications — S.F. 537. Records of investigation conducted pursuant to requirement of law by public officers for benefit of Board of Parole are confidential. (Turner to Bobzin, Sec. & Dir., Board of Parole, 1/12/68) #S68-1-3

Mr. R. W. Bobzin, Secretary & Director of Parole, The Board of Parole: Your letter of September 14th is hereby acknowledged wherein you state:

"Case records of the Board of Parole, including probationers, parolees, and inmates of the five penal institutions, as well as the inmates' institutional records at the five penal institutions and the Division of Corrections, contain in part what has always been considered confidential communications. These particular letters or documents were solicited from District Court Judges, County Attorneys, Sheriffs, Chiefs of Police, Social

Welfare Directors, and other persons. When requests for information on individuals were made either by the Board of Parole or by members of the staffs of our penal institutions, the addresses were usually assured that the information would be held in strictest confidence. It is realized, of course, that public records such as arrest records, court documents, etc., would not necessarily be considered confidential since this information could be obtained from other sources also.

"We respectfully request to be informed as to whether these confidential letters and reports can be included in the exclusions of Section 7 without the necessity of obtaining a court injunction to maintain their confidentiality.

"We also request an opinion as to whether unsolicited correspondence of a personal nature pertaining to an inmate of one of our penal institutions, a parolee, or a probationer could also be considered confidential and excluded under the provision of Section 7."

Senate File 537 passed by the 62nd General Assembly states in part:

"Section 1. Whenever used in this Act, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

The Board of Parole has the duty to make any investigation it may deem necessary in order to determine the facts relative to matters coming before it. §247.13, 1966 Code of Iowa. In addition all public officers have a duty when inquiry is made by the Board of Parole, to divulge all information which would shed light on the fitness of a prisoner for parole. §247.13. The trial judge and prosecuting attorney shall furnish the Board of Parole on request all information known by them concerning the facts and circumstances attending the commission of the offense. §247.15.

Historically, the Board of Parole has given assurance to individuals from whom information was sought, that the information would be treated as confidential. It was determined that confidentiality gave the Board of Parole greater access to information for often the informants were keenly concerned for their welfare if information was divulged to the prisoner or his family.

The right of the public to freedom of access to public records versus the policy of a Board of Parole charged with the duty of making investigations and discharging their duty fairly and intelligently has been the subject of controversy in two jurisdictions in the United States.

The Supreme Court of New York in *Jordan v. Loos*, 125 NYS 2d 447 (1953), was confronted with a statute very similar to Senate File 537. The Court made an extensive review of public policy concerning nondisclosure of records pertaining to paroles. In quoting from a statement of the *National Probation and Parole Association*, the Court stated:

"Experience throughout the country, as found by our association through years of contact with parole administrators is that any other rule would be destructive of the investigative responsibility of Parole Boards. The Model Parole Act of the National Probation and Parole Association drafted in 1940 by a committee of the nation's leading 'judges and penologists' provides that all information obtained by the Board shall not be disclosed directly or indirectly unless and until otherwise ordered by the Board."

The Court went on to say:

"The welfare of our society requires the rehabilitation of criminals wherever possible. Such rehabilitation depends upon the ability of our Parole Boards to obtain voluminous data. Without assurances to the sources of such data that their communications are confidential it would be impossible to acquire it; without it, hundreds of prisoners, now on parole, leading useful and productive lives, might still be languishing in our penal institutions. It is incredible to suggest that our enlightened administration of the penal system should suffer such a setback."

Conversely, the Board of Parole is charged with a duty to protect the public from prisoners who have not become rehabilitated or who are not capable of rehabilitation. In the *1966 Uniform Crime Reports* issued by the Federal Bureau of Investigation, it was noted that fifty-five percent (55%) of the offenders released to the streets in 1963 were rearrested within two and one half years. Fifty-seven percent (57%) of the offenders released on parole were rearrested within two and one half years. Sixty-seven percent (67%) of the prisoners released early in 1963 after earning good time were rearrested Seventy-two percent (72%) of persons granted probation in 1963 for auto theft repeated in a new crime. These statistics serve to emphasize the fact that proper screening of potential parolees is indeed, an almost insurmountable task.

In California, the Court in *Ruyon v. Board of Prison Term and Paroles*, 79 P 2d 101 (1938), stated:

"The Courts have consistently declared that in another class of cases public policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection, notwithstanding that they are in the custody of a public officer or board and are public in nature.

"It is a matter of common knowledge that in order to impartially and intelligently discharge the functions of the state board of prison terms and paroles it is essential to secure all possible information bearing upon applicants for parole."

See also: *People v. Pearson*, 244 P 2d 35 (Cal. 19); *City & County of SanFrancisco v. Superior Court*, 238 P 2d 581 (Cal. 19); *Application of Lee B. Mailler*, 174 NYS 2d 59 (1958). Thus, the Courts have viewed this problem with extreme concern for the confidentiality of communications concerning prisoners and their eligibility for parole.

Senate File 537 provides that certain records should be confidential. Among those records are:

"Section 7.

* * *

"5. Peace officers investigative reports, except where disclosure is authorized elsewhere in this Code.

* * *

"9. Criminal identification files of law enforcement agencies. However records of current and prior arrests shall be public records.

* * *

"11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts."

These references to matters pertaining to law enforcement as being confidential become important when viewed in conjunction with the public policy of the Board of Parole having access to all possible information. It was recognized by the legislature that investigations conducted by peace officers may have to be and should be confidential in order that all possible means be available for the apprehension of suspects. However, does law enforcement stop with the apprehension of the suspected criminal? We think not. It is our opinion that to release or not to release a prisoner on parole or probation is as much a part of law enforcement as is the apprehension of a suspect. Admittedly, the Board of Parol's duties in this regard are more in the nature of prevention of crime than the apprehension of one who has already committed a crime. Yet the prevention of crime by rehabilitating those being punished for a past act is as important to society as apprehension.

Furthermore, §247.24 specifically states that any agent or investigator making an investigation for the Board of Parole shall have the powers of peace officers. Thus, these reports are surely confidential in view of the language of Section 7(5) of Senate File 537.

There is, of course, information that is furnished to the Board of Parole that is and should be public in nature. The Clerk of the District Court furnishes the Board of Parole copies of indictments, minutes of testimony attached to the indictment, the name of the trial judges and prosecuting attorneys and the names of witnesses and jurors. §247.14, 1966 Code of Iowa. This information should be public as well as statistical data required to be furnished to the Board of Parole pursuant to §§247.29 and 247.30. Prior records concerning arrests and convictions should also be opened to the public.

However, it is our opinion that records of investigation conducted pursuant to requirement of law by public officers for the benefit of the Board of Parole, wherein those furnishing the information must exercise judgment, expressions of opinion and make conclusions should be, as a matter of public policy, confidential. The public interest is far better served by the preservation of a sound and well established parole system.

January 16, 1968

HIGHWAYS — Primary Road Funds — Safety Rest Areas — Art. VII, §8, Constitution of Iowa; §§306.2(7), 312.1, 312.2, 313.3, 313.4, 313.5; H.F. 786, 62nd G. A. Safety rest areas are part of the public highways of this state and there is no constitutional or statutory prohibition against the use of a portion of the primary road fund for their construction or for matching federal funds for same although the biennial contingent fund appropriated by H.F. 786, 62nd G. A. is not available for such purpose. (Turner to Hughes, Governor of Iowa, 1/16/68) #S68-1-5

The Hon. Harold E. Hughes, Governor of Iowa: By your letter of December 21, 1967, you have requested an opinion of the attorney general as follows:

"As you know, Mr. J. R. Coupal, Jr., Director of Highways, recently requested that the Executive Council allocate $100,000 from the biennial contingency fund to match $900,000 in federal funds for the construction and improvement of safety rest areas on the National Interstate and Defense Highway System for the State of Iowa.

"On November 28, 1967, the Executive Council voted unanimously to approve such an allocation. On December 18, 1967, the Budget and Financial Control Committee, by a 7-1 vote, also approved the allocation. That same day you wrote to Mr. Marvin Selden, State Comptroller, cautioning him not to spend the money because you feel that such an expenditure from the biennial contingency fund would not be legal.

"Would you please inform me, in an official opinion, whether there is a method by which the state may legally provide the $100,000 in state funds needed to match the $900,000 in federal funds which are available for these highway purposes?"

A 1942 anti-diversion amendment to the Constitution of Iowa added Section 8 to Article VII as follows:

"All motor vehicle registration fees and all licenses and excise taxes on motor vehicle fuel, except cost of administration, shall be used exclusively for the construction, maintenance and supervision of the public highways exclusively within the state or for the payment of bonds issued or to be issued for the construction of such public highways and the payment of interest on such bonds."

The revenues derived from the sources mentioned in the foregoing provision are first deposited in the road use tax fund together with other revenues, as provided in §312.1, Code of Iowa, 1966, the section creating the road use tax fund. Forty-seven percent of the road use tax fund is then allocated to the primary road fund under §312.2(1) of said code. The primary road fund is created by §313.3 and contains its percentage share of the allocation from the road use tax fund and funds received from other sources mentioned therein.

§313.2 of said code divides the public highways of the state into two systems: the primary road system and the secondary road system. It then defines the primary road system. §306.2(7) provides that the National System of Interstate and Defense Highways is included within the primary road system.

Consistent with the 1942 amendment, §313.4 is a standing appropriation of the entire primary road fund for the "establishment, construction and maintenance of the primary road system, including the drainage, grading, surfacing, construction of bridges and culverts, the elimination or improvement of railroad crossings, the acquiring of additional right of way, all other expenses incurred in the construction and maintenance of said primary road system and the maintenance and housing of the state highway commission" and for other purposes stated therein. This standing appropriation is then restricted by the budget provisions of §313.5 and the so-called "biennial appropriation act" or act "authorizing expenditures from the primary road fund" implementing §313.5 (presently Senate File 864, 62nd General Assembly). See O.A.G. to Comptroller Selden, January 9, 1968.

Thus, it appears that the primary road fund is available to provide the necessary matching funds for safety rest areas on the interstate if such are a part of the public highways under the constitution and of the primary road system under the statute.

§4.1(5), Code of Iowa, 1966, provides:

"The words 'highway' and 'road' include public bridges, and may be held equivalent to the words 'county way,' 'county road,' 'common road,' and 'state road.' "

§4.2 of said Code provides:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

Generally, statutes having beneficial purposes should be liberally construed and have the benefit of any reasonable presumption. *Thomas v. State*, 1950, 241 Iowa 1072, 44 N. W. 2d 410. Certainly, statutes regarding construction of public highways may be considered to have a beneficent purpose and should be liberally construed.

§313.2, defining the primary road system, was repealed and reenacted by the 58th General Assembly (Ch. 212) in 1959, with the following paragraph added:

"The state highway commission shall have the authority to utilize any land acquired incidental to the acquisition of land for highway right of way and to also accept by gift, lands not exceeding two (2) acres in area for *roadside parks and parking areas*, provided, however, that the upkeep and maintenance of said roadside parks and parking areas shall involve *only minor maintenance expense*. The commission shall also have authority to accept by gift, equipment or other installations incidental to the use of said parks and parking areas. *Said parks and parking areas shall be a part of the primary road system* and the commission may at its discretion sell or otherwise dispose of said lands." (Emphasis added).

Quite aside from the question of whether the foregoing section specifically authorizes safety rest areas within the terms "roadside parks" and "parking areas," it is indicative of an intention by the legislature, itself, to liberally construe the words "roads" and "highways." It further indicates that the legislature considers that parks and parking areas of such small size would ordinarily involve relatively minor maintenance expense when compared with the total outlay for a highway.

But, seemingly, safety rest areas were not what the legislature had in mind when they added the above paragraph to the statute in 1959. Not only were they not so specifically named, but the act was pertinent to the whole primary system rather than to the interstate only. Doubtless such parks have been acquired by virtue of its authority and are dissimilar to the usual interstate safety rest area to be found on our system. Furthermore, in 1965, the 61st General Assembly (Ch. 267, §1) enacted what is now §313.67, Code of Iowa, 1966:

"There is hereby created a primary road scenic and improvement fund which shall include and embrace all funds hereafter credited thereto. Said fund shall be administered by the state highway commission and shall be used for the construction, reconstruction, improvement, and maintenance of *roadside safety rest areas* and scenic beautification areas along the primary roads of the state including the acquisition of such property and property rights needed to accomplish said purposes. Part or all of said fund may be used to match federal allotments made available to the state of Iowa for the purposes provided in this section and to this end, the state highway commission is empowered on behalf of the state to enter into any agreements or contracts with the duly constituted federal authorities in order to secure the benefit of all present and future federal allotments." (Emphasis added).

Had the legislature considered that §313.2 authorized such rest areas, there might have been no necessity for this law. In any event this bill required an appropriation and such was made for the biennium ending July 1, 1967 (See §2, 61st G. A., Ch. 267). It may be significant that primary road funds were not appropriated for this purpose. Instead income, corporation and sales taxes were used therefor. Perhaps the legislature thought that use of primary road funds would violate the 1942 constitutional amendment. In any event, the 62nd General Assembly did not replenish this fund with a new appropriation. Whether their failure to appropriate may have been an oversight because of the obscure location of the first appropriation and the heavy burden of their many duties, is an irrelevant speculation. It seems more likely, however, that the scenic and improvement fund was not replenished because the legislature was considering a way of paying for roadside safety rest areas from the primary road fund. House File 642, 62nd G. A., which passed the House but not the Senate, sought to amend §313.2, by striking that part quoted above and substituting:

"The state highway commission shall have authority to cause the construction, reconstruction, improvement, or maintenance of roadside safety rest and information areas, including structures necessary and incident thereto, along the controlled access of such property and property rights needed to accomplish such purposes. The commission shall also have the authority to accept by gift, equipment and other installations incidental to said use, and shall be empowered on behalf of the state to enter into any agreements with duly constituted authorities in order to secure the benefit of all present or future federal allotments for said purposes. Roadside safety rest and information areas shall be a part of the primary road system."

An explanation attached to this bill provided:

"This bill will clearly provide authority for the Highway Commission to cooperate with the Federal Government in providing roadside safety rest and information areas along the state's access controlled highways."

Of course, had the bill been enacted, there would still remain the question of whether roadside safety rest areas were included in public highways within the 1942 amendment. If so, the primary road fund could clearly be used. But could the legislature, by statute, give the words "public highways" a broader meaning than the people gave them when the amendment was adopted in 1942?

Regardless of the answer to the foregoing question, H.F. 642, which failed of enactment, is proof that roadside safety rest areas were not a "contingency" or unforeseen event which would enable the executive council to make use of the contingency fund for this purpose. In fact, as I pointed out to Comptroller Selden in my letter of December 18, 1967, the appropriation to the contingency fund provides, among other things, that the "executive council shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law." (H.F. 786, §5, 62nd G. A.).

Nevertheless, if safety rest areas are part of the public highways of this state, there is no constitutional or statutory prohibition against use of the primary road fund for their construction or for matching federal funds for same. Nothing the legislature has ever done or said implies that it opposes use of this fund for safety rest areas and it has, on the

contrary, not only recognized the benefits to be derived by safety rest areas but has made a standing appropriation of all primary road funds for "construction and maintenance of the primary road system." §313.4.

In *Edge v. Brice*, 1962, 253 Iowa 710, 113 N. W. 2d 755, the Iowa Supreme Court held that the relocation of utility facilities was a part of the construction of a public highway as the word "construction" is used in the 1942 amendment. Speaking of that amendment, the Court said:

"The antidiversion amendment was adopted [in] 1942. Then, as now, motor vehicle traffic was heavy on existing highways; there was a need to supply adequate highways for future use; motor vehicle fuel taxes and license fees were considered high. Utility facilities were occupying rights of way without cost to them though they were required to pay relocation costs. From the language used, needs, and circumstances, we think it is fair to say the intent and purpose was to assure adequate highways and that a source of funds be available for that purpose; and at the same time limit the use of the funds, not to maintain the status quo of highway construction but to keep such fees and taxes at a reasonable rate and not allow the same to become a general revenue measure to be used for governmental purposes totally foreign to highways. The necessity for the removal of utility facilities was not then totally foreign to highway construction, though the state had not yet assumed the cost of relocation. *It is fair to say the intent of the term 'construction' as used in the amendment includes all things necessary to the completed accomplishment of a highway for all uses properly a part thereof.*" (Emphasis added).

Subsequently, in *Slapnicka v. City of Cedar Rapids*, 1965, 258 Iowa 382, 139 N. W. 2d 179, the Iowa court followed the Edge case and held that preliminary engineering services in contemplation of building an expressway through Cedar Rapids, were authorized by a statute (§312.6) providing for construction of roads and streets and were not within the prohibition of the 1942 antidiversion amendment. The Court said:

"The word 'construction' now under attack is the same as previously considered. We see no reason for now restricting its meaning. We do not think including the word 'establishment' immediately preceding the word 'construction' in . . . or the 1965 amendment to section 312.6 . . . indicate any legislative intent contrary to our pronouncement."

In *1940 O.A.G. 235*, the attorney general rendered an opinion that $25,000 could be used from the primary road fund to match $25,000 in federal funds for a state-wide highway planning project by authority of what is now §313.1, Code of Iowa, 1966:

"The state highway commission is empowered on behalf of the state to enter into any arrangement or contract with and required by the duly constituted federal authorities, in order to secure the full co-operation of the government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, reconstruction, improvement or maintenance. The good faith of the state is hereby pledged to cause to be made available each year, sufficient funds to equal the total of any sums now or hereafter apportioned to the state for road purposes by the United States government for such year, and to maintain the roads constructed with said funds."

Although the 1942 amendment was not in effect, the attorney general did properly recognize the manifest intent of the legislature expressed in §313.1 to cooperate with the federal government which therein "pledged" the "good faith" of the state to make available matching funds for road purposes. This section has remained unchanged ever since the 1942 amendment.

In *1938 O.A.G. 518*, the attorney general said that the primary road fund could be used in a project to widen a road approaching a bridge to 34 feet notwithstanding a statutory provision that such improvements "shall not exceed in width that of the primary road system" which was then generally no wider than 20 feet. The attorney general relied largely upon the fact that the federal government was a heavy contributor to the expense of the project.

In *1962 O.A.G. 251*, the attorney general decided that the 1942 amendment notwithstanding, cities could use road use tax funds allocated to them in payment of bonds for street programs and also for maintenance of the streets, and for engineering connected with construction, reconstruction, repair and maintenance of roads and streets. But under that attorney general's interpretation of various statutes, cities could not use the road use tax funds for construction and maintenance of alleys, street lighting, off-street parking, on-street parking, traffic-control signs and signals or sidewalks. Nothing in that opinion, however, indicates that the limitation on the use of road use tax money for those specific purposes was on account of the 1942 amendment. Accordingly, I do not consider that opinion as a reason or precedent for a limitation of the primary road fund for roadside safety rest areas.

Thus, I conclude that not only the legislature, but the courts and the attorney general have all given a liberal meaning and interpretation to the 1942 amendment and to statutes pertaining to construction of roads, streets and highways. Nothing in Iowa's legal history may be said to specifically prohibit an interpretation of highways which would include safety rest areas.

On the contrary, the legislature has always indicated an interest in cooperating with the federal government in highway construction and in obtaining all federal funds which may be or become available for this purpose. §312.2(6) is an example. It says:

"The treasurer of state shall before making the above allotments credit annually to the primary road fund the sum of two million five hundred thousand dollars or an amount equal to one-ninth of the federal allotment whichever is the smaller, said sum to be used for matching the federal allotment to the state of Iowa for the use of the interstate and national defense highways in the state of Iowa."

That section, when read in pari materia together with §§313.1, 313.2 and 306.2(7), warrants the conclusion that the highway commission may expend primary road funds for matching federal funds for anything the federal government reasonably and properly determines is a usual and necessary part of the highway. Designation of what is an interstate road is a power partly delegated to the secretary of commerce of the United States under §306.2(7) of our code.

Title 23, §319(a), United States Code Annotated provides:

"The Secretary may approve as a part of the construction of Federal-aid highways the costs of landscape and roadside development, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities reasonably necessary to accommodate the traveling public."

While I have been unable to find what the secretary has or has not approved in this regard, it is evident that Congress deems rest areas and sanitary facilities a necessary part of the interstate system and I presume that the $900,000 now being offered this state by the federal government is under authority of this federal law, which carried an appropriation of $120,000,000 for each of the fiscal years 1966 and 1967.

Under the federal statute "parkways" are included in the definition of "highways," along with rights-of-way, bridges, railroad-highway crossings, tunnels, drainage structures, signs, guardrails, and protective structures. Title 23, §101, U.S.C.A.

Other states have had occasion to construe their statutes liberally under constitutional prohibitions similar to ours. Thus, in *State v. Gainer*, 1965, 149 W. Va. 721, 143 S. E. 2d 351, upholding use of the road fund for relocation of public utility facilities, the Court, citing Iowa's *Edge v. Brice*, referred to a statute defining "highways" as including, but not limited to, the right of way, roadbed, and all necessary culverts, sluices, drains, ditches, waterways, embankment, slopes, retaining walls, bridges, tunnels and viaducts, and said:

"No doubt it must be recognized that such terms would embrace additional items which are deemed usual and necessary parts of highway construction such, for instance, as guardrails, traffic signals and mulching and seeding of cuts and fills."

In re Opinion of Justices, 1957, 101 N. H. 527, 132 A. 2d 613, another relocation of public utilities case, and cited in *Edge v. Brice*, supra, cites *In Re Opinion of Justices*, 94 N. H. 501, 51 A. 2d 836, as holding that funds restricted by a constitutional prohibition similar to ours "could be used to build or maintain off-street parking areas." As reason for this, the Court said:

"The obvious purpose and effect of the establishing of such parking areas is to remove parked cars from the highways and we are clearly of the opinion that this is a highway purpose within the meaning of [our constitution]."

Illinois and Massachusetts have gone even farther. In *Illinois State Toll Highway Com'n v. Eden Cem. Assoc.*, 1959, 16 Ill. 2d 539, 158 N. E. 2d 766, the Court held the Toll highway commission was entitled to exercise the right of eminent domain for an automobile service station to be operated by a private corporation and to service a privately owned restaurant, stating:

"In this modern age of motor vehicle travel we are well aware of the need of safety factors. The very purpose of toll highways is to provide fast, through traffic. To bring about this end it is necessary that there be limited access to the highway, thereby eliminating the danger of accidents arising from traffic entering at numerous places. In order to eliminate this danger on the 187-mile limited access highway it is highly necessary that gasoline service stations and restaurants be located on or in close proximity to the highway proper, thereby reducing a great number of entrances and exits to reach these services. In the Opinion of the Justices, 330 Mass. 713, 113 N. E. 2d 452, at page 468 in speaking of this problem the court said: 'Undoubtedly many travelers will seek food on their way across the State. It will be a great convenience to them to find it at a place where they can park their vehicles without interfering with traffic and without the necessity of looking for an exit, searching for a

restaurant, and then re-entering the turnpike. And on the same page the court said: 'We think restaurants such as are provided in the act are parts of the turnpike, and that a reasonable amount of land taken for them is land 'needed for the actual construction' of the highway and is devoted to a public use.' Going on, the court said, speaking of gas stations, restaurants and other services: 'They do not involve the taking or holding of lands for private purposes. Property leased will still be devoted to the public purpose of the turnpike, to which these services are wholly subordinate.'"

Scharnberg v. Iowa State Highway Commission, 1932, 214 Iowa 1041, 243 N. W. 334, holds:

"A very wide discretion is vested in the state highway commission in the construction of primary roads by the use of state primary road funds. A vast sum is at its disposal annually for said purpose. Every presumption must be indulged that the state highway commission will proceed legally in all highway matters within its jurisdiction. The courts do not interfere with the legal exercise of the discretion vested in such an administrative tribunal."

The authority and power of the highway commission in establishing, maintaining and improving the highways of the state are broad and plenary, and it is only in the exceptional case where such authority and power has been manifestly abused, that a court may interfere. *Porter v. Iowa State Highway Commission*, 1950, 241 Iowa 1208, 44 N. W. 2d 682.

Limited access highways, such as the interstate system, are comparatively new in Iowa, nearly every mile of which has been criss-crossed with secondary roads accessable from the older primaries. All of these older primaries passed directly through cities and towns. Until recently, it was relatively simple and convenient for a traveler to stop in a town or turn off and rest for the safety of others using the highway and for his own comfort. But on today's high-speed highways, which by-pass towns, it is difficult to find turn offs and, with the ever growing volume of traffic, impossible or illegal to stop on the shoulder. Safety rest areas on such highways would thus seem as essential to the safety, comfort and convenience of the traveling public as the large and expensive directional signs, clover leafs, guardrails, center malls and even the very paving itself, none of which are specifically authorized except within the meaning of "highway." Requiring travelers to leave and return to the highway at infrequent intervals and to spend inordinate amounts of time searching for rest stops not only endangers others using the highway, but defeats the very purpose of modern high speed roads.

It is apparent from the cited statutes and cases that the Iowa court will recognize that its people in 1942 were not so lacking in imagination that they could not forsee the probability and necessity of fast, through highways for the safety and convenience of the travelers. Those people did not intend, by requiring that gasoline taxes and vehicle license fees be used only for the public highways, that future construction would necessarily be the same as that of then existing roads, unchanged by human need and technology. Their purpose was not to maintain the status quo but rather to force improvements by preventing their government from using highway revenues for purposes unrelated and foreign to the highways.

Accordingly, if the highway commission in the sound exercise of its discretion finds that safety rest areas are a usual and necessary part of the modern system of interstate highways, essential to the safety, comfort and convenience of travelers thereon, it is legally justified in expending primary road funds in a reasonable amount for establishing and constructing a reasonable number of such areas at appropriate intervals along the interstate or for matching federal funds for this purpose.

The fact that the 62nd General Assembly failed to pass House File 642 to clearly provide authority for the commission in constructing such safety rest areas by re-defining highways to include them, does not alter this power except to the extent it prohibits use of the contingent fund for this purpose. If failure to enact a proposed statute can be considered in construing laws already in existence, or to amend away a legal interpretation of such, a failure of enactment would in effect constitute legislation and be readily susceptible to abuse by a minority of legislators, or even a single legislator, unable to directly accomplish his purpose. Even enactment of an amendment to incorporate in detail and in specific terms the meaning it had already been construed to have does not always establish that the statute formerly had no such meaning. *Hansen v. Kuhn*, 1939, 226 Iowa 794, 285 N. W. 248; *Rural Independent School District No. 10 v. New Independent School District of Kelley*, 1903, 120 Iowa 119, 94 N. W. 284.

CAVEAT

Nothing herein should be construed as an opinion that automotive service stations or other commercial establishments for serving motor vehicle users are a part of the highways of this State. See Title 23, §111, U.S.C.A., which provides:

"All agreements between the Secretary and the State highway department for the construction of projects on the Interstate System shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed or located on the rights-of-way of the Interstate System. Such agreements may, however, authorize a State or political subdivision thereof to use or permit the use of the airspace above and below the established grade line of the highway pavement for such purposes as will not impair the full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System. Pub. L. 85-767, Aug. 27, 1958, 72 Stat. 895; Pub. L. 87-61, Title I, §104(a), June 29, 1961, 75 Stat. 122."

January 17, 1968

STATE OFFICERS AND DEPARTMENTS — Disaster aid to governmental subdivisions — S.F. 796 (62nd G. A.); §§17A.1, 19.7, Code of Iowa, 1966. The executive council may approve an application by a governmental subdivision for a loan to defray obligations and expenses incurred as a result of a disaster even though the obligation or expenditure occurred prior to the effective date of S.F. 796 provided it did not occur more than two years prior to the application. The right of the governmental subdivision to such a loan is governed by the law

in effect at the time the application is filed and not the law in effect at the time of the occurrence of the expenditures or obligations. (Turner to Brig. Gen. Joseph G. May, Deputy Adjutant General, 1/17/68) #S68-1-6

Brigadier General Joseph G. May, Deputy Adjutant General, Headquarters Iowa National Guard: Reference is made to your letter of November 8, 1967, in which you state:

"Senate File 796 (62nd G. A.) amends Section 19.7 Code 1966 thereby expanding the authority of the Executive Council in connection with utilzation of available Contingent Fund Appropriations, by authorizing loans, without interest, under certain prescribed conditions, to governmental subdivisions suffering budgetary problems as a result of natural disasters.

"1 August 1967 the Executive Council designated Major General Junior F. Miller, Adjutant General of Iowa, as Emergency Director for administration of S.F. 796.

"7 November 1967 the Emergency Director presented a draft of proposed Regulations, intended to establish policy and administrative procedures in implementing the provisions of S.F. 796, to the Executive Council for adoption. A copy of the proposed Regulations has been made available to the Attorney General.

"The Executive Council adopted the following motions:

"1. 'Moved by Governor Hughes and seconded by Auditor Smith that the Council approve the Regulations as proposed by General Miller in connection with the State Disaster Assistance Act (Senate File 796, 62nd G. A.), subject to the obtaining of an opinion by General Miller regarding clarification as to whether or not the Act is retroactive,"
and

"2. 'Moved by Auditor Smith and seconded by Secretary of State Synhorst that General Miller ascertain whether this is a matter that should be approved as other Departmental Rules are adopted, and if so, this action should be considered as temporary rules, subject to final approval of the Council.'

"Opinion of the Attorney General is respectfully requested as to whether or not the Act is retroactive and the Regulations should be approved as other Departmental Rules are adopted."

Senate File 796 amends §19.7, Code of Iowa, 1966, to permit the use of the contingent fund created by §19.7:

"for aid to any governmental subdivision in an area declared by the governor to be a disaster area due to natural disasters or to expenditures necessitated by the governmental subdivision toward averting or lessening the impact of such potential disaster, where the effect of such disaster or such action on the governmental subdivision is the immediate financial inability to meet the continuing requirements of local government. Upon application therefor by a governmental subdivision in such an area, accompanied by a showing of obligations and expenditures necessitated by such actual or potential disaster in such form and with such further information as the executive council may require, such aid may be made in the discretion of the council and, if made, shall be in the nature of a loan, up to a limit of seventy-five (75) percent of the showing of such obligations and expenditures. Said loan, without interest, shall be repaid by the maximum annual emergency levy as authorized by section twenty-four point six (24.6) of the Code. The aggregate total of such loans shall not exceed one million dollars in any biennial fiscal term of the state. No such loan shall be for any obligation or expenditure occurring more than two years previous to the application.

"The proceeds of such loan shall be applied toward the payment of costs and obligations necessitated by such actual or potential disaster and the reimbursement of local funds from which such expenditures have been made."

You have asked whether a loan application could be made or granted to defray the expense of natural disasters which occurred prior to the effective date of the act.

In our opinion the executive council may approve an application for a disaster loan even though the obligation or expenditure occurred prior to the effective date of Senate File 796 provided it did not occur more than two years prior to the application.

An application by a governmental subdivision for a loan to defray obligations and expenditures occurring less than two (2) years previous to the application is not a retroactive application of the statute even though such expenditures occurred prior to the effective date of the statute because the right of the applicant governmental subdivision is governed by the law in effect at the time the application is filed and is not governed by the law in effect at the time of the occurrence of expenditures or obligations. *City of Iowa City v. White*, 253 Iowa 41, 111 N. W. 2d 266 (1961); *McCord v. Iowa Employment Security Commission*, 244 Iowa 97, 56 N. W. 2d 5 (1952).

In reply to your second question, it is our opinion that the regulations proposed by you and approved by the executive council would not be a rule requiring review and approval in accordance with Chapter 17A, Code of Iowa, 1966. A rule for the purposes of Chapter 17A is defined in §17A.1 as:

"3. 'Rule' means any rule, regulation, order, or standard, of general application or the amendment, supplement, repeal, recession, or revision of any rule, regulation, order or standard of general application, and rules of administrative procedure issued by any agency under *authority of law.* (Emphasis supplied)

" 'Rule' does not include rules or regulations relating solely to the internal operation of the agency nor rules adopted relating to the management, discipline or release of any person committed to any state institution, nor rules of an agency which may be necessary during emergencies such as floods, epidemics, invasion, or other disasters."

Although the rules you have proposed cite in §1 thereof as authority for their promulgation Senate File 796 (62nd G. A.), an examination of such senate file discloses no authority for the issuance of rules or regulations of any kind. Inasmuch as the underlined portion of the definition of "rule" hereinbefore set forth makes it clear that rules, regulations, orders or standards must be issued under authority of law before Chapter 17A has application to them, it would seem clear that your regulations would not be subject to such Chapter 17A.

While it perhaps may seem somewhat gratuitous to make the observation, I might point out that the absence of any legal basis for the issuance of regulations would render the regulations you have prepared of doubtful enforceability. Nevertheless they no doubt will be most useful as an internal document in guiding the governor and executive council in exercising the discretion conferred upon them by the act.

January 17, 1968

LIQUOR, BEER AND CIGARETTES — Powers and Duties of local beer permit issuing authorities — Chapter 124, Code of Iowa, 1966. The issuing authority has the discretion to determine what is the "principal business" of an "establishment" for which a class "C" beer permit has been requested under §124.1. A city council does not have to issue a class "C" permit unless it finds the statutory requirements are fulfilled. Claerhout to Faches, Linn County Attorney, 1/17/68) #68-1-15.

Mr. William G. Faches, Linn County Attorney: This is in answer to your letter of October 26, 1967, wherein you have requested an opinion regarding Section 124.10, Code of Iowa, 1966.

The two specific questions you have asked are based upon beer permit applications made under the two following factual situations:

"(1) The 'grocery business' is being operated by one corporation and the service station is being operated by another corporation. Each corporation has common stockholders, officers and directors. In this case the 'grocery business' leases its space from the filling station corporation. The two businesses would usually be handled by the same employees on the premises and operated out of the same cash register. Separate books would be maintained for each business.

"(2) In this case the 'grocery business' is owned and held in the wife's name and the filling station is held in the husband's name. Each business is operated as a sole proprietorship. Again the two businesses are handled by the same employees on the premises and operated out of the same cash register.

"In each of the above cases a major portion of the 'grocery business,' considered separately, is groceries."

You have also stated with regard to each business that:

". . . a service station is being operated on the premises and this business constitutes the major business on the premises."

I understand your questions to be as follows:

"1. Does the applicant in each case qualify for a Class 'C' Beer Permit as a 'grocery store' under the provisions of the above quoted Code section?

"2. Does the City Council have to issue the applicants in each case a 'C' permit if the other statutory requirements are met?"

Section 124.10, Code of Iowa, 1966, states in pertinent part:

"No class 'C' permit shall be issued to any person except the owner or proprietor of a grocery store or pharmacy as those terms are hereinafter defined. Except as otherwise provided in this chapter a class 'C' permit shall be issued by the authority so empowered in this chapter to any person who is the owner or proprietor of a grocery store or pharmacy, who:

"1. Submits a written application for a permit, which application shall state under oath:

* * *

"d. The location of the place or building where the applicant intends to operate.

"e. The name of the owner of the building and if such owner is not the applicant that such applicant is the actual lessee of the premises."

The answer to your initial question lies in the definition of "grocery store" included in Section 124.10:

" 'Grocery store' means and includes any retail establishment, the principal business of which consists of the sale of food or food products for consumption off the premises."

It is well settled that the issuing authority has the discretion to determine whether or not beer permit applicants meet the statutory qualifications set forth in Chapter 124 of the Iowa Code. *Lehan v. Greigg*, 1965, 257 Iowa 823, 135 N. W. 2d 80.

While it appears that your first question may not properly be answered here because the determination of the issuing authority is required, the fact situation presented does raise an issue which may be discussed. That issue may be stated in question form as follows:

"Does business arrangement or form have any effect upon the question of what is the principal business of an 'establishment' under Section 124.10?"

According to the permit application requirements of Section 124.10, both the prospective permittee and his building or location to be licensed, are required to be identified. The descriptive words used to indicate the place to be licensed in Section 124.10 include "establishment," "location," and "building." There is no provision for obtaining a permit for an area determined by personal or business agreement within the physical place to be licensed. Thus, within the physical limits of the place where the sale of food or food products for consumption off the premises is the principal business, other lesser businesses may exist which do not conflict with Section 124.10 regardless of business arrangements. It follows that where the person making class "C" beer permit application designates an establishment to be licensed where the principal business is, for example, selling gasoline, the fact that the applicant has some right to use a part of the establishment for the sole purpose of selling food products, does not qualify the whole physical place for a permit. "Establishment" means:

". . . a more or less fixed and used sizable place of business or residence together with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees)." Webster's New International Unabridged Dictionary (3rd Ed. 1966).

Thus, there may be but one principal business in each "establishment." However, it would appear that a physical structure might accommodate two or more establishments, each having a principal business. No business form or arrangement can create within an establishment more than one principal business in fact. I am of the opinion that only the issuing authority may determine what is the "principal business" of an "establishment" for which a class "C" beer permit has been requested.

Your second question asks if the issuing authority is required in each case, to grant a "C" permit if other statutory requirements are met.

The Iowa Supreme Court has considered a similar situation and said:

"We think that a city council, acting as a governmental agency, might properly refuse to issue a permit, if, in their judgment, the evidence did not warrant it." *Curtis v. DeGood*, 1947, 238 Iowa 877, 885, 29 N. W. 2d 225.

In *Lehan v. Greigg*, 1965, 257 Iowa 823, 135 N. W. 2d 80, the Court determined that a city council could not find good moral character (one of the statutory requirements) contrary to the statutory definition.

It is therefore my opinion that a city council must issue a class "C" permit where it finds all statutory requirements are met. However, it does not have to issue such a permit where it finds the evidence does not support the statutory requirements.

January 18, 1968

STATE OFFICERS AND DEPARTMENTS — **Authority of executive council to demand and banking department to pay rentals for space in state office buildings** — Art. XI, §8, Constitution of Iowa; §19.15, Code of Iowa, 1966; H.F. 718 (62nd G. A.). The executive council has no power to require the banking department to pay rent for space allotted to it in the Valley Bank Building, nor may such banking department voluntarily make any such payment. Banking department must move into space assigned to it by executive council but may from its own funds and subject to approval of the executive council refurbish its new quarters. The expression "seat of government" refers to the city of Des Moines and not to any specific building or buildings. (Turner to Robinson, Sec., Executive Council, 1/18/68) #S68-1-7

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to yours of December 20, 1967, in which you recited the following:

"The Council directed, in its meeting of December 19, 1967, that I obtain from you an official opinion regarding the contemplated move of the Banking Department into the Valley Bank Building.

"The Banking Department has been paying to a private lessor a yearly rental from its trust funds. May the State of Iowa require the Banking Department to pay a reasonable rental for the space allotted to it in the Valley Bank Building?

"Secondly, if it is determined that the State of Iowa cannot require the Banking Department to pay this rental, may said department pay this sum voluntarily?"

And reference is further made to yours of January 4, 1968, which states:

"Attached please find copies of two letters, dated December 21 and 29, 1967, from the Department of Banking, wherein they ask certain questions of the Executive Council in connection with their move into the Valley Bank Building.

"With regard to these questions, the Executive Council, in meeting held January 2, 1968, directed that I obtain from you an official opinion as to the extent of the Council's authority over the Department of Banking; specifically, does the Council have the authority to require the Department of Banking to move into the Valley Bank Building?

"If it is determined that the Council has this authority, and the move is accomplished, does the Council have any authority over the Departmental funds, i.e., regarding the expenditures described in numbers 1 through 6 on the first page of the letter dated December 21, 1967?"

The power of the council over the placing of state offices, agencies and commissions in and about state buildings at the seat of government is described in §19.15, Code of Iowa, 1966, and as its terms are extended in H.F. 718, Acts of the 62nd G. A. §19.15 provides in part that the execu-

tive council shall control the assignment of rooms in the capitol building and further states that the various officers to whom rooms have been so assigned may control the same while the assignment to them is in force, and further provides that the term "capitol" as used in the statute shall be descriptive of all buildings upon the capitol grounds. Section 3 of H. F. 718 respecting the acquisition of the Valley Bank Building provides:

"Upon the acquisition of the real property described in this Act, the state executive council shall have the authority to manage, control, protect by insurance, and lease, as the executive council may deem to be in the best interests of the state. The state executive council may assign space to state agencies, boards, and commissions as though the property were located upon the capitol grounds. Section nineteen point fifteen (19.15) of the Code shall apply when applicable."

On the authority of the foregoing statutes I advise:

1. The executive council has no power to require the banking department to pay rent for space allotted to it in the Valley Bank Building, nor is there any statutory provision authorizing the executive council or the state to accept rent voluntarily paid. There are circumstances under which the state may accept gifts but these need not be considered since the banking department has no power or authority to make gifts. Such banking department may only pay expenses necessarily and reasonably incurred in performing its statutory functions. Rent may be one of these expenses if the department maintains its offices in buildings not owned or controlled by the state.

2. You also ask whether the executive council has authority to require the Department of Banking to move into the Valley Bank Building. As I understand it, the department has been maintaining its offices, and paying reasonable rent, in a building in downtown Des Moines which is not owned or controlled by the state. The rent, salaries and other expenses of the department are paid by the treasurer of state as prescribed by law, entirely from fees collected from bank examinations and there is no legislative appropriation for the department.

The superintendent of banking is required by law to maintain his offices at the seat of government. §524.1, Code of Iowa, 1966. Many similar statutes may be found in the Code, but, generally the legislature has not provided that designated offices be maintained in any specific building.

Article XI, §8, Constitution of Iowa establishes the seat of government at Des Moines, Polk County, Iowa. The seat of government has never been regarded as a specific building or buildings but rather only as the city of Des Moines. 1936 O.A.G. 694 and O.A.G. 1-17-67 to Representative Miller.

Thus, it appears that the location of the offices or operations of departments, agencies, commissions and public officers is controlled by law and not the constitution. Designation of such location is a legislative function. In my opinion to Representative Miller dated January 17, 1967, I said that the location of the hall of the house of representatives is not controlled by the Constitution of Iowa, but by statute. Shortly thereafter, the 62nd General Assembly enacted House File 38 providing that the speaker of the house of representatives may, for purposes of canvass of votes for governor and lieutenant governor and for the inauguration of such officers, designate any suitable hall at the seat of government as the hall of the house of representatives.

Under §19.15, Code of Iowa, 1966, and House File 718, 62nd General Assembly, the executive council has been delegated the authority and duty to assign space in the capitol building and other buildings owned or controlled by the state in Des Moines. Whether these provisions empower the executive council to require a public officer or agency to move into a state building is a question that need not be answered in resolving this problem. No rent may be paid from public funds unless the payment of such rent is a necessary, as well as a reasonable, expense. Thus, the treasurer is not authorized to expend fees collected from bank examinations for rent unless payment of such rent is shown to be necessary. If suitable free office space is available to a public official or agency, in a state owned or controlled building, it can hardly be maintained that the payment of rent is necessary. Thus, the department of banking must move into the offices assigned to them.

3. The requested improvements are described in numbers 1 through 6 of the letter to the council dated December 21, 1967, as follows:

"1. Lower the ceilings to cover pipes and secure adequate lighting arrangements.
2. Carpet the floor.
3. Arrange for some sort of wall covering.
4. Have curtains at the windows.
5. Investigate the need for air conditioning.
6. Cover the hot water radiators now in existence with some sort of cover."

These improvements may be made by the banking department from the examination fees, subject to approval thereof by the council.

January 18, 1968

DRAINAGE DISTRICTS — Qualifications of voters in elections of trustees — §462.11, Code of Iowa, 1966. Landowners whose interests in land were created for the sole purpose of qualifying them as voters are not so qualified. A contract purchaser of land may be a qualified voter, and the vendor who retains title for security purposes only is not qualified. Municipalities and other political subdivisions are not qualified. (Cullison to Hicklin, State Representative, 1/18/68) #68-1-17.

The Hon. Edwin A. Hicklin, State Representative: You recently requested my opinion as follows:

"Chapter 462 of the Code provides for the management of drainage or levee districts by Trustees and the manner of their election. All of my questions involve the interpretation of Section 462.11 which provides as follows:

" 'Each landowner over twenty-one years of age without regard to sex and any railway or other corporation owning land in said district assessed for benefits shall be entitled to one vote only, except as provided in Section 462.12.'

"1. Where the owner of a 40-acre tract has conveyed one remotely located, inaccessible by any road, unimproved agricultural acre from said 40-acre tract to himself, his wife, his nine children and their spouses as tenants in common, are such persons landowners within the purview of Section 462.11 and entitled to vote?

"The only ostensible reason for the conveyance was to create a multiplicity of voters, and I invite your attention to the case of State of Iowa ex rel. William J. Pieper vs. Patterson, et al, (1955) 246 Iowa 1129, 70

N. W. 2d 838, which I believe to be almost squarely in point on this question.

"2. Is the vendor under an installment contract for the sale of real estate who retains title for security purposes only a landowner and entitled to vote under Section 462.11?

"3. Is the purchaser in possession under an installment contract for the sale of real estate a landowner and entitled to vote under Section 462.11?

"Section 462.10 may have a bearing on Questions 2 and 3. It occurs to me that if a contract vendor can vote under this statute, then a mortgagee should also be allowed to do so.

"4. Are political or municipal corporations or subdivisions entitled to vote under the statute?

"I am aware of no levee or drainage district in which the County does not own land. In some districts the State of Iowa, Townships, School Districts and other drainage or levee districts also own land."

In reply to your questions:

1. The owner of the 40 acre tract is a qualified voter under §462.11, but the other tenants in common, whose interests were created for the purpose of qualifying them as voters, are not thereby qualified.

2. A vendor under an installment contract for the sale of real estate who retains title for security purposes only is not a qualified voter.

3. The purchaser under such an installment contract is a qualified voter.

4. Municipalities, drainage districts and other political subdivisions are not qualified voters.

Chapter 426 of the Code of Iowa authorizes the control and management of existing levee or drainage districts by three trustees, elected by landowners in such districts. §426.11, relating to the qualifications of voters in such elections, states:

"Each landowner over twenty-one years of age without regard to sex and any railway or other corporation owning land in said district assessed for benefits shall be entitled to one vote only, except as provided in Section 462.12."

Section 462.12 authorizes the right to vote in proportion to assessment for benefits, if a majority of those owning land assessed for benefits so petition.

While it is clear that ownership of land is the qualifying factor for voting under §462.11, it cannot be so literally construed as to frustrate the purpose of an election.

A grantee of a small parcel of land, or a tenant in common, may be a "landowner" in the strict sense of the word, but not within the meaning of §462.11 when the interests were created merely for the purpose of giving disproportionate influence to one landowner. See *State vs. Patterson* (1955) 246 Iowa 1129, 70 N. W. 2d 838, where the court in a comparable case, said:

"Someone . . . evolved the clever scheme of circumventing the will of

the majority of owners by the execution of gratuitous conveyances to relatives, friends and acquaintances, 122 in all, in various parts of the country. As stated, the two principal deeds purported to convey 27.095 acres, only 11 of which were fit for agricultural purposes, to 100 grantees scattered about from Pasadena to Chicago. If such manipulation were to receive the sanction of a court, . . . it would seem the only effective course open to those who had been in the majority would be to make gratuitous deeds to a larger number of relatives, friends and acquaintances. Thus the manner of counting votes would depend upon which faction could ultimately name the greater number of grantees in gratuitous conveyances, not — as the statute contemplates — on the will of a majority of actual landowners."

With respect to the rights of vendor and vendee under a contract to purchase real estate, where title remains with the vendor for security purposes only, to vote in an election pursuant to §462.11, it is the equitable owner who is qualified to vote, because it is his interest which will be affected by the good or bad management of the prospective trustees. In *Wolfe v. Iowa Ry. & Light Co.*, (1915) 173 Iowa 277, 15 N. W. 324, the court stated:

"Under this contract, the full beneficial interest of (the vendor) in the land was the agreed purchase price to be paid. Under the same contract, the (vendors) became subject to every future unfavorable contingency, and entitled to every favorable one. Future depreciation of value would fall upon them. Future appreciation would inure to them. Future appreciation or depreciation could affect (the vendor) only as affecting his security for the purchase price."

See also, *Johnston v. Robertson*, (1917) 179 Iowa 838, 162 N. W. 66, where the court stated:

"We are of the opinion . . . that the equitable owner of land under executory contract is entitled to protect his interest therein in drainage proceedings precisely as any other owner."

Political or municipal corporations and other political subdivisions are not "other corporation(s)" within the meaning of Sec. 462.11. The term "corporation" in a statute does not ordinarily mean such corporations unless they are clearly included by the terms of the statute. *Graham v. Worthington*, (1966) ..... Iowa....., 146 N. W. 2d 626; *State v. Executive Council of State of Iowa*, (1929) 207 Iowa 923, 223 N. W. 737; *City of St. Petersburg v. Carter*, 39 So. 2d 804; *Poynter v. Otter Tail County*, 223 Minn. 121, 25 N. W. 2d 708; *City of Webster Groves v. Smith*, 340 Mo. 798, 102 S. W. 2d 618.

It is not apparent from the terms of Sec. 462.11 that municipal and other political units and corporations were intended to be qualified voters in elections of trustees. Indeed, a contrary intention may appear from the language "any railway or other corporation," which is susceptible of the interpretation that "other corporation" means private corporation in the same class as railways. This interpretation is reinforced by the fact that assessments and other matters relating to highways, railways, and municipalities are specifically dealt with in other sections, but they are not mentioned, except for railways, in Sec. 462.11.

January 22, 1968

COURTS — Judges of police courts, solemnization of marriages — §§367.1 and 595.10, Code of Iowa, 1966. A judge of a police court is not authorized to solemnize marriages. (Haesemeyer to Carstensen, Clinton County Attorney, 1/22/68) #68-1-18

Mr. L. D. Carstensen, Clinton County Attorney: By your letter of January 18, 1968, you have requested an opinion of this office as to whether or not marriages can be performed by a judge of a police court established pursuant to Chapter 367, Code of Iowa, 1966. §595.10 provides:

"595.10 Who may solemnize. Marriages must be solemnized by:

1. A justice of the peace, or the mayor of the city or town wherein the marriage takes place.

2. Some judge of the supreme, district, superior, or municipal court of the state.

3. Some minister of the gospel, ordained or licensed according to the usages of his denomination."

§367.1 provides in relevant part as follows:

"In cities of fifteen thousand or more population wherein there is no municipal or superior court there shall be a police court *which in all criminal actions shall have the jurisdiction of a justice of the peace court and a mayor's court.*" (Emphasis supplied)

It is to be observed that §595.10 is quite specific in specifying those classes of persons who are authorized to solemnize marriages. A judge of a police court is not among those named. While §367.1 does give a police court the same jurisdiction as a justice of the peace court it has such jurisdiction only in all criminal actions. While there are undoubtedly those who would strenuously disagree, we can not conclude that the solemnization of marriages may fairly be characterized as a "criminal action."

Accordingly, it is our opinion that a judge of the police court may not solemnize marriages. However, I might point out that §595.11 provides:

"Nonstatutory solemnization — forfeiture. Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days thereafter he makes the required return to the clerk of the district court."

Thus, the mere fact that a marriage in a particular case may have been solemnized by a judge of a police court would not serve to invalidate such a marriage.

January 22, 1968

COUNTIES AND COUNTY OFFICERS — County conservation boards, construction of office buildings — Chapter 111A, Code of Iowa, 1966. County boards of supervisors are required to furnish suitable offices to county conservation boards and such conservation boards are not authorized to expend funds raised by the tax provided by §111A.6 to construct an office building for their own use. (Turner to Speaker, Director, State Conservation Commission, 1/22/68) #S68-1-9

Mr. E. B. Speaker, Director, State Conservation Commission: You have requested an opinion of this office regarding the following situation:

"Section 111A.3, Iowa Code 1966, covering certain activities of the County Conservation Boards, states: 'The County Board of Supervisors shall provide suitable offices for the meetings of the County Conservation Board and for the safe keeping of its records.'

"Moreover, under Section 111A.4 of the said Code, under the caption of 'Powers and Duties' governing County Conservation Boards, states in part:

" 'The County Conservation Board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes and is authorized and empowered:

" '4. To plan, develop, preserve, administer and maintain all such areas, places and facilities, and construct, alter and renew buildings and other structures, and equip and maintain the same.'

"A number of the County Conservation Boards in Iowa have used county conservation funds to construct a headquarters building in conjunction with their service building where they service all of their equipment. At the present time, quite a few of the other County Conservation Boards are contemplating the construction of a headquarters and service building combination and the question has arisen whether they may use their county conservation funds legally for this purpose. We are requesting your opinion on the following questions:

"1. Under the Sections of the Code of Iowa as set forth above is the Board of Supervisors required to furnish the Conservation Board suitable offices? Who determines what is 'suitable'?

"2. Does the County Conservation Board have the authority to construct an office building out of conservation funds for its central headquarters on land now owned by the county and under the jurisdiction of the Board of Supervisors or the County Conservation Board?

"3. Would the construction of an office building for the County Conservation Board under the apparent authority of 1 or 2 be in conflict with any provisions of Chapter 345 of the Iowa Code, 1966?"

In answer to question number 1, Section 111A.3, 1966 Code of Iowa, provides in part as follows:

". . . The County Board of Supervisors shall provide suitable offices for the meetings of the County Conservation Board and for the safekeeping of its records. . . ."

It is the opinion of this office that the board of supervisors must provide suitable offices for the holding of county conservation board meetings and space for safekeeping its records and for the conduct of its day to day operations. What is suitable is a question of fact within the discretion of the board of supervisors. In absence of showing they have failed to act or have acted arbitrarily and capriciously and thereby abused their discretion, their determination of this fact must control.

In answer to question number 2, Subsection 4 of §111A.4, 1966 Code of Iowa, provides as follows:

"4. To plan, develop, preserve, administer and maintain all such areas, places and facilities, and construct, reconstruct, alter and renew buildings and other structures, and equip and maintain the same."

It is the opinion of this office that a county conservation board has no authority to construct and equip an administrative office building for its own use.

While the provisions of §111A.4(4) set forth above might at first glance appear to confer such authority, it is our opinion that when such subsection is considered in the context of the balance of Chapter 111A and in pari materia with §111A.3 which, as pointed out in response to your first question, requires the board of supervisors to furnish the county conservation board with suitable offices, there is a manifest and overriding purpose to be found in §111A.4 that the powers granted to the county conservation board are to be closely related to the purposes (as described in §111A.1) for which such board is created. Thus §111A.4 begins:

"The county conservation board shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for public parks, preserves, parkways, playgrounds, recreation centers, county forests, county wildlife areas, and other county conservation and recreation purposes. . . ."

The construction of an office building goes beyond this limited statutory mandate. This is especially clear in view of the fact that the county board of supervisors is obliged by law to furnish the county conservation board with offices adequate to such board's needs.

Since the county conservation board has no authority to construct an office building on its own land, it seems quite obvious that it could not erect such a building on other county land.

In answer to question number 3 this office has recently ruled that the expenditure of funds by the county conservation board under Chapter 111A is not subject to the limitations of Chapter 345. See OAG (Turner to Samore) dated January 22, 1968. However, the expenditures by the county board of supervisors to furnish suitable offices for the county conservation board would be subject to the provisions of Chapter 345 since the county board of supervisors would be the owner of said facilities and it would require the expenditure of county funds by the board of supervisors rather than the expenditure of county conservation funds by the county conservation board pursuant to §111A.

January 22, 1968

COUNTIES AND COUNTY OFFICERS — **County conservation boards, cost limitations on acquisitions of real estate** — Chapters 111A and 345, Code of Iowa, 1966. Chapter 345 does not apply to acquisition of land by county conservation boards under Chapter 111A. (Turner to Samore, Woodbury County Attorney, 1/22/68) #S68-1-8

Mr. Edward Samore, Woodbury County Attorney: We have received your recent request for an opinion regarding the following:

"The authority and limitations of the County Conservation Board to acquire real estate, and specific reference is made to cost limitations. In effect, it would appear to be a question whether the Conservation Board

may proceed under Chapters 111A and 23 of the Iowa Code, or whether the limitation contained at Chapter 345 imposed on the Board of Supervisors applies to the County Conservation Board."

It is the opinion of this office that §111A.4, 1966 Code of Iowa, grants unto the County Conservation Board the right to acquire in the name of the county by purchase or otherwise certain real estate for the various purposes enumerated in Chapter 111A. Section 111A.6, 1966 Code of Iowa, does provide for the levy of a tax by the County Board of Supervisors. However, a determination of the expenditure of the funds raised by the tax or by the bonding procedure prescribed therein is the duty and responsibility of the County Conservation Board. They are the subdivision of state government that makes the actual purchase of any real estate.

The specific limitation upon the County Conservation Board as to the expenditure of these tax funds is governed by the following limitation as prescribed in §111A.6:

". . . The County Conservation Board shall have no power or authority to contract any debt or obligation in any year in excess of the moneys in the hands of the County Treasurer immediately available for such purposes. Any single expenditure of, or contract to expend, a sum of $5,000.00 shall be subject to the provisions of Chapter 23. . . ."

Hence the legislature expressly placed certain limitations on the contracting power of the County Conservation Board. If they had intended Chapter 345 to apply, reference would have been made to such limitation as was done by prescribing that the provisions of Chapter 23 should apply to any expenditures of the County Conservation Board. *Expressio unis est exclusio alterius.*

It is the opinion of this office that Chapter 345 imposes a limitation upon the Board of Supervisors when acting only in the capacity as a Board of Supervisors in the usual course of county purchasing of real estate. Therefore, the answer to your inquiry is that Chapter 345 does not apply to acquisitions of land under Chapter 111A.

January 23, 1968

CIVIL SERVICE. §365.13, Code of Iowa, 1966. The office of chief of the police department of a city operating under civil service, Chapter 365, must be filled by an active member of the police department. (Strauss to Colton(Appanoose County Attorney, 1/23/68) #68-1-29

Mr. Marvin V. Colton, Appanoose County Attorney: Reference is herein made to yours of December 28, 1967, in which you advise that the City of Centerville has had a civil service program under the civil service statutes of the state for a number of years. That the city government is in the form of Council-Mayor and the city has a police department.

You further state:

"In view of the statutes of the State of Iowa regarding the Civil Service in cities and towns and the appointment of a police chief, to-wit: Section 365.13 and 365.17, may the Mayor of the said City appoint a person as Chief of the City Police Department, who satisfies the requirements of Section 365.17, sub-paragraph 1 through sub-paragraph 7 inclusive, and who has passed a Civil Service examination and has just been certified as being eligible as a policeman, although all other policemen on the department have more seniority but the proposed appointee

has sixteen years experience as a police officer in two other localities in the State, a portion of said experience being service as a Chief in both localities?"

Section 365.13, Code of Iowa, 1966, provides with respect to the appointment of both the chief of the fire department and the chief of the police department the following:

"The chief of the fire department shall be appointed from the chief's civil service eligible list and shall hold full civil service rights as chief, and the chief of the police department shall be appointed from the active members of the department who hold civil service seniority rights as patrolmen and have had five years service in the department, but this shall not apply to any person holding the office of chief of police in any city on April 16, 1937 in such city during his term of office as chief which may include successive reappointments thereto. Any such chief of police, having ten or more years service, shall be entitled to civil service rights as patrolman for the period of such service as chief with continuing seniority determined as provided in section 365.12."

In the case of Dennis v. Bennet, 258 Iowa 664, 140 N. W. 2d 123, with respect to such above numbered section it is stated:

"Then Code section 365.13 provides in part as follows: 'The chief of the fire department shall be appointed from the chief's civil service eligible list and shall hold full civil service rights as chief, and the chief of the police department shall be appointed from the active members of the department. . . .'

* * *

"[2] Referring now to Code sections 365.6(2) (a), 365.13 and 365.14, we find the chief of the fire department must be appointed from the chief's civil service list and once appointed holds full civil service rights as such.

"On the other hand, the law specifically provides the chief of police must be appointed from the active members of the department and holds no civil service status in that office. In fact, he, as chief, retains only those civil service rights which were held prior to appointment as head of the department. Noticeably the law does not provide that the chief of the fire department be appointed from the active members of the department."

It appears that the proposed appointee as chief of police has been certified as a policeman. This status does not qualify him as eligible for appointment as chief of police. Under the statute to be eligible to such office he is required to be an active member of the department.

January 23, 1968

COUNTY OFFICERS: PUBLIC RECORDS. S.F. 537, 62nd G. A. List of bank stockholders furnished assessor is a public record which any citizen has a right to examine pursuant to S.F. 537, 62nd G. A. (Nolan to Bruner, Carroll County Attorney, 1/23/68) #68-1-24

Mr. Robert S. Bruner, Carroll County Attorney: This is in answer to your letter dated December 26, 1967, requesting an opinion as to the following:

"A business known as 'Iowa Bank Sales' is located in this community. Its object is to operate as an exchange whereby bank stock can be handled in approximately the same manner as other stock. It has registered with the State Security and Exchange Commission and has posted the proper bond.

"It now appears that, in order to operate as an exchange for bank stock, it needs certain information about banks in this and other counties, such as the amount of stock issued, par value, the book value, the stockholders, etc.

"In an opinion from your office under date of June 26, 1963, it was ruled that a list of bank stockholders furnished to an assessor may be disclosed to citizens and taxpayers with a bona fide public interest. This opinion was brought to the attention of all city and county assessors in memorandum #137 issued by the State Tax Commission. Since that ruling, Senate File 537 of the 62nd General Assembly has been enacted providing in effect every citizen of Iowa shall have the right to examine and make copies of all public records unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential.

"Iowa Bank Sales is owned by citizens of this county and state.

"The opinion of your office is requested as to whether or not citizens now have the absolute right to secure the information above referred to from the County Auditor and/or Assessor."

Senate File 537 enacted by the 62nd General Assembly provides that every citizen of Iowa shall have the right to examine all public records and to copy such records unless some other provision of the code expressly limits such right or requires such records to be kept secret or confidential. Section 1 of this act defines public records as "all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing."

Section 8 of the act also declares it to be the "policy of this act that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."

In view of the fact that the list of bank stockholders furnished to an assessor has been determined not to be confidential per se, see 1964 O.A.G. 19.2, it is our opinion that the public records must be made available to any citizen seeking to examine them. You should advise the county officers that under Section 6 of the act it is unlawful for any person to deny or refuse any citizen of Iowa any right under the act or to cause such right to be denied or refused; and any person knowingly violating any provision of the public records act is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars.

January 23, 1968

SOLDIERS' RELIEF COMMISSION: Chapter 250, Code of Iowa, 1966. Soldiers' relief authorized by Ch. 250, Code of Iowa, 1966, is available only to soldiers having an actual residence in the county in which relief is sought. (Strauss to Kauffman, Executive Secretary, Iowa Bonus Board, 1/23/68) #68-1-27

Mr. Ray J. Kauffman, Executive Secretary, State of Iowa Bonus Board: Reference is herein made to yours of December 13, 1967, in which you submitted the following:

"The Iowa Bonus Board has been asked for an opinion as to the case of a World War I veteran who has lived in Polk County the past seven-

teen (17) years, but presently is residing in a Nursing Home in Jasper County, Prairie City, Iowa, as to which county should be indebted for the difference in cost due from their Soldiers' Relief Commission Account.

"Jasper County Soldiers' Relief Commission contends the veteran is still a legal resident of Polk County and further that his presence in the Nursing Home in Jasper County is a temporary move.

"I'm enclosing a copy of the letter received by the Iowa Bonus Board.

"The question is, which County Soldiers' Relief Commission should bear the expenses involved?"

The letter dated December 8, 1967, which you received from the Jasper County Commission states the following:

"We desire an opinion as to the expenditure of Soldiers Relief funds for a veteran receiving Nursing home care in Jasper County, but who has residency in Polk County.

"A veteran, who has lived in Polk County the past 17 years, and who owns a half interest with a son, in a house at 4008 South Union, Des Moines, Iowa, entered a nursing home in Prairie City, November 7th.

"The nursing care cost is $300.00 per month. The veteran receives $204.00 per month leaving a balance of $96.00. Jasper County Soldiers Relief has been requested to assist with the balance.

"We do not believe we are responsible to assist the veteran, because, this is a temporary move. The veteran has made application for admission to the Iowa Soldiers Home and is on the waiting list to enter the Home."

In reply to your inquiry I advise that a recipient of soldiers' relief is required to be an actual resident of the county from which aid is sought and such residence is legally retained until the recipient has abandoned such residence and a new one is acquired. See 1938 O.A.G. 160, 1936 O.A.G. 311 and 1930 O.A.G. 47.

Residence in a nursing home by such a recipient in another county does not by itself evidence an abandonment of his residence. See *Farrow v. Farrow*, 162 Iowa 87, 143 N. W. 856.

In view of the foregoing rule the soldiers' relief commission in Polk County is liable for this form of relief in Jasper County as Jasper County has no obligation to this resident of Polk County.

January 23, 1968

STATE OFFICERS AND DEPARTMENTS — Department of Public Safety, examination of records — §321.11, Code of Iowa, 1966 — Chapter 106 (62nd G. A.) The department of public safety must allow the examination and reproduction of its copies of operators licenses, chauffers licenses, temporary driving permits and motor vehicle registration on a mass basis and may not restrict the use to which the information contained in such records is or may be put by the person copying the same. (Turner to Fulton, Commissioner, Dept. of Pub. Safety, 1/23/68) #S68-1-10

Mr. Jack M. Fulton, Commissioner, Dept. of Public Safety: You have requested an opinion of this office concerning the following:

"The Iowa Department of Public Safety issues and has copies of each operator's license, chauffeur's license and temporary driving permits issued in the State of Iowa. Also, the Department issues motor vehicle registrations and has copies of each registration.

"Section 321.11 of the 1966 Code of Iowa deals with records of this Department and Senate File 537 of the 62nd General Assembly deals with public records in the State in general.

"There is no doubt that the operator's license, chauffeur's license, temporary driving permits and motor vehicle registrations are 'public records,' and we must comply with the provisions of the Act and permit examination and copying of these records.

"My question is this:

"Is the Department required by law to allow the examination or reproduction of its copies of operator's licenses, chauffeur's licenses, temporary driving permits or motor vehicle registrations, on a mass basis or may it require the person asking to inspect the records to specify the particular operator's license, chauffeur's license, temporary driving permit or motor vehicle registration to be examined or reproduced.

"If the answer to the above question is that we may require the person to specify the particular license, temporary driving permit or registration he wants to examine or copy, could we then permit a person to examine all of the licenses, permits and registrations, but restrict the purposes for which that person can use the information contained in these records, to uses determined by the Department to be in the public interest?"

Senate File 537, which has been designated as Chapter 106, Acts 62nd General Assembly, provides in relevant part as follows:

"Section 1. Wherever used in this Act, 'public records' includes all records and documents of or belonging to this state or any county, city, town, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

"Sec. 2. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section six hundred twenty-two point forty-six (622.46) of the Code.

"Sec. 3. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules and regulations regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work.

"Sec. 4. The rights of citizens under this Act may be exercised at any time during the customary office hours of the lawful custodian of the records. However, if the lawful custodian does not have customary office hours of at least thirty (30) hours per week, such right may be exercised at any time from nine (9) o'clock a.m. to noon and from one (1) o'clock p.m. to four (4) o'clock p.m. Monday through Friday, excluding legal holidays, unless the citizen exercising such right and the lawful custodian agree on a different time."

Although there are some public records which are to be kept confidential and are exempted from the open inspection right under Chapter 106, all license and registration lists and records of your department as well as other departments are included and clearly come under the definition of "public records." We are unable to find any language in this statute which would justify you in denying to any person the right to inspect your records on a mass basis or that would permit you to require a person asking to inspect any of your records to specify the particular operator's license, chauffeur's license, temporary driving permit or motor vehicle registration to be examined or reproduced. Moreover, while you would not be required to prepare or make lists or compilations of registration information for persons desiring the same, any such lists which you already had or were to prepare for your own use would themselves be public records and open to inspection and copying under the act.

Whether or not the data obtained from your records is to be used for commercial purposes is immaterial. The statute does not make any distinctions as to the purpose for which public records may be used. Hence, there is no legal authority under which you could restrict the purposes for which the person copying your records could use the information contained therein to uses determined by your department to be in the public interest.

§321.11, Code of Iowa, 1966, to which you make reference and which merely provides, "All records of the department, other than those declared by law to be confidential for the use of the department, shall be open to public inspection during office hours," is in no way inconsistent with Chapter 106.

Support for this opinion may be found in the case of *State v. Brown*, 345 Mo. 430, 134 S. W. 2d 28 (1939). In this case a citizen of Missouri who is in the business of publishing and selling lists of registration of motor vehicles brought a mandamus action against the state to require it to grant to him the right to inspect certain records. The court held that the right to inspect such records was not denied him, but in so ruling did state that motor vehicle lists were public records which he has the right to inspect. The Missouri court at page 30 of said opinion declared as follows:

"Since Section 7760 authorizes the branch office to receive applications and deliver certificates and number plates, and Section 7772 requires applications to be filed and registered as received, we think the statutes contemplated that records shall be kept in the branch offices as well as in the main office. If so, such records are 'official' records of public records because the statute requires them to be kept open to public inspection.

"True, the statute does not specifically refer to 'ditto lists,' but it does include 'such other * * * records as [the commissioner] may deem necessary' and the commissioner has seen fit to keep such lists in the branch office and to keep them for the very purpose of giving information to the public. Therefore, we hold such lists to be public or official records."

The Court also held that such right of inspection was subject to reasonable regulations as the state may impose to prevent undue interference with the work of the employees of the office and to prevent undue inter-

ference with members of the public being served at the office. Holding that the party seeking the right to inspect the records does not have an unlimited right the court stated at page 32 of the opinion:

"The special commissioner did not hold, and neither do we, that relator's right to inspect and copy the records is an unlimited right. It is subject to such reasonable regulations as respondents may impose to prevent undue interference with the work of the employees of the office, and to prevent undue interference with members of the public being served at the office."

January 23, 1968

STATE OFFICERS AND DEPARTMENTS: State printing board. §§17.27 and 321.15, Code of Iowa, 1966. The state publications costing more than fifty cents (50¢) per copy to produce may not be distributed gratis but must be sold. (Haesemeyer to Moore, Superintendent, Iowa State Printing Board, 1/23/68) #68-1-22

Mr. J. C. Moore, Superintendent of Printing, Iowa State Printing Board: Reference is made to your letter of December 19, 1967, in which you state:

"At the Printing Board meeting held December 14, 1967 the Department of Public Safety had a requisition for 23,000 copies of 'IOWA LAWS RELATING TO PUBLIC SAFETY.' The Specifications were sent out to twelve (12) printing firms capable of printing the book.

"Wallace-Homestead Co. was the only bidder. Their bid was $12,654.00 which makes the books cost 55¢ each. The Board in regular procedure moved to suspend the rules and award the bid to Wallace-Homestead.

"Chairman Synhorst then raised the question as to whether these books could be distributed free by the Department, citing Section 17.27 (1966 Code).

"The Department was contacted and they cited the authority given on their requisition, Section 321.15. Also citing the need for wide distribution of the book, which would be severely hampered if a 55¢ charge were made.

"Wallace-Homestead Co. was then contacted and every effort was made to devise some way to produce the book for less than 50¢ per copy. The decision was made that to do so would destroy the effectiveness and intent of the book.

"Your Superintendent of Printing was then instructed to seek an Attorney General's Opinion as to which is the overriding, Section 17.27 or 321.15 before awarding the contract."

The two sections of the code to which you refer provide as follows:

"17.27 Other necessary publications — when necessary to sell. There may be published other miscellaneous documents, reports, bulletins, books, and booklets that are needed for the use of the various officials and departments of state, or are of value for the information of the general assembly or the public, in form and number most useful and convenient, to be determined by the printing board.

"When such publications paid for by public funds furnished by the state, contain reprints of statutes or departmental rules, or both, they shall be sold and distributed at cost by the department, ordering same if the cost per publication is fifty cents or more. Such publications shall be obtained from the superintendent of printing on requisition by the

department and the selling price, if any, shall be determined by the printing board by dividing the total cost of printing, paper and binding by the number printed. Said price shall be set at the nearest multiple of ten to the quotient thus obtained. Distribution of such publications shall be made by the superintendent of printing gratis to public officers, purchasers of licenses from state departments required by statute, and departments. Funds from the sale of such publications shall be deposited monthly in the general fund of the state."

"321.15 Publication of law. The department shall issue such parts of this chapter in pamphlet form, together with such rules, instructions, and explanatory matter as may seem advisable. Copies of such pamphlet shall be given as wide distribution as the department shall determine and a supply shall be furnished each county treasurer."

It is to be observed that §17.27 has no application to instances where the per unit cost of a particular publication is less than 50¢. Also, it should be noted that §321.15 authorizes the department of public safety only to issue parts of chapter 321 in pamphlet form together with such rules and instructions and explanatory material as may seem advisable. Thus §321.15 furnishes no authority for the publication of a pamphlet containing parts of chapters other than chapter 321 although I understand from our conversations with respect to this matter that the booklet which the department of public safety contemplates publishing will contain extracts from numerous other chapters and that it is because of the inclusion of this substantial additional material that the cost of printing will exceed 50¢. Under these circumstances §17.27 is the governing provision of law and the pamphlets in question may not be distributed free of charge.

January 23, 1968

STATE FIRE MARSHAL. AUTHORITY OVER UNSAFE BUILDINGS. §100.13, Code of Iowa, 1966. Such numbered statute, being of general application, does not include in such application, the state of Iowa. (Strauss to Robinson, Sec., Executive Council, 1/23/68) #68-1-26

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of January 4, 1968, in which you state that you were directed by the council to obtain an official opinion as to the legality of allowing the demolition of the Amos Hiatt and/or the Archives Building under §100.13, Code of Iowa, 1966. The foregoing numbered section provides the following:

"When the fire marshal acting in person or through his designated subordinate, shall find any building or structure, which for want of proper repair or by reason of age and dilapidated condition, is especially liable to fire, and is so situated as to endanger other buildings or property therein, or when any such official shall find in any building or upon any premises combustible or explosive matter or inflammable materials dangerous to the safety of any buildings or premises, he shall in writing order the same to be removed or remedied, or he may order the owner or occupant to follow safe-storage procedures for explosives as set forth by the fire prevention code of the National Fire Protection Association. Any such order shall be complied with by the owner or occupant of said building or premises, within such reasonable time as the fire marshal shall specify."

This is a statute of general application and is not available to the state for the purpose stated in your letter. The reason therefor is found in §14, 49 Am. Jur., Title, States, Territories, and Dependencies, which states:

"The principle of English common law that where an act of Parliament is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the King is bound by such act, although not particularly named therein, but where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, the King is not bound, unless the statute is made to extend to him by express words, is equally applicable to our state governments. The state is not to be considered within the purview of a statute, however general and comprehensive the language of the statute may be, unless it is expressly named therein. General legislation is intended primarily for the subjects, and not for the sovereign.

"An exception is recognized with respect to legislation prescribing rules of procedure in civil actions, the state being bound thereby when it invokes the jurisdiction of courts in its aid, but where the effect of a statute in general terms is to restrict or limit the rights of the state, to affect its interests, or to impose liabilities upon it, the statute is deemed to be inapplicable to the state unless it is named expressly or by necessary implication. The reason for applying the rule is equally as cogent in a representative government, where the people act only through the delegated power of their agents, as it is in a kingly government; the rule stands on the same ground of expediency and public convenience. Moreover, independently of any doctrine founded on the notion of prerogative, the same construction ought to prevail founded upon legislative intent. The presumption of a legislative intent to exclude the state from the operation of a statute is based on the fact that laws are ordinarily made for the government of citizens and not of the state, and the probability that if the legislative power intended to divest the sovereign power of any right, privilege, title, or interest, it would say so in express words. Where an act contains no words to express such an intent, it will be presumed that the intent does not exist. Any doubt as to whether the state is intended to be included is to be resolved in favor of the state. If, however, a statute is enacted for the public good, the state is included therein, although not expressly named, and the fact that the subject matter of a statute is one in which the state is the chief party in interest may indicate an intention to bind the state. The rule that the state is not bound unless expressly named does not apply to statutes prescribing general rules of procedure on civil actions."

Such reason is also found in *Fulton v. First Volunteer Co. of Oconto*, 236 N. W. 120, where it is said:

"The rule of construction which protects the state against general legislation is a rule of certainty based upon the sovereign right to be free from the effects of legislation, unless it has expressly consented to be included in the terms of the statute. . . .

* * *

"The purpose of the rule relied on by appellant that general statutes are not to be construed to include to its hurt the state is to prevent interference with the exercise of authority in the administration of the affairs of state or community. The government exists primarily for the protection of the people in their individual rights, and, when the Legislature enacts a law giving materialmen, laborers, and others certain lien protection against the property upon which they are working, this being private property, and if by mischance a state agency accepts a mortgage which is in fact a second mortgage, there is no method by which the owner of the prior lien can be divested of his right without just compensation."

The Supreme Court of Iowa adheres to this rule. In *State v. City of Des Moines*, 221 Iowa, 642, 647, 266 N. W. 41, it was said:

" 'Where the government is not expressly or by necessary implication

included, it ought to be clear, from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself. It appears to me therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.'"

January 23, 1968

STATE OFFICERS AND DEPARTMENTS: **Iowa State Commerce Commission, jurisdiction to regulate municipally owned utilities.** §490A.1, Code of Iowa, 1966. A municipally owned and operated electric, sewage or gas utility is subject to service regulation by the Iowa State Commerce Commission although not subject to rate regulation. A municipally owned water utility is subject to neither rate nor service regulation. A municipal corporation is a "corporation" within the meaning of §490A.1. (Haesemeyer to Ball, Davis County Attorney, 1/23/68) #68-1-21

Mr. Vern M. Ball, Davis County Attorney: You have requested an opinion of this office with respect to the following:

"This is to respectfully request your official opinion on the following question: Does the Iowa State Commerce Commission have jurisdiction to regulate municipally owned and operated electric, water, sewage, and gas facilities, with particular reference to the requiring of meter deposits, by virtue of Section 490A.1 CODE OF IOWA (1966)? Specifically, does the word 'corporation' in this act apply to municipal corporations?

"In the case of Medical College Association vs. Schrader, 55 N. W. 24, 27, 87 Iowa 659, the Court said the word 'corporation' shall be interpreted as meaning private or quasi public corporations.

"However, in interpreting the term 'corporation,' some states have specifically stated the term to mean private corporations and not municipal ones. See Landowners vs. People, 131 Illinois 296, 314; Sherman County vs. Simmonds, 3 Supreme Court 502, 506, 109 U. S. 735; and George W. Emory & Company vs. Commissioners of Town of Laurel (Delaware), 55 Atlantic 1118, 1119.

"There seem to be many old decisions wherein the various states differ in their interpretation of the meaning of the word 'corporation.' I will appreciate having your citations of the Iowa law on which you base your decision."

§490A.1 to which you refer provides:

"Applicability of authority. The Iowa state commerce commission shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.

"As used in this chapter, 'public utility' shall include any person, partnership, business association, or *corporation*, domestic or foreign, owning or operating any facilities for:

"1. Furnishing gas by piped distribution system or electricity to the public for compensation.

"2. Furnishing communications services to the public for compensation.

"3. Furnishing water by piped distribution system to the public for compensation.

"Mutual telephone companies in which at least fifty percent of the users are owners, telephone companies having less than two thousand stations, *municipally-owned utilities*, unincorporated villages which own their own distribution system, and co-operative corporations or associations *shall not be subject to the rate regulation* provided for in this chapter; provided, however, that *nothing contained in this chapter shall be construed to apply to municipally-owned water works.* Telephone companies otherwise exempt from rate regulation and having telephone exchange facilities which cross state lines may elect, in writing, filed with the commission, to have their rates regulated by the commission. When such election, in writing, has been filed with the commission, the commission shall assume rate regulation jurisdiction over said companies." (Emphasis added)

In our opinion it is unnecessary to look beyond the language of the statute quoted above to find the answer to your question.

Clearly, unless the word "corporation" as used in the second paragraph of §490A.1 is taken to include municipal corporations the subsequent exemption of municipally-owned utilities from rate regulations and municipally-owned water works from all regulation under the chapter is unnecessary and superfluous. It is well settled that a statute should not be so construed as to make parts of it surplusage unless no other construction is reasonably possible. *Board of Directors of Menlo Consolidated School District of Menlo v. Blakesley*, 240 Iowa 910, 36 N. W. 2d 751 (1949). Applying the foregoing principle to §490A.1, it is our opinion that the word "corporation" as used in such §490A.1 includes municipal corporations. See also *Knotts v. Nollen*, 206 Iowa 261, 218 N. W. 563 (1928); *Incorp. Town of Mapleton v. Iowa Public Service Co.*, 209 Iowa 400, 223 N. W. 476 (1929); and *State v. Barker*, 116 Iowa 96, 89 N. W. 204 (1902) wherein municipally operated utilities are treated much as are privately operated enterprises of like character.

However, there are circumstances in which the expression "corporations" is construed to exclude municipal corporations because of the statutory context in which such expression is used. See opinion of attorney general to Representative Hicklin, January 18, 1968.

In answer to your first question we advise that a municipally-owned and operated electric, sewage or gas utility would be subject to service regulation by the Iowa Commerce Commission although not subject to rate regulation. A municipally-owned water utility would not be subject to either rate or service regulation.

January 23, 1968

CLERK OF THE DISTRICT COURT: §607.5, Sec. 142, S.F. 288, 62nd G. A. It is the duty of the Clerk to certify to the county auditor the number of days of attendance and mileage of both petit and grand jurors. (Strauss to Knoshaug, Wright County Attorney, 1/23/68) #68-1-28

Mr. Dewayne A. Knoshaug, Wright County Attorney: Reference is herein made to your letter of December 22, 1967, in which you submitted the following:

"Please be advised that I have been requested by Bessie Johnson, Wright County Clerk of District Court, to obtain your opinion in regards to the following:

"I understand that Section 607.6 of the 1966 Code of Iowa was repealed by the 62nd General Assembly by Chapter 400, Section 142.

"The question our Clerk has is who should pay the Grand and Petit Jurors — the Auditor or Clerk. The same question as to who should pay mileage to the Grand and Petit Jurors — the Auditor or Clerk. When the Clerk certifies to the Auditor, should she also certify the mileage?"

In reply thereto I advise the current statute concerning certification of days of attendance of jurors is now contained in §142 of Senate File 288 providing as follows:

"Section six hundred seven point six (607 6), Code 1966, is repealed and the following enacted in lieu thereof:

"Upon conclusion of every calendar quarter the clerk of the district court shall certify to the county auditor a list of the jurors with the number of days attendance to which each one is entitled."

As far as mileage allowance of jurors is concerned §607.5, Code of Iowa, 1966, provides as far as petit jurors are concerned:

"1. For each day's service or attendance in courts of record, including jurors summoned on special venire, five dollars, and for each mile traveled from his residence to the place of trial for each day's service and attendance, ten cents."

As far as certification for days of service or attendance and certification for mileage for grand jurors is concerned §607.5 provides:

"Grand jurors shall receive for each day's service or attendance, seven dollars, and for each mile traveled each day from his residence to the place of attendance and in the performance of their duties, seven cents, provided, however, that grand jurors shall be entitled to mileage for travel from the place of their residence to the county seat for the purpose of being impaneled. . . ."

These certifications are comparable in content with §§10846 and 10847, exhibited in the case of *Park v. Polk County*, 220 Iowa 120, 125, 261 N. W. 508, 1935, which case respecting your inquiry stated the following:

"Section 10847 makes it the duty of the clerk, after the adjournment of each term of court to certify to the county auditor the number of days which each juror is entitled to be paid. This section read in conjunction with section 10846 would contemplate that such certificate should also cover the mileage to which each juror is entitled. The duty of making this certificate is thus plainly imposed upon the clerk and not upon the court or judge."

January 23, 1968

TAXATION: Sales Tax on Parking Lot Facilities provided by Fairs. H.F. 702, Acts of the 62nd G. A. (1967). The gross receipts from membership fees paid to a County Fair Association to enable members to vote in proceedings of the association and to park their automobiles on fair ground facilities are subject to the sales tax on that part of the gross receipts separately attributable to parking lot services. If no separation can be made between gross receipts attributable to parking lot services and non-taxable services by the association, the entire gross receipts would be subject to the sales tax. (Griger to Poston, 1/23/68) #68-1-30

Mr. T. C. Poston, Wayne County Attorney: This will acknowledge receipt of your letter of December 15, 1967, in which you requested an opinion as follows:

"The local County Fair Association is organized under the Non-profit Corporation Act. It is a 'free fair.' Anyone may go in and out the gate on foot. The members of the association are those who purchase membership tickets costing fifty cents. If they turn the ticket in for registration on the membership rolls, they are eligible to vote in the proceedings of the corporation. If they do not register their membership ticket, then they are not eligible to vote. Members are allowed to park their cars on the fairgrounds, non-members are not.

"Are the sale of these memberships subject to the new sales tax requirements under either parking services or admissions to County Fairs or memberships to private clubs as provided in Section 20; 22(2); or 23, respectively?"

The sections referred to in your letter are those of H.F. 702, Acts of the 62nd General Assembly (1967). Section 20 has no application to the facts you have presented; Section 25 of H.F. 702 pertains to the services of parking lots.

Section 22(2) of H.F. 702 amends Section 422.45(3), Code of Iowa, 1966, and strikes the exemption for sales of tickets or admissions to state, county, district, and local fairs.

Section 23 of H.F. 702 amends Section 422.43, Code of Iowa, 1966, by imposing the sales tax on:

"Athletic events including those of educational institutions, fairs; and a like rate of tax upon that part of private club membership fees or charges paid for the privilege of participating in any athletic sports provided club members."

Section 25 of H.F. 702 amends Section 422.43, Code of Iowa, 1966, by extending the sales tax to certain enumerated services in pertinent part:

"The following enumerated services shall be subject to the tax herein imposed on gross taxable services:

". . . golf and county clubs and all commercial recreation; . . . parking lots; . . ."

From the facts which you have presented, it would appear that the membership tickets are not related to mere admission to the fair inasmuch as the same is a "free fair" and anyone can enter on foot. The facts presented by you seem to denote that the memberships are purchased for two purposes: (1) To enable members to vote in the proceedings in the County Fair Association, and (2) to enable the members to park their automobiles on the fair grounds. We assume that the members are not paying for the privilege of participating in any athletic sports provided private club members nor does it appear that members pay for the services rendered by "golf and country clubs and all commercial recreation."

The payment of a fee to enable a member of any association *to vote* in the proceedings therein, is not a taxable service in Iowa. However, services rendered by parking lots are subject to the sales tax. Off-street parking facilities of a County Fair Association which are made available to members of that association could be a "parking lot." The Iowa

Supreme Court has held if a taxable sale of tangible personal property is separate from the sale of a non-taxable service, although related, and it is so understood and agreed to by the parties to the transaction, the sale of a non-taxable service is not subject to the sales tax. *Schemmer vs. Iowa State Tax Commission*, 254 Iowa 315, 117 N. W. 2d 420 (1962). There is no reason why this rule may not apply to the sales of taxable and non-taxable services.

The Iowa State Tax Commission has promulgated Rule 5.37 concerning parking lots which rule provides in part that parking lots include facilities used seasonally or for even shorter duration such as at the time of a fair. This rule was approved by the Attorney General in an advisory opinion, dated September 27, 1967.

It is the opinion of this office that the gross receipts from membership fees paid to a County Fair Association to enable the members to vote in the proceedings of the association and to park their automobiles on fair ground facilities are subject to the sales tax on that part of the gross receipts separately attributable to parking lot services. If no separation can be made between gross receipts attributable to parking lot services and non-taxable services provided by the local County Fair Association, the entire gross receipts would be subject to the sales tax.

January 23, 1968

BOARD OF REGENTS. EXECUTIVE COUNCIL. §§262.9(5), 262.10 and 262.12, Code of Iowa, 1966. The administrative functions of the board of regents are exercised without the approval of the executive council. (Strauss to Robinson, Sec., Executive Council, 1/23/68) #68-1-32

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of December 27, 1967, in which you submitted the following:

"Enclosed please find the request from the Board of Regents to purchase two acres of land in Polk County for the sum of $14,500 to be used to provide housing for the resident superintendent in connection with Iowa State University's research activities, which had the prior approval of your office as to the form of the purchase.

"The Council, in meeting held December 26, 1967, directed that I obtain from you an official opinion as to whether or not the state of Iowa or its agencies such as the Board of Regents has the right to provide housing for certain of its employees such as resident superintendent. The Council further directed that I obtain from you an official opinion as to whether or not the Council has any voice or determination in the policy question as to the desirability of providing said housing for a state employee after said determination has been made by the affected Board or Commission, in this instance the Board of Regents. Please advise."

I advise the following:

This purchase was approved by this department on December 15, 1967. The question you present now concerns the authority of the council to confirm and ratify the purpose for which the purchase was made.

It will be observed that under §262.9(5), Code of Iowa, 1966, the approval of the council to the acquisition of real estate acquired for the proper use of the institutions under the control of the board of regents was required. According to §262.10, Code of Iowa, 1966, "no sale or purchase of land shall be made save upon the order of the board at a regular

meeting or one called for that purpose and then in such manner and under such terms as the board may prescribe and only with the approval of the council." These are powers that may be exercised by the board of regents with the approval of the executive council.

By an opinion of this department appearing in the Report for 1936, at page 647, §262.10, then appearing in the 1936 Code as §3922 in substantially the same form and there designated as §3922 stated: "Section 3922 clearly appears to refer only to the acquisition of property." On the other hand, §262.12, Code of Iowa, 1966, provides that "the board of regents shall also have and exercise all the powers necessary and convenient for the effective administration of its office and the institutions under its control." This power of administration is defined in *People v. Salsbury*, 134 Mich. 537, 96 N. W. 936, 941, as: "The administration of government means the practical management and direction of the executive department or of the public machinery or functions, or of the operations of the various organs of the sovereign."

The use to which property purchased is to be put by the board of regents is an administrative power and is exercised without statutory approval by the council.

From this record I am of the opinion that the purpose or use of property for which a purchase is made by the board of regents is not the subject of approval by the council.

January 23, 1968

CITIES AND TOWNS: Mayor's vote — §§363A.5 and 366.4, Code of Iowa, 1966. The adoption of a resolution or ordinance by the city council must be by vote of the majority of the members thereof. This means that the mayor may not vote to break a tie as he is not a member of the city council. (Martin to McNamara, State Representative, 1/23/68) #68-2-3

The Hon. Walter L. McNamara, State Representative: I have received your letters of October 27, 1967 and December 11, 1967, wherein you recite the following facts:

"The Town of Delhi, Delaware County, Iowa, had submitted to it for consideration an application for a beer permit. The Council of the Town of Delhi then at a regular meeting, in the absence of the dulty elected, qualified and acting Mayor, passed on the application for the said beer permit by a vote of two in favor and two against, the Mayor pro tem abstaining. The action of the Council resulted in a deadlock and as a result thereof the application for the said beer permit was not adopted or ratified at the Council meeting.

"The following day the duly elected Mayor exercised his prerogative to break the tie and voted in favor of approval. There was no formal meeting of the Council of the Town of Delhi when the Mayor voted in favor of the approval of the beer permit." (Your letter of October 27, 1967)

". . . that the approval of beer permits in the Town of Delhi is by ordinance." (Your letter of November 11, 1967)

You then pose the following question:

"Can the Mayor exercise his vote to adopt and approve a matter, other than at a regular or special Council meeting?"

In light of the following view of the law, it is unnecessary to discuss whether the mayor's vote was properly cast, as a mayor, or mayor pro tempore, has no vote on an ordinance or resolution in case of a tie.

As we discussed in our recent telephone conversation, § 366.4, Code of Iowa, 1966, provides that a resolution or ordinance may not be adopted without the concurrence of the majority of the members of the city council. In numerous cases this has been interpreted to mean that a mayor may not vote to break a tie as he is not a member of the city council. *Doonan vs. City of Winterset*, 224 Iowa 365, 275 N. W. 640 (1937); *State vs. Alexander*, 107 Iowa 177, 77 N. W. 841 (1899); *Cochran vs. McCleary*, 22 Iowa 75 (1867); Op. Atty. Gen., July 21, 1958. Thus, since approval of beer permits in the Town of Delhi takes the form of an ordinance, the mayor or mayor pro tempore had no vote.

NOTE: The town of Delhi has a five-member council under a mayor-council form of government. Thus, the provisions of §363.5, Code of Iowa, 1966, authorizing a mayor to vote to break a tie when the municipality's council consists of four members, does not apply to this situation.

January 23, 1968

CITIES AND TOWNS: Low-Rent Housing Law — Elections. §§403A.5, 403A.25, 403A.2(9), Code of Iowa, 1966. A lease-type low-rent housing program in which the city plays a major role is a "project" within the meaning of §403A.2(9) and an election is required under §§403A.5 and 403A.25 prior to its commencement. (Haesemeyer to Riley, State Senator, 1/23/68) #S68-1-11.

The Hon. Tom Riley, State Senator: I have received your request for an Attorney General's opinion in which you inquire as follows:

"Is a referendum required before a municipality can conduct a leasing program by creating a 'low rent housing agency' to lease existing individual housing units (not a project) with the required subsidies being funded under Section 23 of the Federal Housing Act of 1937?"

Chapter 403A, Code of Iowa, 1966, which establishes the "Low-Rent Housing Law" provides, in pertinent part, as follows:

"403A.5 Any municipality may create, in such municipality, a public body corporate and politic to be known as the 'Low-Rent Housing Agency' of such municipality except that such agency shall not transact any business or exercise its powers hereunder until or unless the local governing body has elected to exercise its municipal housing powers through such an agency as prescribed in this section; and, *except further, that any housing agency shall not undertake any low-rent housing project* until such project has been approved by a referendum as provided in section 403A.25 . . ." (Emphasis added)

"403A.25 No municipality nor any low-rent housing agency shall proceed with the acquisition of any property for, or with the erection or *operation* of any low-rent housing project unless authorized by a vote . . ." (Emphasis added)

Section 403A.2(9) defines the words "Housing Project" and "project" as follows:

". . . any work or undertaking:

"(a) to demolish, clear or remove buildings from any slum areas; or (b) *to provide decent, safe and sanitary urban or rural dwellings, apart-*

ments or other living accommodations for persons of low income . . ." (Emphasis added)

It is clear from the above and the additional information you have supplied concerning the role of Cedar Rapids in this program that the action being considered by the City of Cedar Rapids is a "project" since apartments or other living accommodations for persons of low income are sought to be provided. All leases are to be between the city and the low-rent tenants, the city actually being the original lessee from the private land owner. Rules and regulations governing leasing and all lease forms will come from the Low-Rent Housing Agency, established as an arm of municipal government. The agency's regulation officials will also inspect the facilities for compliance with minimum standards promulgated by the agency. When viewed as a whole, the above information indicates that the City of Cedar Rapids is contemplating undertaking a major project.

Section 403A.25, set out above, provides that a referendum shall be held prior to the operation of any low-rent housing project by the city or any low-rent housing agency. By the use of the word "operation" the Legislature clearly contemplated the inclusion of any lease-type project within its terms. Section 403A.3 sets out the powers of a municipality or low-rent housing agency carrying out the provisions of this section. Subsection 4 thereof provides that an agency properly acting under this chapter may *lease* or *rent* structures, as well as construct them, for the carrying out of the provisions of this chapter. Real property is defined in §403A.2(12), Code of Iowa, 1966, as including " . . every estate, interest and right, legal or equitable, therein, *including terms for years.*" (Emphasis added) Similarly, other sections of the statute, all of which must be considered in pari materia and construed together to arrive at the meaning of the word "operation" in §403A.25 indicate that a leasehold interest would be included within the meaning of the word "operation." Section 403A.17, Code of Iowa, 1966, talks about all property ". . . owned *or held.* . . ." (Emphasis added) Section 403A.20, Code of Iowa, 1966, refers to the right of a municipality " . . to acquire by condemnation *any interest* in real property, including a fee simple title. . . ." (Emphasis added) Section 403A.21(1), Code of Iowa, 1966, also speaks of the power to ". . . lease any of its interest in any property . . ."

When the active role of the City of Cedar Rapids in low-rent housing is coupled with the language of the statute relating to the leasing or renting of structures, it is clear that the word "operation" includes the Cedar Rapids project.

The question remaining is: Does the form of the ballot set forth in §403A.25 limit instances in which referendums must be held to those in which new construction or rehabilitation of existing structures is to be undertaken. We are of the opinion that it does not.

Section 403A.25, Code of Iowa, 1966, in pertinent part provides as follows:

"The form of the question to be presented for a vote of the electors shall include the name of the proposed project, describe its location with

reasonable certainty, specify the maximum number of housing units in said project, state whether new construction or rehabilitation of existing structures is contemplated, or a combination of same, state the maximum amount of funds to be expended for the contemplated construction or rehabilitation or both, and state the type of occupancy contemplated whether it be without limitation as to age or designed for the elderly."

Under this statutory provision the ballot must contain a statement of whether new construction or rehabilitation of existing structures is contemplated plus a statement of the total amount of funds to be spent for new construction or rehabilitation. If the project is of the type that will not require new construction or rehabilitation of existing structures, or, if no funds are to be spent for those purposes the ballot may so state.

January 23, 1968

TECHNICIANS, IOWA NATIONAL GUARD, §79.1, Code of 1966, as amended. National Guard Technicians or caretakers are state employees eligible to vacation allowance, salary determination and longevity credits promulgated by the state personnel director. However a state employee who entered the state service in 1935 and thereafter was engaged in federal active duty is not entitled to credit for such federal active duty in connection with annual vacation time and determination of salary eligiiblity and longevity credit. (Strauss to May, Asst. Adjutant General, 1/23/68) #68-1-31

Joseph G. May, Col. GS. Iowa ARNG, Assistant Adjutant General: Reference is herein made to your request for an opinion in which you state the following:

"National Guard technicians are federally recognized officers, warrant officers and enlisted men/airmen of the Army and Air National Guard, employed as civilians for the performance of administrative, supply, accounting, operational and maintenance functions in connection with the National Guard Program. Authority for the National Guard technician program is contained in Title 32, U. S. Code, Section 709, and pursuant to regulations implemented by the Department of the Army and the Department of the Air Force, as applicable, which regulate rates of compensation and meaning. Authority has been delegated to each State Adjutant General to employ, establish duty and work hours and supervise and discharge technician employees authorized for the State.

"National Guard technicians are compensated by Federal pay checks issued direct by applicable Army or Air Force fiscal agencies.

"The principle that technician employees, although compensated by Federal funds, are employees of the State by which employed, has been upheld in a recent decision of the Supreme Court of the United States of 3 May, 1965, (Maryland, for the use of Nadine Y. Levin, Sydney L. Johns, et al., Petitioners, v United States, 14 L ed 2d 205.

"The Attorney General of Iowa, in an Opinion to the Executive Council (16 Feb. 65), ruled that National Guard technicians are State employees and eligible for membership in State sponsored insurance programs. (Copy attached)

"National Guard technicians employed by the Adjutant General of Iowa participate in the Iowa Public Employees Retirement System, are entitled to Federal Old Age and Survivors Insurance benefits under the Social Security Act (49 Stat. 622 et seq) as amended (42 USC 401 et seq(, compensation under the Federal Employees Compensation Act (63 Stat. 866 et seq) as amended (USC 751 et seq) for injuries or death sustained while in the performance of their official duties as technicians, and unemployment compensation under the Social Security Act (68 Stat. 1130 et seq) as amended (42 USC 1361 et seq).

"National Guard Bureau regulations pertaining to administration of the National Guard technician program include policy with reference to various types of leave authorized for such employees in a technician status, and provide for payment, under the Federal funding authority, for accrued and unused annual leave upon termination or death.

"The Military Division, this Department, the Civil Aeronautics Commission, and the Conservation Commission presently employ individuals who were formerly employed as National Guard technicians, and Mr. Jack Langford, the State Car Dispatcher, is also in that category.

"The opinion of the Attorney General of Iowa is respectfully requested with reference to the following questions.

"1. Are the former National Guard technicians now employed under the Departmental Table of Organization authorized by the State Personnel Division, creditable with the period of service as technicians in connection with accrual of annual vacation eligibility under the provisions of Section 79.1 Code 1966, as amended, and in connection with determination of salary eligibility and longevity credit under the provisions of the 'Classification and Compensation Plan' promulgated by the State Personnel Director?

"2. Is an employee, currently employed in a position under the Departmental Table of organization authorized by the State Personnel Division, but who was employed as a technician in 1935, and as such technician entered Federal Active Duty as an Iowa National Guardsman in 1941, returned from Active Duty in 1947 and again, at that time, entered State employment, entitled to creditability for his Federal Active Duty service, under the provisions of Section 29.28 Code 1966, in connection with eligibility for accrual of annual vacation time under the provisions of Section 79.1 Code 1966, as amended, and in connection with determination of salary eligibility and longevity credit under the provisions of the Classification and Compensation Plan promulgated by the State Personnel Director?"

In answer thereto I advise that vacation benefits for public employees is described in §79.1, Code of 1966, providing as follows:

"Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly or semimonthly installments and shall be in full compensation of all services, except as otherwise expressly provided. All employees of the state including highway maintenance employees of the state highway commission are granted one week vacation after one year employment and two weeks vacation per year after the second and through the tenth year of employment, and three weeks vacation per year after the tenth and through the fifteenth year of employment, and four weeks vacation after the fifteenth year and all subsequent years of employment, with pay. Said vacations after the first complete year of employment shall be granted, regardless of anniversary date, at the discretion and convenience of the head of the department, agency or commission. In the event that the employment of an employee of the state who has been in such employ for more than one year shall be terminated for any reason other than a discharge for good cause, he shall be paid a vacation allowance for any vacation which may have accrued to him during the twelve months immediately prior to such termination, and which he has not yet taken. For the purposes of this section, death of an employee shall be considered a termination of employment which shall require payment of such vacation allowances as might be payable for any other termination.

"Vacation allowances for any period of less than one year shall be computed as having accrued at the rate of two and one-half days pay for each completed calendar quarter during the second and through the ninth

year of employment, and at the rate of three and three-fourths days pay for each completed calendar quarter through the tenth and all subsequent years of employment.

"If said termination of employment shall be by reason of the death of the employee, such vacation allowance shall be paid to the estate of the deceased employee if such estate shall be opened for probate. If no estate be opened, the allowance shall be paid to the surviving spouse, if any, or to the legal heirs if no spouse survives.

"Payments authorized by this section shall be approved by the department and paid from the appropriation or fund of original certification of the claim.

"Leave of absence of thirty days per year with pay may be granted in the discretion of the head of any department to employees of such department when necessary by reason of sickness or injury; unused portions of such leave for any one year may be accumulative for three consecutive years. . . ."

1. In order to answer query number one it is to be said that such benefits as you detail are available only to employees of the state. In an opinion of this department dated February 16, 1965, it was the holding of the department that these technicians or caretakers are eligible to participate in any state group life or health insurance program installed by the adjutant general. In a letter opinion issued by this department on March 25, 1966, the view was expressed that such technicians are not eligible to statutory vacation time or salary classification under the personnel director, nor under such opinion are they entitled to vacation time. Case authority for this conclusion was not presented, it being stated:

"In this regard we again mention the fact that a National Guard technician may be considered a State employee for some limited purposes, but for the most part, he performs Federal services and he must be considered a Federal employee. To allow these persons to accrue longevity for purposes of vacation time and salary classification under state law at a time when they are performing services almost exclusively for the Federal government would be an anomaly of reason and logic.

"We are therefore of the opinion that National Guard technicians may not be credited with their periods of service as technicians in connection with accrual of annual vacation under the provisions of section 79.1 of the 1962 Code of Iowa, as amended, and further that their period of service as technicians can not be considered in connection with salary eligibility under the provisions of the classification and compensation plan promulgated by the State Personnel Director."

Contrary to such opinion is an official opinion of this department appearing in the Report of 1948 at page 108, where the following questions were submitted:

" 'It is requested that this office be furnished with an attorney general's opinion concerning the legality of an employee of this department being paid partially from state funds and partially from federal funds.

" 'The point in question concerns an individual we wish to employ at Camp Dodge, Iowa. There are federal funds available to pay him a portion of his salary but in order that he might receive a living wage, it will be necessary to augment the federal funds available by state funds.

" 'In view of the fact that the national guard is both a state and federal force, it is requested that this office be furnished with an opinion as to whether we may be authorized to pay an employee from both state and federal funds.' "

It was determined that these technicians or caretakers (1) are state employees and (2) the fact that they receive federal money for their services does not effect their status as such state employees. A copy of this opinion is hereto attached and by this reference made a part hereof.

The foregoing conclusion is fortified by the case of *Maryland for the use of Levin. et al. v. United States*, 14 L. Ed. 2d 205, 381 U. S. 41, 85 S. Ct. 1293, where it appears that one McCoy held a commission as an officer of the Maryland Air National Guard, performing duties both in a civil and military capacity. While in his civil capacity piloting a Maryland Air Trainer a collision occurred in which the petitioner decedents were killed. Suit followed against the United States and the question to be decided was whether McCoy was acting in his civil or in his military capacity. The Supreme Court did not deal with the factual question involved, but determined that McCoy in either capacity, civil or military, was a caretaker as a state employee. In this case it was stated:

"Section 90 of the National Defense Act authorized the payment of federal funds for the employment by the Guard of civilian 'caretakers' to be responsible for the upkeep of federal equipment allocated to the National Guard. This section was later amended to make explicit that employment as a caretaker could be held by officers in the Guard, who would receive a full-time salary as civilian caretakers, and in addition would receive compensation for service as military members of the Guard. The legislative history of these amendments makes clear that the State Adjutant General could appoint officers of the Guard to serve as civilian caretakers, provided only that the appointees met the requirements established by the federal authorities.

II.

"It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. See n. 5, supra. Civilian caretakers should not be considered as occupying a different status. Caretakers, like military members of the Guard, are also paid with federal funds and must observe federal requirements in order to maintain their positions. Although they are employed to maintain federal property, it is property for which the States are responsible, and its maintenance is for the purpose of keeping the state militia in a ready status."

The answer to query number one is in the affirmative.

2. Insofar as your question number two is concerned, I find no statutory provision whereby a state employee is entitled to credit for federal active duty service under §29.28, Code of 1966, in connection with annual vacation time under the provisions of §79.1 and determination of salary eligibility and longevity credit.

January 23, 1968

CRIMINAL LAW: Lotteries; Article III, §28, Constitution of Iowa; §726.8, Code of Iowa, 1966. A proposal whereby a community antenna system proposes to award by way of a drawing a color television set to one of its subscribers would be an unlawful lottery. (D. B. Hendrickson to Tucker, Deputy Lee County Attorney, 1/23/68) #68-1-20

Mr. Thomas E. Tucker, Deputy Lee County Attorney: Reference is

made to your letter of December 6, 1967, wherein you requested an opinion as to whether the following circumstances constitutes a lottery in violation of Chapter 726.8, 1966 Code of Iowa as amended, to wit:

"The community antennae system now has a number of subscribers. It proposes to give to one of its subscribers a color television set. The only requirement for eligibility is that the person whose name is drawn from the list of subscribers, be a subscriber on December 18. No registration is required, no purchase is requested, and no names other than those on record in the company offices as subscribers on December 18, will be drawn."

Article III, Section 28, of the Iowa Constitution provides:

"No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed."

Chapter 726.8 implements the constitutional provisions by defining lotteries and providing a penalty for violation of the lottery prohibitions.

The Iowa Court has often stated that a lottery consists of three elements:

1. A chance
2. A prize
3. Consideration

See *Idea Research and Development Corp. v. Hultman*, 256 Iowa 1381, 131 N. W. 2d 496 (1964) and cases cited therein.

In the question posed to our office, at least two of the elements of a lottery are present, i.e. a chance (the drawing) and a prize (the color television set). The third element of consideration is troublesome and has been for many years.

The latest pronouncement by the Iowa Supreme Court on what constitutes consideration was in *Idea Research and Development Corp. v. Hultman, supra,* where four members of the court in an evenly divided opinion stated in effect that the mere fact of having to go to a place of business to obtain a card to play a game of chance was sufficient consideration, notwithstanding the fact that no purchase was necessary. Four members dissented and a fifth took no part in the decision. This left standing, the trial court's decision that having to go to the place of business was sufficient consideration to constitute a lottery. Though not required to do so, some participants did make purchases.

Subsequent to the decision in that case, the 61st General Assembly amended Chapter 726.8 of the 1966 Code of Iowa by providing as follows:

"For the purpose of determining the existence of a lottery under this section, a consideration shall be deemed to have been paid or furnished only in such cases where as a direct or indirect requirement or condition of obtaining a chance to win a prize, the participants are required to make an expenditure of money or something of monetary value through a purchase, payment of an entry or admission fee, or other payment or the participants are required to make a substantial expenditure of effort; provided, however, that no substantial expenditure of effort shall be deemed to have been expended by any participant solely by reason of the registration of the participant's name, address, and related information, the obtaining of an entry blank or participation sheet, by permitting or taking

part in a demonstration of any article or commodity, by making a personal examination of posted lists of prize winners, or by acts of a comparable nature, whether performed or accomplished in person at any store, place of business, or other designated location, through the mails, or by telephone; and further provided, that no participant shall be required to be present in person or by representative at any designated location at the time of the determination of the winner of the prize, and that the winner shall be notified either by the same method used to communicate the offering of the prize or by regular mail."

The question of whether a legislature may by subsequent legislation alter the court's interpretation of a constitutional provision is a question that need not be answered in this opinion.

It is our opinion that the fact that only persons who are subscribers to the community antennae system on December 18, 1967, are eligible to win the prize is sufficient consideration to render the promotional scheme a lottery.

Consideration under the definition now found in Chapter 726.8, shall be deemed to have been paid where as a *direct* or *indirect* condition of obtaining a chance to win an expenditure of money must be made by the participant.

Admittedly, under the question posed to this office, a direct payment for a chance to win the television set is not required, yet a participant must purchase the television service to be eligible and, therefore, it is our opinion that the purchase of the service constitutes an indirect expenditure of money by the participant. Thus, sufficient consideration is present to create a lottery.

January 23, 1968

BOARD OF CONTROL — Powers — §218.94, 1966 Code of Iowa. The Board of Control has power, pursuant to §218.94, 1966 Code of Iowa, to sell real estate on such terms and conditions as they wish, subject to the approval of the Executive Council. (Seckington to Gay, Chief of Business Service, Board of Control, 1/23/68) #68-1-19.

Mr. J. A. Gay, Chief of Business Service, Board of Control: I have received your request for an advisory letter on the following question:

Can the Board of Control sell state-owned land under its jurisdiction to the City of Glenwood, Iowa, on contract?

The Board of Control has power to sell real estate pursuant to §218.94, 1966 Code of Iowa, which provides as follows:

"The Board of Control shall have full power, subject to the approval of the Executive Council . . . to acquire and sell real estate for the proper uses of said institutions. Real estate shall be acquired and sold upon such terms and conditions as the Board may recommend subject to the approval of the Executive Council . . ."

When state land is sold, a patent must be issued to the purchaser in accordance with §10.6, 1966 Code of Iowa. That section is as follows:

"When patents issued. No patents shall be issued for any lands belonging to the state, except upon the certificate of the person or officer specially charged with the custody of the same, setting forth the appraised value per acre, name of person to whom sold, date of sale, price per acre, amount paid, name of person making final payment, and of

person who is entitled to the patent, and, if thus entitled by assignment from the original purchaser, setting forth fully such assignment, which certificate shall be filed and preserved in the land office.

"Whenever the governor is satisfied that the purchase price has been paid by the person to whom the sale has been made and that a patent has not been issued to the purchaser, a patent shall be issued, signed by the governor and secretary of state and recorded by the secretary of state. The passage of seventy-five years from the date of sale without issuance of a patent shall be conclusive proof that the purchase price has been paid."

It is thus clear that the state, through its agencies, may sell land and issue patents as provided above. It should be noted that a patent can only be issued after final payment is made for the land. In a situation such as this, where the sale is on contract, the state retains title to the land being sold until final payment is made. At such time that the buyer fulfills all the terms of the contract, then the procedure for issuing patents may be invoked.

Therefore, we see no reason why the Board of Control cannot submit their request to sell this parcel of land to the Town of Glenwood on such terms and conditions as they see fit. It would then be up to the Executive Council to approve or disapprove the contract as submitted by the Board of Control.

If there are any further questions, please contact me.

January 23, 1968

COUNTIES: BOARD OF SUPERVISORS. §339.19, Code of Iowa, 1966. Only persons who are elected to terms which are not to be filled at the next election are "holdovers." (Nolan to Bentz, 1/23/68) #68-1-23

Mr. C. R. Bentz, Madison County Attorney: This replies to your letter of January 5, 1968, which requests an opinion as to the meaning of §39.19 of the 1966 Code of Iowa as follows:

"This section of the Code provides that no person shall be elected a member of the Board of Supervisors who is a resident of the same township with any of the members 'holding over.'

"Madison County has three supervisors. One supervisor term expires January 1, 1969; and another supervisor term expires January 1, 1970. Both of these terms must be filled at the general election in 1968. The third supervisor term does not expire until January 1, 1971.

"My question is: Can persons residing in the same township be elected at the 1968 General Election to the supervisor terms commencing on January 2, 1969, and January 2, 1970?

"It is my opinion that the only 'hold over' term is the one that expires on January 1, 1971, which is not to be filled at the 1968 General Election. Therefore, it would seem to me that the statute does not prohibit the election of two persons from the same township to the terms commencing January 2, 1969, and January 2, 1970. Since both terms must be filled at the 1968 election, it does not seem to me that either of the present incumbents can be said to be 'holding over.'

"The amendment to Section 39.18 of the Code enacted by the Sixty-second General Assembly creates a situation which requires the election of two members of all three member boards every four years. If my interpretation of Section 39.19 is incorrect, what happens if two persons from the same township are elected to the expiring terms?"

Your question appears to have been answered in *State ex rel Stewart v. Boyles*, 199 Iowa 398, 202 N. W. 92, 1925, where the court held that a person elected to a term commencing in January following the election is not "holding over" within the meaning of the section quoted. There the court said at page 401:

"If, at the time of the election, appellee and Adamson were both residents of the same township, and Adamson was then 'holding over,' as a member of the board of supervisors, the statute would apply according to its terms. This is its language, and we cannot abrogate its provisions by judicial construction. But, at the time of the election, Adamson was not 'holding over,' and in fact he had never been an incumbent of the office.

"Appellant argues, with much force and plausibility, that the purpose of the legislature was to prevent two persons from being members of the board of supervisors who were residents of the same township. If this be deemed to have been the purpose of the legislature, the statute is not free from ambiguity and inconsistency in expressing such purpose. It is not so written.

"In view of the fact that elections in this state are held biennially, and that nominations are under the primary system and by different parties, it is obvious that it is difficult to determine the qualifications of a candidate for the office of a member of the board of supervisors under this statute. We are, however, called upon only to construe the statute in the instant case; and, applying it to the facts admitted by the demurrer, and confining our decision solely to the particular facts of this case, we hold that appellee was not disqualified, under the statute, from taking the office as a member of the board of supervisors of Appanoose County, on January 2, 1924; and that at the time of the election of appellee, Adamson was not 'holding over,' as a member of the board of supervisors."

In view of the above we concur with your interpretation that the only "hold over" term is the one that expires on January 1, 1971, and which is not to be filled at the next election.

January 23, 1968

SCHOOLS: ATTORNEYS. §279.35, Code of Iowa, 1966, authorizes employment of counsel where there is possibility of litigation including administrative hearings from which appeal might be taken to the courts. (Nolan to Crookham, Mahaska County Attorney, 1/23/68) #68-1-25

Mr. Lake E. Crookham, Mahaska County Attorney: This replies to your letter requesting an opinion as to "whether or not the County School Board has authority to employ independent counsel, for the purpose of representing the County Superintendent of Schools in any administrative hearing beyond the county level; and further permitting them to employ counsel to represent the Superintendent of Schools in any action in District Court or Supreme Court that might arise out of his ruling in any administrative matters."

While this office has held in an opinion dated June 12, 1967, that the directors of a school district have no authority to engage an attorney on a retainer basis for advice on anticipated legal problems and attendance at board meetings, there is authority under §279.35 for the employment of counsel "where actions may be instituted by or against any school officer to enforce any provision of law" and this includes any and all

possibilities of litigation. It is my view that this would also include administrative hearings beyond the county level from which appeal might be taken to the courts.

January 24, 1968

STATE OFFICERS AND DEPARTMENTS: TREASURER. H.F. 101, 62nd G. A. 1) The term "willfully refusing" means intentional and unreasonable refusal, without good cause; 2) "willfully failing" means negligent failure to comply with law with a knowledge of such violation; 3) Treasurer may designate postmark date as filing date by regulation; 4) fine and imprisonment can only be imposed by court and Treasurer cannot assess penalties provided by §25. (Nolan to Sexton, Dep. Treas., 1/24/68) #68-1-34

Mr. Jon P. Sexton, Deputy Treasurer, Office of Treasurer of State: This replies to your letter of November 16, 1967, requesting an opinion on the following questions on H.F. 101, 62nd G. A.:

"(1) What constitutes 'willfully refusing' to pay or deliver abandoned property as specified in Section 25?

"(2) What constitutes 'willfully failing' to render a report as specified in Section 25?

"(3) Does the postmark date constitute the filing date?

"(4) Are reports bearing a postmark date later than the due date of these reports (Section 12) construed delinquent and, if so, must the Treasurer of State assess a penalty specified in Section 25 to these reports?

"(5) Must a similar penalty be assessed by the Treasurer of State for failure to pay or deliver by the due date (Section 13)?"

In answer to the above questions, I advise as follows:

1. The term "willfully refusing" is an intentional and unreasonable refusal which is substantially the same as a refusal without good cause. 45 Words and Phrases, Cumulative Annual Pocket Part, 1967, page 134.

2. The term "willfully failing" as used in Section 25 means a negligent failure to comply with the law with the knowledge of fact of such law carrying with it the idea of a knowledge that the act is being violated thereby. A failure for a long period of time to perform an act which is required by law to be performed generally constitutes a willful failure to perform. *Safeway Cabs v. Honer*, 52 N. W. 2d 266, 271, 155 Neb. 418. "Willful failure" imports conscious, knowing, voluntary, intentional failure, or a purpose of willingness to make omission, rather than mere inadvertent, accidental, involuntary, inattentive, inert, or passive omission. *Carpenter v. Forshee*, 120 S. E. 2d 786, 796, 103 Ga. App. 758.

3. Since the law does not specify in Section 11 how the report is to be filed, the Treasurer may under the authority of Section 26 if he finds it necessary to thereby implement this act, designate the postmark date as the filing date.

4. The answer to the first part of this question is yes. Whether or not rules and regulations are adopted which would make the postmark date the filing date and also whether or not the Treasurer postpones the

reporting date upon the written request of any person required to file a report as permitted under Section 11(4) will have additional bearing on this.

Section 25 of this Act provides:

"Penalties.

"1. Any person who wilfully fails to render any report or perform other duties required under this Act, shall be punished by a fine of twenty-five (25) dollars for each day such report is withheld, but not more than five hundred (500) dollars.

"2. Any person who wilfully refuses to pay or deliver abandoned property to the state treasurer as required under this Act shall be punished by a fine of not less than five hundred (500) dollars nor more than one thousand (1,000) dollars, or imprisonment for not more than six (6) months, or both, in the discretion of the court."

You will note that the provision for a fine or imprisonment under this section of the Code is a penalty which cannot be imposed by any authority other than the court. Therefore, the Treasurer would have no authority to assess a penalty for failure to pay as indicated by your question number 5.

January 24, 1968

CITIES AND TOWNS: COUNCILMAN. §368A.22, Code of Iowa, 1966. 1) Generally a councilman cannot be employed by city for hauling sand etc. 2) Offices of district court clerk and city councilman are not incompatible. (Nolan to Pahlas, Clayton County Attorney, 1/24/68) #68-1-38

Mr. Harold H. Pahlas, Clayton County Attorney: This replies to your letter dated December 8, 1967, in which you requested a ruling on the following:

"1. Can an elected District Court Clerk also be elected and serve as a Town Councilman?

"2. Can an elected Town Councilman work for the City at an hourly rate and furnish other services such as the furnishing of a truck or charge said Town for hauling sand and gravel, etc?"

Following the rule set out in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 1965, I find no incompatibility of offices of district court clerk and town councilman. A public officer, other than a state legislator, may hold an additional office or employment as long as there is no incompatibility between the two offices held. Opinion of the Attorney General, August 8, 1967. Neither of the offices mentioned are subordinate to the other nor is there a violation of the constitutional separation of powers doctrine inasmuch as both offices are created by statute and are not constitutional offices, and further, the functions of the two offices do not appear to be incongruous so as to render the dual office holding inherently repugnant and against public policy.

With respect to your second question I must advise that the city councilman is prohibited by §368A.22 from having any interest, direct or indirect, in "any contract or job of work or material or the profits thereof or services to be furnished or performed for his municipality" except as provided in the subsections of paragraph 2 of §368A.22. One of these

subsections permits contracts made by municipalities of less than 3,000 population upon competitive bid in writing publicly invited and opened. There are several other exceptions which may or may not fit the situation about which you inquire. Generally, however, a councilman may not otherwise be an employee of the city or an independent contractor therefor.

January 24, 1968

TAXATION: Property Tax Exemption — §427.1(18), Code of Iowa, 1966. Land purchased from the State of Iowa by a non-exempt purchaser is not taxable for the year in which purchased. (Griger to Colton, Appanoose Co. Atty., 1/24/68) #68-1-39

Mr. Marvin V. Colton, Appanoose County Attorney: By your letter of January 4, 1968, you have requested an opinion of the Attorney General as to whether land purchased from the State is taxable for the year in which purchased notwithstanding the clear provisions of §427.1(18), Code of Iowa, 1966.

You say a non-exempt taxpayer acquired real estate from an exempt governmental agency in 1966; the deed was dated October 4, 1966 and delivered to the purchaser on October 28, 1966; taxes on the property in question were formally levied October 20, 1966, although the statute (Section 444.9) requires that the levy be made in the September session of the board of supervisors. In your letter to the County Assessor, you opine that "any property acquired by an individual from a tax exempt organization prior to the date of fixing the levy is subject to tax for the full year in which the property is acquired." Accordingly, you apparently conclude that the property in question is subject to the 1966 taxes which are due and payable in 1967. We think you are in error.

Previously, this office considered the same question, but in a slightly different factual picture. A copy of that opinion, dated April 12, 1967, is attached. Briefly, in that opinion we state that property acquired from the State of Iowa was not, in the hands of the non-exempt purchaser, subject to property taxes for the year of sale. In that opinion, we relied upon §427.1(18) of the 1966 Iowa Code. We do so here and, following the April 12, 1967 opinion, this property is not subject to 1966 taxes payable in 1967.

Although the foregoing disposes of the question you raised, we should like to point out that we are in agreement with that part of your opinion which states that a state agent by his oral promise "cannot bind the county contrary to the laws of the State."

January 24, 1968

COUNTIES: Unclaimed probate deposits. H.F. 101, 62nd G.A., §§606.16 and 302.2, Code of Iowa, 1966. 1) The county treasurer rather than the clerk of district court is required to make the report and payment of money to the state treasurer as provided in §302.2 and H.F. 101. 2) §606.16 is not in conflict with H.F. 101, 62nd G. A. (Nolan to Erhardt, Wapello County Attorney, 1/24/68) #68-1-36

Mr. Samuel O. Erhardt, Wapello County Attorney: This replies to your letter of January 4, 1968, which contained the following request for an opinion:

"The Clerk of the Wapello County Iowa District Court has requested this office to obtain an Attorney General's Opinion in connection with Section 8 of House File 101 and relating legislation as to the payment of certain monies held by his office into the office of the State Treasurer. He is particularly interested in Probate deposits which have been left at his office for more than ten years, and under the present law are presumed to have been abandoned. Is he required to pay this money into the office of the State Treasurer and what procedure does he follow in making said payment?

"Apparently Section 606.16 of the 1966 Code of Iowa has never been repealed. Please advise."

In response to your question I advise that §11 of the unclaimed property act provides for the report of abandoned property (as defined by §8) to the state treasurer. The report is to be filed before November first of each year as of the preceding June 30. §13 requires that all abandoned property be paid or delivered to the state treasurer within twenty days of the date of the report. It is my opinion that this act is not in conflict with §606.16 which provides that the clerk of the district court shall "on the first Monday in January and July of each year, pay into the county treasury, for the use of the county, all other fees not belonging to his office, in his hands at the date of the preceding payment and still unclaimed."

There is also §302.2 which must be considered and which provides:

"The proceeds of all lands sold, and all sums due from escheats, shall be payable to the treasurer of the county in which the lands or escheated estates are situated or found, and the county treasurer shall pay the proceeds to the state treasurer once each month."

The clerk of court is not required to pay unclaimed probate deposits to the state treasurer. He pays such money to the county treasurer who is required to make the report and payment to the state treasurer.

January 24, 1968

CRIMINAL LAW: Child detention. Chapter 232, §321.482, Code of Iowa, 1966. Provisions for committing a child to a detention facility are not applicable to violations of motor vehicle laws which are a misdemeanor punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days. (D. Hendrickson to Rowe, Jefferson County Attorney, 1/24/68) #68-1-40.

Mr. Thomas Rowe, Jefferson County Attorney: This will acknowledge receipt of your letter of January 12, 1968, wherein you ask for an opinion on the following matter, to wit:

"When a child has been tried and convicted of a minor traffic violation which is a misdemeanor and the penalty assessed by the court is a fine of less than $100.00 but the child is without funds to pay said fine, may the trial judge, under these circumstances, commit the child to an adult detention facility there to be confined in a room entirely separate from adults for a period of one day for each $3.33 of said fine plus costs?"

Chapter 232 of the 1966 Code of Iowa pertains to neglected, dependent and delinquent children. §232.2(3) defines a "child" as a person less than eighteen years of age. Generally, Chapter 232 prescribes the procedure for the prosecution and punishment of children under the age of eighteen years.

§321.482, 1966 Code of Iowa states in part:

"It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this Chapter unless any such violation is by this Chapter or other law of this state declared to be a felony. *Chapter 232 shall have no application in the prosecution of offenses committed in violation of this Chapter which are punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty day.*" (emphasis added)

The question of whether the word "prosecution" includes punishment, is fairly well settled. The Iowa Court in the early case of *Shulte v. Keokuk County*, 74 Iowa 292, 37 N. W. 376 (1888) stated:

"A prosecution is the means adopted to bring a supposed offender to justice and punishment by due course of law."

See also, *Summerour v. Fortson*, 164 S. E. 809; *Words and Phrases*, Vol. 34A p. 484.

Therefore, it is our opinion that the provisions for committing a child to a detention facility are not applicable to violations of motor vehicle laws which are a misdemeanor punishable by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days and, therefore, a trial judge may commit a child under such circumstances to a detention facility.

January 24, 1968

TAXATION: Constitutionality of H.F. 702, Acts of the 62nd G. A. (1967). The Attorney General must decline to render an opinion on questions which are in litigation before the Courts of this State since any attempt to render such an opinion would tend to invade the exclusive province of those Courts. (Griger to Millen, State Representative, 1/24/68) #68-1-33.

The Hon. Floyd H. Millen, State Representative: This will acknowledge receipt of your letter of November 13, 1967, in which you requested an opinion concerning the constitutionality of House File 702, Acts of the 62nd General Assembly (1967) as follows:

"1. In view of Article VII, Sec. 7 of the Constitution of the State of Iowa, what is your opinion on the constitutionality of (a) Division 7 of H.F. 702 or any sections contained therein; (b) the title of the bill as it pertains to Division 7 under Article III, Sec. 29 of the State Constitution; (c) the entire bill?

"2. Does the Act contain excessive delegation of legislative authority to the Iowa Tax Commission or its successor, the Department of Revenue?"

Since the issuance of the advisory opinion of September 27, 1967, to Mr. Burrows, two lawsuits have been brought challenging the constitutionality of Division VII of House File 702. *Lee Enterprises, Inc., et al vs. Iowa State Tax Commission, et al; Rodee, Inc., et al vs. Iowa State Tax Commission, et al.* The first above-captioned lawsuit is pending in the District Court of Scott County and the second in the District Court of Polk County. In both suits, it is contended that House File 702 violates the Iowa Constitutional provisions of Article III, Section 29 and Article VII, Section 7. Also, in both suits, the plaintiffs are claiming that Division VII of House File 702 constitutes an undue delegation of

legislative power to the Iowa State Tax Commission and its successor, the Department of Revenue. Furthermore, in the Scott County case, Divisions I and II of House File 702 regarding tobacco products and cigarettes have been challenged in regard to the title of the Act.

Since the questions you pose are now before the Courts of this state, any attempt to render an opinion would tend to invade the exclusive province of those Courts and we must, therefore, respectfully decline at this time to furnish such an opinion.

January 24, 1968

COUNTIES AND COUNTY OFFICERS — Paroles — §§356.5, 356.15, 247.22, 247.23, Code of Iowa, 1966. The charges and expenses for the safekeeping of a prisoner, including emergency medical costs is borne by the county in which the emergency arises. The fact that the prisoner is a parolee does not shift the cost of such emergency medical aid to the Board of Parole. (Claerhout to Norland, Worth County Attorney, 1/24/68) #68-1-37.

Mr. Phillip N. Norland, Worth County Attorney: This is in response to your letter of November 27, 1967, wherein you have requested an opinion based upon the following facts which I will briefly restate:

"On November 22, 1967, an agent of the Board of Parole placed a parolee in the county jail for violation of parole. Because this was done after court house hours, the actual proceedings required to revoke the parole could not be performed at that time. The prisoner began severe withdrawal from excessive use of alcohol and a local doctor would not provide treatment in the jail. The prisoner was then transported to Mason City, Iowa, where he was admitted to the psychiatric ward of a hospital."

Your question upon these facts is: Does the county or the State bear the burden of medical expenses incurred by a prisoner between the time of incarceration in the county jail and the revocation of parole?

Your attention is called to §356.5, 1966 Code of Iowa, which states in pertinent part:

"The keeper of each jail shall:

* * *

"2. Furnish each prisoner with necessary bedding, clothing, towels, fuel, and medical aid."

Clearly, the Board of Supervisors is required to allow the costs of such procedure according to §356.15, 1966 Code of Iowa, which states:

"All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county."

There is an absence in Chapter 247 of any authority which provides for expenses not contracted by the Board of Parole or specifically allowed by statute. Sections 247.22 and 247.23, 1966 Code of Iowa.

While no Iowa Supreme Court decision has squarely faced this question, a previous opinion of the Iowa Attorney General has provided rele-

vant guidance. The words of an opinion at page 413 of the 1936 Report of the Attorney General states as follows:

"In view of the above statutes and the cited cases, we are of the opinion that it is the duty of the Dubuque County Board to pay the expenses incurred in the matter at hand, and it is immaterial that the patient was under the jurisdiction of the Board of Parole. To hold otherwise would be to place a burden upon the Board of Parole which is not contemplated or provided for by statute. The Legislature and the Supreme Court have insured immediate medical and hospital care to every person found in this state in urgent need of such attention and care, even though said person is a total stranger and unable to pay for such attention and care, and the financial responsibility in such cases is placed upon the county in which the emergency arises."

Because the guiding statutes are substantially unchanged, there appears to be no reason for changing the reasoning of the previous opinion of the Iowa Attorney General. Therefore, I am of the opinion that the county and not the State or the Iowa Board of Parole, is responsible for the expense of medical aid provided for a parolee in the care of the keeper of a county jail.

January 24, 1968

COUNTIES: ROAD BUILDING AND MAINTENANCE EQUIPMENT. §332.3(6). Code of Iowa, 1966. 1) There is no statute prohibiting the purchase of road building and maintenance equipment without competitive bidding; 2) board of supervisors may dispose of such equipment without competitive bidding; 3) there is no authority for board of supervisors to enter contract of purchase with a provision to sell the equipment at a predetermined price at a fixed time to the future; 4) if competitive bidding is used when such equipment is purchased the board of supervisors may require all bids to be submitted on a particular form according to the specifications determined by the board. (Nolan to Vandebur, Story Co. Atty., 1/24/68) #68-1-35

Mr. Charles E. Vandebur, Story County Attorney: This is in answer to your letter of December 4, 1967, in which you requested an opinion concerning the possibility of the county board of supervisors entering into contracts for road building and maintenance equipment under a bid proposal which specifies that the seller shall guarantee a maximum cost of repair in a specified amount or a specified number of hours and which also specifies that if certain conditions are met the seller guarantees to repurchase the equipment at a price fixed in the original bid at the end of five years (or a certain number of hours). Your letter presented four questions as follows:

"1. May a county purchase road building and maintenance equipment irrespective of the amount of the purchase price without inviting and utilizing competitive bidding?

"2. May a county sell or otherwise dispose of personal property of the county without inviting and utilizing competitive bidding?

"3. May a county enter into a contract for the purchase of road building and maintenance equipment with a provision which binds a future board of supervisors to re-sell said equipment at a predetermined price at the expiration of five years?

"4. If competitive bidding is required or used by the county when purchasing road building and maintenance equipment, may the county restrict the form to be used by the prospective bidders although such form may be prejudicial to one or more of the bidders?"

In answer to your first question I find no specific requirement that road building and maintenance equipment be purchased by utilizing competitive bidding. In Chapter 21 of the Code which relates to the purchase of all motor vehicles for the state government, there is a specific provision that before the state car dispatcher purchases any motor vehicles he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the type and make of car designated. In Chapter 23 public bids are required for "public improvements" which are defined as "any building or other construction work to be paid for in whole or in part by the use of funds of any municipality." However, neither of these chapters are applicable to the purchases in question; nor does there appear to be any requirement in §§309.39-309.43 or in Chapter 332 of the Code of Iowa which prohibits purchasing road building and maintenance eqiupment without competitive bidding.

Inasmuch as §332.3(6) empowers the board of supervisors to have the care and management of the property and business of the county in all cases where no other provision is made, and since there appears to be no provision requiring competitive bidding, it is my opinion that your second question should be answered in the affirmative.

There is no authority for the board of supervisors to enter into a contract for the purchase of such equipment with the provision for reselling at a predetermined price at the expiration of a number of years or hours. It is well settled that one who attempts to contract with a municipality is bound to take notice of the limitations of power of the officials. *Madrid Lumber Company v. Boone County*, 255 Iowa 380, 121 N. W. 2d 523. It is not essential that the contract be limited to the terms of office of the individuals making up the board when such individuals in good faith determine that it is necessary to make a longer term contract. See 1964 O.A.G. 17.9. Such a contract for the repair of specialized machinery and the guarantee of parts may be reasonable and advantageous to the county. However, a provision in such a contract for the resale of the equipment at a fixed price or exchange value is not authorized and would appear to be invalid.

If competitive bidding is used by the county when purchasing road building and maintenance equipment the board of supervisors may require that all bids be submitted on a particular form according to the specifications required by the board.

January 29, 1968

STATE OFFICERS AND DEPARTMENTS: Identification of publicly owned vehicles. §§21.2(7), 321.19, 740.21, Code of Iowa, 1966. Exemption of state-owned and other publicly owned vehicles used in "police work" or in the "enforcement of police regulations" from the requirement that they carry identifying signs should be strictly construed. Such exemption generally should only be granted to peace officers who convincingly demonstrate that a failure to obtain such exemption will seriously hamper law enforcement. Free ordinary registration plates may only be issued to "peace officers" as defined in the code and to persons enforcing the drug and narcotic laws. (Haesemeyer to Lanford, State Car Dispatcher and S. Robinson, Sec., Executive Council, 1/29/68) #68-1-41.

Mr. J. R. Langford, State Car Dispatcher, Mr. Stephen C. Robinson, Secretary, Executive Council: We have received from each of you sepa-

rate requests for opinions of the attorney general with respect to questions which are so closely related that it is appropriate that they be answered herewith together.

By letter dated December 7, 1967, Mr. Langford has requested an opinion of this office with respect to the following:

"This office has received numerous inquiries regarding use of unmarked state vehicles by various departments for various uses such as: Your Department for investigative work, the Adjutant General for police work when the Guard is empowered to act in such a capacity, Board of Control for VD control and other investigative functions, Board of Parole for use in parole work, Tax Commission for enforcement and investigation of tax violations, Department of Agriculture for use in surprise inspections, and enforcement of agriculture violations, etc.

"Section 21.2(7), Code of Iowa states, 'All state-owned motor vehicles shall display registration plates bearing the word "official" except cars assigned for use in police work . . .,' and section 740.21, Code of Iowa, in speaking of required side identification labels states 'This section shall not apply to any motor vehicle which shall be specifically assigned by the head of the Department or Office owning or controlling it, to enforcement of police regulations.'

"Since the aforementioned Departments are not specifically in the same category as the Highway Patrol, Bureau of Criminal Investigation or Narcotics Division of the Pharmacy Board, your opinion is requested as to what encompasses 'police work and regulations' as to definition, latitude, and restrictions as to the other Departments."

By letter dated January 17, 1968, Mr. Robinson has requested an opinion of this office as follows:

"The Executive Council, in meeting held January 16, 1968, directed that I obtain from you an official opinion to determine the legality of 'dummy' license plates which are issued with the approval of the Executive Council, and their relationship with the decals that are to be affixed to State-owned cars.

"Would you be so kind as to suggest guide lines for the Council in the issuance of these license plates."

Hereinafter set forth are the relevant statutory provisions:

"§21.2(7). The state car dispatcher shall cause to be marked on every state-owned motor vehicle a sign in a conspicuous place which indicates its ownership by the state *except cars necessary for use in police work.* All state-owned motor vehicles shall display registration plates bearing the word 'official' *except cars assigned for use in police work* for which ordinary plates may be used when necessary but only upon order of the state car dispatcher who shall keep an accurate record of the registration plates used on all state cars." (Emphasis supplied)

"§321.19. General exemptions. All vehicles owned by the government and used in the transaction of official business by the representatives of foreign powers or by officers, boards, or departments of the government of the United States, and by the state of Iowa, counties, municipalities and other subdivisions of government, and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business nor for the transportation of freight, and all fire trucks, providing they are not owned and operated for a pecuniary profit, are hereby exempted from the payment of the fees in this chapter prescribed, but shall not be exempt from the penalties herein provided. The department shall furnish, on application, free of charge, distinguishing plates for ve-

hicles thus exempted, which plates shall bear the word 'official,' and the department shall keep a separate record thereof. Provided that the executive council may order the issuance of regular registration plates, for any such exempted vehicle, *used by peace officers in the enforcement of the law and persons enforcing the drug and narcotic laws.*" (Emphasis supplied)

"§740.21. Labeling publicly owned motor vehicles. All publicly owned motor vehicles shall bear at least two labels in a conspicuous place, one on each side of said vehicle designating the bureau, department or commission using it. This label shall be designed to cover not less than one square foot of surface. This section shall not apply to any motor vehicle which shall be specifically assigned by the head of the department or office owning or controlling it, to *enforcement of police regulations.*" (Emphasis supplied)

It should be noted at the outset that §§21.2(7) and 740.21 differ in a number of respects. Thus §21.2(7) applies only to "state owned vehicles," whereas, §740.21 applies to "all publicly owned motor vehicles." Accordingly, vehicles owned by cities, counties and towns would be covered by §740.21 while state owned vehicles would be subject to the marking requirements of both §21.2(7) and §740.21. Section 21.2(7) merely requires "a sign in a conspicuous place which indicates [the vehicles] ownership by the state" without specifying the placement or dimensions of such sign. Section 740.21, on the other hand, requires two labels each at least one square foot in area, one on either side of a vehicle, designating the bureau, department or commission using it. Section 740.21 is a criminal statute a violation of which is a misdemeanor, whereas §21.2(7) is not. The exemption provisions of §740.21 apply to "vehicles," whereas those of §21.2(7) apply only to "cars." Thus, the state car dispatcher could not exempt a state owned truck or any state owned motor vehicle other than a car from the requirement that such a vehicle carry official plates and a conspicuous sign designating its ownership by the state. Finally, §740.21 does not apply to a vehicle assigned by the head of the office or department owning or controlling it to enforcement of police regulations, whereas, §21.2(7) merely says that cars necessary for use in police work are not required to carry signs designating their state ownership without specifying who is to make the determination of necessity although in view of the rather plenary powers with respect to state owned vehicles given to the state car dispatcher by Chapter 21 it may be fairly inferred that he would have the authority to make the determination. This last difference is probably a distinction without substance since even if the head of a state department, bureau or commission should assign a vehicle to the enforcement of police regulations thereby exempting it from §740.21, the state car dispatcher could still require the vehicle to carry a conspicuous identifying sign unless he agreed that such vehicle was necessary for use in police work and, of course, §21.2(7) would in no event have application to county and city owned vehicles.

Sections 21.2(7) and 740.21 do have one element in common. Before a vehicle can be exempted from the requirement that it carry signs designating its public ownership a determination must be made that it is to be used in police work or in the enforcement of police regulations.

The first question we are therefore called upon to answer may be stated as follows: What is the meaning of the terms "use in police work" and "enforcement of police regulations" as used in §§21.2(7) and 740.21.

In the broadest sense the "police power" is generally held to mean the power, inherent in the sovereign, to prohibit or regulate certain acts or functions of the populace as may be deemed to be inimical to the comfort, safety, health and welfare of society. *Davis, Brody, Wisniewsai v. Barrett*, 253 Iowa 1178, 115 N. W. 2d 839 (1962). By the same token laws and ordinances relating to the safety, comfort, health, convenience, good order, and general welfare of the inhabitants are styled "police regulations." *L. N. Dantzler Lumber Company v. Texas and P. Ry. Co.*, 119 Miss. 328, 80 So. 770, 775, ( ). Thus the police regulations of a state in a comprehensive sense embraces its whole system of internal regulation for preservation of public order.

However, considering the context in which the expressions "police work" and "enforcement of police regulations" are used in §§21.2(7) and 740.21 and bearing in mind the manifest statutory objective to be attained by the exemption provisions it is our opinion that these words must be given a considerably more restrictive interpretation than the foregoing cited authorities would indicate. Accordingly, the exemption from the marking requirements should be sparingly granted and generally only to peace officers who can convincingly demonstrate that they require such exemption to effectively investigate and prevent crimes or to enforce the criminal laws. The people are entitled to know the use to which their publicly owned vehicles are being put and the requirement that such vehicles be plainly marked should not be waived unless it can be convincingly shown that the failure to do so will seriously hamper law enforcement. The exemption should not be granted merely to spare the sensitivities of those who might be offended or embarrassed by the presence of a publicly owned vehicle parked near their residence or places of business or employment. Similarly the exemption should not be granted to those who would affect an incognito they do not need. Referring to the examples cited in Mr. Langford's letter it would be a rare instance where this department, the Department of Agriculture, the Department of Revenue or the Adjutant General would need a car without signs. However, it is difficult to generalize in this area and the state car dispatcher will have to exercise some discretion in making a determination of necessity on a case by case basis. If one or more specific cases arise which are particularly difficult of determination, we will be pleased to render whatever assistance we can.

Insofar as the issuance of dummy plates is concerned, consideration must be given to §321.19 as well as to §21.2(7). The former section permits the executive council to order the issuance of regular registration plates for any vehicle used for official business and owned by the government of the United States and the state of Iowa and by its subdivisions where such vehicle is to be used "by peace officers in the enforcement of the law and persons enforcing the drug and narcotic laws." The language "except cars assigned for use in police work" found in §21.2(7) is not in conflict with the exemption provision of §321.19 because, as previously

stated herein, the words "use in police work" are generally construed to mean use by peace officers.

However, a problem would arise if the executive council sought to order the issuance of regular plates to an agency of the federal government free of charge under §321.19. This is so because "peace officers" is a defined term in Chapter 321. Section 321.1 provides in relevant part:

"The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

* * *

"45. 'Peace officer' means every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations in addition to its meaning in section 748.3.

* * *"

Section 748.3 provides:

"The following are 'peace officers':

"1. Sheriffs and their deputies.

"2. Constables.

"3. Marshals and policemen of cities and towns.

"4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force.

"5. All agents appointed by the secretary of the board of pharmacy examiners.

"6. Such persons as may be otherwise so designated by law."

It is to be observed that subsection 6 of §748.3 incorporates by reference as peace officers all persons so designated by law.

A search of the Code discloses that the following are all designated peace officers although sometimes with limited jurisdictions and powers:

Capitol police when serving in and about the Capitol and other state buildings at the seat of government. §18.2(4)

Conservation officers, boat inspectors and water safety patrolmen in enforcing the provisions of Chapter 106. §106.19

State employees designated as emergency highway peace officers under §7.10.

Members, directors and designated officers and employees of the aeronautics commission in enforcement of Chapter 328. §328.12(6)

Watchmen, sextons, superintendents and gardeners of cemeteries are given power of police officers within and adjacent to cemetery grounds. §349.39

County and district fairground police. §174.5

Parole agents. §247.24

Probation officers. §231.10

Thus, under §321.19 the executive council *may* issue regular registration plates for a government owned vehicle used in the transaction of official business and in the enforcement of the law by any of the foregoing classes of persons designated in the Code as peace officers. However, nowhere in the Code is there any definition or designation of federal officers or agents as peace officers. Hence, there is no statutory authority for the issuance of regular registration plates free of charge to any

agency, branch or arm of the federal government, except that such plates could be issued for federally owned vehicles used by "persons enforcing the drug and narcotic laws." However, such federal agencies as are ineligible to receive regular plates presumably could waive their rights to free official plates and purchase regular plates much as ordinary citizens do.

By way of one final observation, I should point out that the placement of the expression "departmental" on the sides of some state owned vehicles is not compliance with §740.21. That section quite plainly requires that the name of the bureau, department or commission using it be shown.

January 29, 1968

STATE DEPARTMENTS — Contingency Fund — §5, Ch. 77, Acts of the 62nd G. A. — 1) To be a contingency an event must be to some degree unforeseen; 2) whether the need for an additional computer was unforeseen so as to constitute a contingency is a question of fact within the discretion of the executive council to determine. (Turner to Selden, State Comptroller, 1/29/68) #S68-1-12

The Hon. Marvin R. Selden, Jr., State Comptroller: Reference is made to your letter of January 5, 1968, in which you submitted the following:

"The Sixty-second General Assembly appropriated to this office, data processing division, $531,410.00 for 'Support, Maintenance, and Miscellaneous.' The purpose and uses of this appropriation are generally to provide electronic equipment and related supplies for the operation of the central data processing center maintained under the direction and supervision of this office. To this end, we provide from the central unit, continuing services to nearly all state departments located in the Des Moines complex, and to the legislative branch of government.

"The budget presented by our office to the Governor, and recommended by the Governor to the legislature, included the leasing of one computer and the related supplies for the services we provide for state departments. Prior to the presentation of our budget to the Appropriations Sub-committee, a purchase option for one computer was made available to our department through the Iowa State University, with certain long-range economic and financial savings due to the manufacturer's educational discount policy, which savings in part were available to us. As a result, the Sub-committee recommended that these savings be effected, and introduced a capital appropriation bill (H.F. 749) for the purchase of this one computer, and correspondingly, the operating budget was adjusted for the lease payment originally included for the one computer. The recommendations of the Sub-committee were then presented to the Legislature and enacted into law. A full-time, second computer (in addition to the purchase) was not presented to the Governor nor the General Assembly.

"With the passage of the school aid legislation and the related tax legislation, the need has arisen to acquire a second full-time computer (lease), which need was not considered by us, the Governor, Sub-committee or General Assembly in appropriating to this office. The legislation which was enacted substantially changed the requirements of the Department of Revenue, both in the information to be supplied and maintained, and also statistical data to be available to this office and the Department of Public Instruction. Substantial changes were made in the timing of the reports. Also, it increased the complexity of the income tax returns to be filed, and hence, additional computer operating time. In order to support this program, and continue to maintain those already in effect, an additional computer is needed, together with additional peripheral equipment. The estimated additional machine costs total $250,000.00.

"It is also noted that during the final deliberations of the departmental appropriation bill, the Department of Revenue was given an additional $350,000.00 for their staffing and supplies, specifically due to the passage of the school aid and tax legislation. However, nothing was provided to this office, division of data processing, since it was for all intent and purposes impossible to measure the effect of the legislation on the equipment needs. It was assumed by myself and legislators from historical patterns of actions of the Executive Council and the Budget and Financial Control Committee, that any additional needs would constitute an emergency, and that the contingent funds as passed in H.F. 786 would be available for such emergency.

"In order that we may proceed with the orderly work of providing service to the Department of Revenue and other agencies, we respectfully request the following opinion from you:

"(1) Do the additional funds needed by this department to implement the needs of the Department of Revenue as provided in the school aid and tax legislation, and the additional data and statistical information required of this department constitute an emergency not considered by the legislature, and can the funds appropriated with Section 5 of H.F. 786 be allocated for this purpose?

"Because of the urgency of this matter, and the intricate timing schedules of the departments involved, we request your prompt attention."

Section 5 of H.F. 786, 62nd G. A., now Section 5 of Chapter 77, Acts of the 62nd G. A., provides:

"The general contingent fund of the state for the biennium beginning July 1, 1967 and ending June 30, 1969 is hereby created and said fund shall consist of the sum of one million seven hundred thousand (1,700,000) dollars, hereby appropriated thereto from the general fund of the state. The contingent fund shall be administered by the executive council and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. The executive council shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law.

"Before any of the funds appropriated by this Act shall be allocated, a written recommendation shall be obtained from the state comptroller and the executive council and they shall determine that the proposed allocation shall be for the best interest of the state. Any allocation in excess of thirty-five thousand dollars ($35,000.00) shall first be approved by the budget and financial control committee.

"Any balance in the contingent fund as of June 30, 1969 shall revert to the general fund of the state as of June 30, 1969."

Webster's Third New International Dictionary, Unabridged, defines "contingency," "contingency fund," "contingent" and "contingent fund" as follows:

"contingency — . . . 1. The quality or state of being contingent: as a(1): the condition that something may or may not occur: the condition of being subject to chance (2): the happening of anything by chance: FORTUITOUSNESS b(1): close connection or relationship esp. of a causal nature . . . 2 . . . a: something that is contingent: an event or condition occurring by chance and without intent, viewed as possible or eventually probable, or depending on uncertain occurrences or coincidences . . . b: a possible future event or condition or an unforeseen occurrence that may necessitate special measures (a reserve fund for CONTINGENCIES). . . ."

"contingency fund n: assets segregated as a fund for the purpose of meeting a specific or general contingency and usu. accompanied by a contingency reserve."

"contingent — . . . 2: of possible occurrence: likely but not certain to happen . . . 3 a: happening by chance: affected by unforeseen causes or conditions: not patently necessary: unpredictable in occurrence or outcome . . . b: intended for use in exigent circumstances not completely foreseen c: unpredictable in outcome or effect because happening by chance and modified by unseen causes and unforeseen conditions . . . 4 a: dependent on, associated with, or conditioned by something else, sometimes indirectly or remotely . . . b: dependent for effect on or liable to modification by something that may or may not occur. . . ."

"contingent fund n: CONTINGENCY FUND."

The Iowa supreme court, so far as we can determine, has never defined the foregoing expressions in a context comparable to that in which they are used in §5 of Chapter 77, Acts of the 62nd G. A. However, in the case of *State Bank of Hulstad v. Bilstad,* 162 Iowa 433, 136 N. W. 204, 207 (1912) it is stated:

"A contingency is, in law, an uncertain future event, and, as a contingency may never happen, a note payable only upon the happening thereof may never become due."

Decisions from other jurisdictions have defined "contingent fund" and "contingency" as follows:

"In other words, the Legislature itself, by its treatment of this 'contingent' fund, indicates that it uses the word in section 4744-3 in the sense of 'miscellaneous' or 'general,' and inserted the phrase in the statute not as meaning merely 'accidental' or 'unforeseen' expenses, but as covering all general expenditures of county boards of education besides that for the salary of county and assistant county superintendents.

"It is in line with this construction that the federal Court of Claims held, in Dunwoody v. United States, 22 Ct. Cl., 269, at page 280 (affirmed by the Supreme Court in 143 U. S. 578, 12 Sup. Ct. 465, 36 L. Ed. 269) as follows:

" 'The adjectives contingent, incidental, and miscellaneous, as used in appropriation bills to qualify the word expenses, have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of "contingent expenses," or "incidental expenses," or "miscellaneous expenses." '

"That is, the Supreme Court of the United States treated the word 'contingent' in the Dunwoody Case as being practically synonymous with miscellaneous." *State v. Kurtz,* 110 Ohio St. 332, 144 N. E. 120, 124 (1924)

"In general terms, where such funds exist, a contingent fund is ordinarily a fund which is set up from which to pay items of expense which will necessarily arise during the year, but which cannot appropriately be classified under any of the specific purposes for which other taxes are levied. 1 Pope's Legal Definitions, 273; People v. Cairo, V. & C. Ry. Co., 247 Ill. 360, 363, 93 N. E. 405. See, also, McQuillin on Municipal Corporations, vol. 5, §2179; State v. Kurtz, 110 Ohio St. 332, 144 N. E. 120; Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66; Heston v. Atlantic City, 93 N. J. L. 317, 107 A. 820." *First Nat. Bank of Norman v. City of Norman,* 182 Okla. 7, 75 P. 2d 1109, 1110, (1938)

"The Legislature had the matter before it and that which the Legislature elected not to do may not be done as a contingency or emergency 'arising' subsequent to legislative adjournment." (Use of Governor's contingent fund), *Wells v. Childers*, 196 Okla. 353, 165 P. 2d 371, 373 (1945)

"A certificate of the commissioners of highways of a town, which recites that in the opinion of the commissioners an additional tax levy is necessary 'in view of the contingency that it is necessary, on account of their destruction to rebuild immediately nine bridges,' does not show the existence of a contingency within Hurd's Rev. St. 1905, c. 121, §14, authorizing the commissioners of highways to make an additional tax levy, where in their opinion a greater levy is needed in view of some 'contingency,' since the 'contingency' contemplated is something that does not occur regularly in the ordinary course of events." *People v. Kankakee & S. W. R. Co.*, 237 Ill. 362, 86 N. E. 742 (1908)

"That bridges will become unsafe and will have to be repaired and rebuilt on account of gradual decay and deterioration by use is a certainty, and is not of the nature of a contingency which authorizes an additional levy. A contingency has the element of uncertainty and doubt, and is defined as an event which is possible, but which may or may not occur. It is in the nature of a casualty, accident, or chance, and results from an agency the operation of which is uncertain. It is dependent upon a possibility and on causes which are undetermined or unknown." *Bahde v. Toledo St. L. & W. R. Co.*, 231 Ill. 125, 83 N. E. 118, 119 (1907)

There is a common thread running through both the dictionary definitions and the cases cited above (with the exception of *State v. Kurtz* and *First Nat. Bank of Norman v. City of Norman, supra*) to the effect that to be a contingency an event must be to some degree unforeseen, and in our opinion that is the meaning which should be given to the word "contingencies" as it is used in §5 of Chapter 77, Acts of the 62nd G. A.

A number of Iowa attorney general's opinions have been issued in which the question was presented of whether or not a contingency existed in a particular fact situation. In an opinion dated June 17, 1957, the attorney general cited with approval the definition of a contingency set forth in the *Bahde* case, supra. However, in most of the prior attorney general's opinions we have found it does not appear that any consistent standards or definitions of what constitutes a contingency has been followed or, for that matter, laid down. In most cases the opinions avoided the question by holding that a determination of what constitutes a contingency is a purely factual determination solely within the discretion of the body vested with the authority to make allocations from a contingent fund. See e.g., 38 OAG 496, 38 OAG 530, 38 OAG 648, 58 OAG 245, 58 OAG 246. However, in a recent opinion of this office, Turner to Robinson, October 13, 1967, we determined that a contingency existed in a fact situation somewhat analagous to that which you have presented. In that case we approved the transfer of $5,000.00 from the contingent fund to the Iowa commission for the blind to supplement that commission's appropriation "for the training and education of multiple handicapped blind children." In so doing we referred to the dictionary definition of "contingency" and "contingent" and then observed:

"It cannot be denied that the circumstances here involved were unforeseen. At the time the legislature enacted §53, S.F. 853 it thought there was one deaf-blind child who would require training and education. It did not forsee that there might be more than one who would require such training. Thus, the subsequent discovery that there was an additional blind-deaf child was a contingency which would justify the executive council in allocating a portion of the contingent fund to the Iowa commission for the blind."

By the same token, it would appear that the additional demand which the school aid and related tax legislation have placed upon your data processing division could have been unforeseen when the departmental and capital appropriation bills were approved.

Whether the need for an additional computer was unforseen, so as to constitute a contingency, is a question of fact within the discretion of the executive council to determine subject to the approval of the budget and financial control committee upon your recommendation and such evidence as may be presented and upon the definition herein set out.

February 7, 1968

TAXATION: Property Tax Equalization — Chapter 356, Acts 62nd G. A. The total of all proposed general fund expenditures of the various school districts in the basic school tax unit must be reduced by the total of all anticipated receipts from other sources, including state equalization aid and any other state aid, of said districts in the basic school tax unit and the levy in the basic school tax unit are then to be spread by the county auditor at the millage necessary to raise an amount of money equal to 40% thereof. Prior opinion, OAG 10/4/67, Murray to Simpson, reaffirmed in part, modified in part. (Turner to Wade Clarke, Legal Ass't. to Governor, 2/7/68) #S68-2-1

Mr. Wade Clarke, Jr., Legal Assistant to the Governor: You have asked me to reconsider an opinion of the attorney general dated October 4, 1967, pertaining to House File 686, Acts of the 62nd General Assembly, and relating to distribution of state aid to schools, and on January 29, 1968, you submitted to me an extensive legal brief or memorandum which you have prepared with respect thereto with the help and advice of various un-named lawyers.

Specifically, you have asked me to change my interpretation of § 2(2) of said Act which provides:

"This levy will be the millage necessary to raise an amount of money equal to 40% of the total of the proposed general fund expenditures, *reduced by anticipated receipts* from other sources of all the school districts in the basic school tax unit." (Emphasis added)

You contend that the phrase "reduced by anticipated receipts from other sources" means "reduced by anticipated receipts from incidental sources not provided by the Act."

DIVISION I

In support of this contention, you have submitted to me computer runs made by the state comptroller and the State University of Iowa, and the analysis of university officials with reference thereto, which show the various school levies which will be made against the individual school districts and the "basic school tax unit" under three possible interpretations of this law.

It seems clear to me that the words "reduced by anticipated receipts from other sources" plainly mean "*all* other sources" including state equalization aid and any other state aid, income tax rebates or sources other than property taxes. The word "other" is in no way limited or qualified in this section.

This construction is fortified by § 32 of the Act which provides in part:

"No later than September 1 of each year the department of public instruction shall certify to the state comptroller the amounts of *state equalization aid and any other state aid* that will be received by each school district within the county. In the event *any estimate of said aids in any school budget* certified to the auditor. . . ." (Emphasis added)

The first step in arriving at the levy is for a school district to prepare a budget. Thus, when § 32 refers to "any estimate of said aid in any school budget" it obviously means that the "state equalization aid and any other state aid," specifically mentioned in the sentence immediately preceding the sentence in which "said aid" appears, were estimated and placed in the school budget. There is nothing which is ambiguous about these words. They are so plain and clear they can admit of no doubt. There is no conflict between these words and any other section which would suggest that anticipated receipts from other sources is to be limited or qualified in any way, whatsoever.

Rule 344(f) of the Iowa Rules of Civil Procedure provides that "the following propositions are deemed so well established that authorities need not be cited in support of any of them:"

"(13) In construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said."

The foregoing proposition was cited by the Supreme Court as recently as January 9, 1968, in *State of Iowa v. Arthur Downing, et al,* ..... Iowa ....., better known as the Ahern case, the court also saying with regard to arguments made as to the effect of a statute "This court has no power to write into the statute words which are not there." It is equally well settled that words of a statute must be given their plain, ordinary meaning and that, in absence of ambiguity, there is no room for construction. When the words are clear the courts are not permitted to search for meaning beyond the statute. *Dingman v. City of Council Bluffs,* 249 Iowa 1121, 90 N. W. 2d 742.

You suggest in your brief that recognition of the plain words of the statute will render the computations of the levies much more difficult, although you admit not impossible. The circuity of output-input problem you say arises and requires "sophisticated mathematical knowledge" and time consuming resort to trial and error computations is not unknown in tax law. Often in this area the law requires the final answer to an amount to be used within the formula under which the answer is found. For example, in computing a marital or charitable deduction on a federal estate tax return it is necessary to reduce the amount of the marital or charitable deduction by the share of the federal estate tax which the surviving spouse or charity is required to pay. (See Supplemental Instructions to Form 706 for computation of Interrelated Death Taxes and Marital or Charitable Deduction, Internal Revenue Service, Rev. 7-59). While these are seemingly formidable tasks, they are always based upon estimates. § 32 specifically states that the school district budget include "an estimate" of state equalization aid. Difficulty of application does not necessarily warrant a disregard of the plain meaning of the words. *Randolph Foods, Inc. v. State Tax Commission,* 1965, 253 Iowa 1258, 137 N. W. 2d 307.

But, notwithstanding the aforesaid argument, the Iowa Supreme Court says that in absence of a specific provision in a statute allowing the handling of funds contrary to the provisions of the local budget law, the provisions of the local budget law are applicable. *Dyer v. City of Des Moines*, 1941, 230 Iowa 1246, 300 N. W. 562. In the Dyer case the court said:

"Under the local budget law, it is the mandatory duty of the municipality to show the amount to be collected from sources other than taxation. Next from the amount to be collected by taxation, there shall be deducted from income monies received from sources other than taxation. The purpose of this statute is that the taxpayer shall pay less money by virtue of the fact that income other than taxation shall be deducted. It is undisputed in this record that in arriving at the budget ordinance, no consideration whatsoever was given to the income of the testing station. The statute is mandatory that all such income shall be listed and the statute further provides that the levy shall not be certified until the estimates have been filed and considered. * * *.

"* * *

"The statute setting up the Traffic Safety Council does not exempt the inclusion of the funds received from the testing station from being listed in the budget of the city. The statute does not say so nor neither can it be inferred from the language. The taxpayers have a right under the law to have the funds which are received by the Traffic Safety Council handled in the same manner as in which all other funds of the city are handled except those specifically provided by the statutes to be handled in a different manner. Here are large sums of money handled separate from the city funds, not taken into consideration in arriving at the amount of the budget, deposited in a separate bank, disbursed not on order of the city treasurer. The budget law gives to the taxpayer the right to know in advance the amount of money that the city is going to ask to be levied as taxes, the purpose for which the funds are to be expended. It requires of the city that notice of the hearing be given. The taxpayer may be there present and object to certain items. If the objection is overruled, he has a right to appeal. It is the taxpayer who is going to pay the bill. It is his money that the city is going to expend and the legislature of Iowa, rightly so, we believe, has given to the taxpayer certain rights and has required of cities that the funds of the taxpayers be handled in a certain way. * * *."

Under Chapter 24, Code of Iowa, 1966, we see that, historically, estimates of income receipts from all sources other than taxation have been required to be included in the budgets of all tax levying bodies and deducted from the proposed expenditures thereof. Thereunder, "sources other than taxation" means "sources other than property taxation," and includes all state aids derived from other taxes. Every tax levying body since the Dyer case has been familiar with, and followed, this practice.

It is my opinion that House File 686 is in pari materia and must be construed together with Chapter 24, Code of Iowa, 1966. *Lewis Consolidated School District v. Johnston*, 1964, 256 Iowa 236, 127 N. W. 2d 118; *Consolidated Freightways, Inc. v. Nichols*, 1965, ...Iowa....., 137 N. W. 2d 900.

Thus, from the history of our tax system, as well as the usual aids of statutory construction and interpretation, and the clear and plain meaning of the words themselves, the opinion of October 4, 1967, interpreting the words "reduced by anticipated receipts from other sources," and requiring a reduction by all other sources including state aids, seems unassailable.

But does this construction result in an absurdity or manifest injustice or oppression and destroy the purpose and intent of the statute? If so, the courts will seek a construction consistent with a sense of justice, if possible, and presume that to have been the legislature's intent. *State v. Patterson*, 1955, 246 Iowa 1129, 70 N. W. 2d 838; *Lamb v. Kroeger*, 1943, 233 Iowa 730, 8 N. W. 2d 405; *State v. Perry*, 1955, 246 Iowa 861, 69 N. W. 2d 412; *Worthington v. McDonald*, 1955, 246 Iowa 466, 68 N. W. 2d 89; *Case v. Olson*, 1944, 234 Iowa 869, 14 N. W. 2d 717. If such is the case, here, I might be warranted in considering extrinsic aids, possibly including evidence elicited from legislators and administrators who sponsored the bill although the latter is rarely considered to have probative value. *Center Township School District v. Oakland Independent School* District, 1962, 253 Iowa 391, 112 N. W. 2d 665.

The purpose of the bill is stated in § 1 as follows:

"The purpose of this Act shall be to provide a method for general property tax replacement and equalization; and relating to the payment of agricultural land tax credits and making an appropriation therefor. This Act shall be liberally construed to that end."

Further help may be obtained from the title which provides:

"An Act relating to a method for general property tax replacement and equalization by revising the method of taxation of property for school purposes and to make allocations of state funds to local governmental units in the form of aid to schools, agricultural land tax credit, personal property tax credit and additional homestead credit for the aged, all in the furtherance of tax equalization."

While we do not feel justified in looking beyond the title and the Act itself, for its purpose, where such are clearly stated and when the words of the Act seem clear, we note that an explanation attached to House File 686, as originally introduced in the house, provides:

"The purpose of this bill is to establish a new method of distributing state aid to schools in order to achieve greater educational opportunity and general property tax relief. It provides for a new larger property tax base in the home community known as the 'basic school tax unit.' It achieves a degree of equalization by requiring a uniform millage levy within this new basic school tax unit in an amount needed to raise 40% of the combined general fund budgets in this basic tax unit. It also provides for a refund to the county equalization fund of 40% of the state income taxes paid by the residents of the school districts in the basic school tax unit. It provides state equalization aid to guarantee that each school district will have at least an amount of money equal to 85% of the state average per pupil expenditure for general fund purposes. The state equalization aid replaces present general and supplemental aid."

Since the amount of the state equalization aid is fixed by a legislative appropriation, it remains unchanged regardless of which of the three possible interpretations of the bill are followed. Thus, the opinion of October 4, 1967, does not, in any way, effect the amount of equalization provided on a state-wide basis. However, the words of the statute seemingly provide less equalization on a county-wide basis than was apparently intended by the principal sponsors of the bill and many members of the legislature with whom I have discussed the results of the opinion.

We have given careful study and consideration to the new computer

runs which were submitted to us last week and to the analysis thereof by Dr. Franklin D. Stone of the State University of Iowa. We do not attempt to review the findings except to note that figures used in the computer are reportedly based upon three "possible" interpretations of the law, including the so-called "Turner" method supposedly based upon my opinion of October 4, 1967; that levies in mills are shown for each school district and each basic school tax unit; that one complete set of these runs are actual figures for the 1967-68 school year; another complete set are "projected" figures for the 1968-69 school year assuming the same expenditures. We have repeatedly requested that we be furnished the computer runs submitted to the legislature shortly before the bill was enacted but these have not been furnished. The significance of new computer runs without comparison of the old ones used by the legislature is open to serious question. We are unable to determine whether apples are being compared with apples or oranges or precisely how these new figures may be used in determining what the legislature intended. Nevertheless, it is apparent that the county-wide or "basic school tax levy" is substantially less in many cases under the opinion of October 4, 1967 and that, generally, equalization on a county-wide basis is somewhat reduced. On the other hand, under the opinion, state equalization aid is not effected and, in fact, the total mill levy for both school district and basic tax units, will be less in 245 of the 477 school districts, under the opinion of October 4, 1967 than under the interpretation you suggest.

Thus, there is no question but that substantial equalization will have been accomplished by the bill in accordance with its declared purpose and it cannot be seriously maintained that the opinion of October 4, 1967 will result either in an absurdity or a destruction of the intent and purpose as stated in § 1, the title or the explanation attached to the original bill. Nothing in any of the statements of the purpose of the bill indicates that absolute equality of taxation in each district was intended to be achieved.

DIVISION II

No careful consideration of the difficulties presented by the Act under examination can avoid a subordinate issue as to whether the 40% factor must be applied after, rather than before, reducing the proposed general fund expenditures by anticipated receipts from other sources. It arises from a conflict between § 2(2) and § 4 of the Act. This conflict must, if possible, be resolved.

§ 2 provides in part:

"This levy will be the millage necessary to raise an amount of money equal to forty (40) percent of the total of the proposed general fund expenditures, reduced by anticipated receipts from other sources of all the school districts in the basic school tax unit."

The comma following the word "expenditures" in the foregoing quotation would seem to require that 40% of the proposed general fund expenditures be first ascertained, before the required reduction. This is the interpretation we followed in our opinion of October 4. If the comma had been deleted, the proposed general fund expenditures would seemingly be reduced by anticipated receipts and the 40% factor applied afterwards.

But § 4, which also relates to the levy for the basic school tax, provides in part:

"The county auditor of each county shall, prior to making the levies for school purposes in his county, starting with the 1967-68 school budgets and continuing with each school year thereafter, total the *askings* for general school purposes of the various school districts in the basic school tax unit. He shall then multiply said yearly total by forty hundredths (.40) and spread the levy to raise the amount thus ascertained at a uniform rate over all the taxable property in the basic school tax unit." (Emphasis added).

We find little precedent for use of the word "askings" in the tax laws of this state. If, on the one hand, askings means the same as "proposed general fund expenditures" in § 2(2), the question arises as to why no reference is made to reducing 40% thereof by anticipated receipts from other sources as required in § 2(2). If, on the other hand, askings means "proposed general fund expenditures reduced by anticipated receipts from other sources," it appears that the comma has been effectively deleted and the 40% factor applies after the reduction. Under either construction, a conflict exists between § 2(2) and § 4.

Dictionary definitions of the word "askings" are of little or no help in resolving this conflict. § 8.6(17)b, Code of Iowa, 1966, uses the word "askings" in its guides to the comptroller's preparation of the state budget report in a sense which clearly implies, there, that "askings" are synonymous with "proposed expenditures." But this is not a compelling reason for determining that askings necessarily mean proposed expenditures where other receipts must be considered and it cannot be gainsaid that a persuasive argument can be made for an interpretation that askings means the ultimate amount the tax levying body is seeking to raise after deducting other receipts from proposed expenditures.

In an attempt to resolve the conflict, I ascertained that the original draft of House File 686 was prepared by Wayne Faupel, Deputy Code Editor, under the direction of Representative LeRoy Petersen. § 3 of that draft is, except for technical differences not pertinent here, identical to § 4 as it now appears in the Act. Moreover, Mr. Faupel's draft contained no conflict between his respective sections of the Act. His § 1(2) provided:

"The 'basic school tax' on property is a uniform levy on all taxable property in the basic school tax unit for support of schools within the unit. This levy will be the millage necessary to raise an amount of money equal to forty percent of the total of the *general fund askings* of all the school districts in the basic school tax unit." (Emphasis added)

Mr. Faupel used the words "general fund askings" and did not include a provision for reducing 40% thereof by anticipated receipts from other sources. The words "general fund askings" were changed to "proposed general fund expenditures, reduced by anticipated receipts from other sources" with the comma included, when the bill was originally introduced in the house. Thereafter that section remained unchanged through countless attempts to amend it and other provisions of the bill. We have attempted, without success, to ascertain where, when and why Mr. Faupel's draft was changed before the bill was introduced. No one has been

able to suggest an answer. Mr. Faupel's draft is consistent with the interpretation you are now urging upon us but we deem the later insertion of the present words to have significance in resolving what is now a conflict, but was not under Mr. Faupel's language. Clearly, under Mr. Faupel's bill, askings were not reduced by anticipated receipts from other sources and must necessarily have meant proposed general fund expenditures (rather than such reduced by anticipated receipts). When the legislature changed these words from "general fund askings" to "proposed general fund expenditures, reduced by anticipated receipts from other sources" it must be presumed to have had some purpose in making this change. It is well settled that meaning must be given a legislature's Acts and that they are presumed not to do a futile or useless thing. Thus, your interpretation on this basis is faulty. Furthermore, the facts you set out on page 9 of your brief are incorrectly stated and misleading with reference to this question. The original draft by Mr. Faupel did not omit the words "from other sources." It omitted the words "reduced by anticipated receipts from other sources." Incidentally, it should also be mentioned that nothing in Mr. Faupel's draft contained anything remotely resembling the words of § 32.

Furthermore, a good argument, although not persuasive, can be made that § 4 does not conflict with § 2(2). § 4 requires the auditor to multiply the yearly total of the askings for general school purposes of the various school districts in the basic school tax unit by 40 hundredths "and *spread the levy* to raise the amount thus ascertained at a uniform rate over all the taxable property in the basic school tax unit." In performing the ministerial task of spreading this levy, he must refer to § 2(2) to see how the levy is arrived at. When he does, he is then confronted with the comma and the apparently clear mandate that he must reduce 40% of the proposed general fund expenditures by receipts from other sources.

In reaching a final conclusion about resolving the conflicts between these two sections, I am confronted on the one hand by the well-established rule of the Iowa Supreme Court that taxing statutes are to be strictly construed with any doubts resolved in favor of the taxpayer and against the taxing body. *Dain Mfg. Co. of Iowa v. Iowa State Tax Commission*, 1946, 237 Iowa 531, 22 N. W. 2d 786; *Palmer v. State Board of Assessment and Review*, 1939, 226 Iowa 92, 283 N. W. 415. On the other hand, § 1 of the act provides:

"The purpose of this Act shall be to provide a method of general property tax replacement and equalization; and relating to the payment of agricultural land tax credits and making an appropriation therefor. *This Act shall be liberally construed to that end.*" (Emphasis added).

While H.F. 686 is a taxing statute, in the sense that it imposes an increased property tax on one group for the benefit of another, it is also a remedial statute intended to equalize the burdens as between taxing districts. The Supreme Court's rule is applicable ordinarily in a case involving an individual taxpayer rather in cases respecting differences between tax levying bodies. I am not unmindful of the Supreme Court's pronouncement in *Moorman Mfg. Co. v. Iowa Unemployment Compensation Commission*, 1941, 230 Iowa 123, 296 N. W. 791, which holds that the strict construction rule must be applied to a taxing statute even though it is remedial:

"Despite the fact that this statute is of a remedial character and because of that fact we should seek to carry out the general purposes for which it was enacted, yet we are constrained to hold that this general rule of law should not and cannot be applicable where it is involved in connection with a taxing statute and that each individual case under the unemployment compensation statute must be considered and construed upon the facts as presented irrespective of the purpose of the statute to generally remedy social conditions that naturally develop by reason of unemployment."

Nevertheless, the specific words of the statute requiring the liberal construction should in this instance prevail. Moreover, here we are primarily concerned with how a tax law is to be administered and not with its effect on the individual taxpayer, the burdens upon any particular one of whom may be increased or diminished whatever construction is adopted.

The conflict between § 2(2) and § 4 is more logically resolved by disregarding the comma following the word "expenditures" in § 2(2) and interpreting the word "askings" in § 4 to mean "the total proposed general fund expenditures reduced by the total of the anticipated receipts from all other sources," consistently with the reduction required by § 2(2) of receipts from other sources, than it is by adding words to the latter section to achieve consistency with the aforesaid § 2(2). In other words, it is more reasonable to disregard a comma than to add a phrase to resolve the conflict. The Supreme Court has held, many times, that it cannot supply missing words. On the other hand, the Court has said:

"Mere verbal inaccuracies or other clerical errors in the statute in the use of words or numbers, grammar, spelling, or punctuation will be corrected by the court, whenever necessary to carry out the intention of the Legislature as gathered from the entire act. . . . ."

"We cannot stumble over a semicolon or a comma to defeat what is the evident purpose and intent of the Legislature, made to appear in every statute. Punctuation, including quotation marks, brackets, etc., is subordinate to the context, and can never control the plain meaning of the statute. . . . ." *In re Petersen's Will*, 1919, 186 Iowa 75, 172 N. W. 206.

The Petersen case quoted a Texas case to the effect:

"We are not willing to hold that it was the intention of the Legislature to do so merely because a comma was so used as to render that construction plausible. In construing written laws courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention."

See also, to the same effect, *State ex rel Winterfield v. Hardin Co. Rural Electric Cooperative*, 1939, 226 Iowa 896, 285 N. W. 219. And, see *Green v. City of Mt. Pleasant*, 1964, 256 Iowa 1184, 131 N. W. 2d 5, 23.

Regardless of the fact that the final computer runs submitted to the legislature have not been furnished to me, the new computer runs handed me on January 29, 1968, do indicate that this construction will enhance equalization on a countywide basis. Thus, the 40% factor should be applied after, rather than before, proposed general fund expenditures are reduced by anticipated receipts from other sources.

CONCLUSION

For all of the aforesaid reasons, it is my opinion that the total of all proposed general fund expenditures of the various school districts in the basic school tax unit must be reduced by the total of all anticipated receipts from other sources, including state equalization aid and any other state aid, of said districts in the basic school tax unit and that the levy in the basic school tax unit shall be spread by the county auditor at the millage necessary to raise an amount of money equal to 40% thereof.

February 9, 1968

STATE OFFICERS AND DEPARTMENTS — Executive council, contingency fund — § 5 of Chapter 77, Acts of the 62nd G. A. Whether or not a contingency exists which would justify the executive council to make an allocation from the contingency fund to finance a study of Dutch elm disease is a question of fact within the discretion of the council to determine taking into consideration the fact that a "contingency" is considered to be to some degree an unforseen event and bearing in mind that Dutch elm disease has spread across the state gradually over a period of years. (Haesemeyer to Robinson, Sec., Executive Council, 2/9/68) #68-2-1

Mr. Stephen C. Robinson, Secretary, Executive Council: You have requested an opinion of this office with respect to the following:

"The Executive Council, in meeting held December 5, 1967, directed that I obtain from you a formal, official opinion in regard to the funding of a study program of Dutch elm disease by Iowa State University of Science and Technology. See attached copies of the letter from the State Comptroller recommending the amount of $18,853 for the study for the first year, the letter from J. P. Mahlstede, Associate Director, Agriculture & Home Economics Experiment Station, and accompanying documents.

"The question which we wish to present to you for your opinion is whether or not monies may be allocated for this project from funds provided by H.F. 786, Acts of the 62nd General Assembly."

In a recent opinion dated January 29, 1968, to Comptroller Marvin R. Selden, Jr. we gave extensive consideration to the meaning which should be given to the word "contingencies" as it is used in § 5 of Chapter 77, Acts of the 62nd G. A., and concluded that to be a contingency an event must be to some degree unforseen. In that opinion we also recognized that any determination that a contingency exists is a question of fact within the discretion of the executive council to determine upon the recommendation of the comptroller and in certain instances subject to the approval of the budget and financial control committee. However, in view of the fact that Dutch elm disease has slowly spread across the state over a period of years it seems doubtful that the executive council could reasonably conclude that the need for a study of such disease was unforseen.

February 12, 1968

STATE OFFICERS AND DEPARTMENTS — Executive Council, contingency fund — § 5 of Chapter 77, Acts of the 62nd G. A. The executive council can use part of its appropriated funds to purchase radio equipment for the capitol security police. However, any insufficiency in such appropriation deliberately created by such purchase would not be an unforseen event which would justify a transfer from the contingency fund. (Haesemeyer to Robinson, Sec., Executive Council, 2/12/68) #68-2-4

Mr. Stephen C. Robinson, Sec., Executive Council: You have requested an opinion of this office with respect to the following:

"The Executive Council, in meeting held December 5, 1967, directed that I request from you an official opinion as to whether or not the Executive Council can use part of its appropriated funds for equipment for the purchase of radio equipment in the amount of $2,673.40 for the Capitol Security Police Patrol, since this matter was not brought up during the Governor's budget hearings nor was it brough before the Appropriations Committee during the legislative session. The Comptroller's recommendation is: 'The appropriation to the Executive Council was based on a $5,000 budget for equipment each year. At the present time you have expended only $154.25 this first year. Therefore, it would be our recommendation at this time that should the Council approve this purchase, it could come out of the present equipment budget and then if need be later, due to this purchase, that your budget falls short, an allocation could be made from the Contingent Fund upon the Council determining that this was a contingency.' "

There can be little doubt that the executive council can use part of its appropriated funds for equipment for the purchase of radio equipment to be used by the capitol security police patrol.

However, it seems doubtful that it could subsequently make an allocation from the contingent fund to itself to make up an shortage created in its appropriation by reason of this purchase. In a recent opinion dated January 29, 1968, to Comptroller Marvin R. Selden, Jr. we gave extensive consideration to the meaning which should be given to the word "contingencies" as it is used in § 5 of Chapter 77, Acts of the 62nd G. A., and concluded that to be a contingency an event must be unforseen. If you are now to deliberately take steps to create a situation which might result in a shortage in your appropriation it could hardly be said that the shortage thus created was unforseen. You cannot do indirectly that which the law forbids you to do directly. Thus, if the contingent fund cannot be expended directly for this purpose, it can't be used to supplement your own appropriation used therefor. The mere fact that you have seen fit to request an opinion of this office on this question is in itself a strong indication that any resulting insufficiency in your appropriation is clearly forseen.

February 12, 1968

STATE OFFICERS AND DEPARTMENTS — Uniform Disposition of Unclaimed Property Act; reasonable service charge — Chapter 391, Acts 62nd G. A. In addition to the costs described in subsections (a) and (b) of § 18(2) the Treasurer of State would be justified in deducting from funds coming into his hands under Chapter 391, Acts 62nd G. A. such additional expenses as he might actually, fairly and necessarily incur in administering such Act including the expenses of additional personnel employed by such Treasurer of State to carry out his responsibilities under such Act. (Haesemeyer to Franzenburg, Treasurer of State, 2/12/68) #68 2-2

The Hon. Paul Franzenburg, Treasurer of State. You have requested an opinion of this office with respect to the following:

"In reference to the Uniform Disposition of Unclaimed Property Act as enacted by the 62nd General Assembly (Chapter 391, Code of Iowa), I have certain questions relating to Section 18 which is titled 'Deposit of Funds.'

"Under subsection 1, we are clearly instructed as to the manner of depositing in the general funds of the State all monies received with the exception of $25,000 from which this office is to make prompt payment of claims as provided in this Chapter.

"Subsection 2 states that before making any deposit to the credit of the General Funds I may deduct (a) Any costs in connection with sale of abandoned property, (b) Any costs of mailing and publication in connection with any abandoned property; and (c) Reasonable service charges.

"As I am sure you understand, this Act has imposed upon this office an enormous amount of work. It is my earnest conviction that 'reasonable service charges' are intended to cover the employment of any additional individuals whose assistance has been, and will be, essential to the proper and anticipated attention to this Act.

"I wish to receive from you, therefore, an opinion which defines for this office the meaning of 'reasonable service charges.' "

The Uniform Disposition of Unclaimed Property Act is of fairly recent origin. Hence, while such Act has been adopted (sometimes in modified form) in at least twelve other states, we have been unable to find a single authority wherein the words of § 18(2)(c) have been interpreted or construed. Similarly the Iowa supreme court has apparently never been called upon to construe the expression "reasonable service charges." It is difficult to formulate any hard and fast rules of easy application to guide you in deciding what would be "reasonable service charges" within the meaning of § 18(2)(c) because any conclusion as to what is reasonable in a particular case necessarily involves a highly subjective determination. As stated in *Altshuler v. Coburn*, 38 Neb. 881, 57 N W 836 (1894), "An attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number, and measure what is not space." As good a definition as any is that which is found in *Black's Law Dictionary*, 4th ed., 1961, West Publishing Co.:

"REASONABLE. Just; proper. Ordinary or usual. Fit and appropriate to the end in view. Parkes v. Bartlett, 236 Mich. 460, 210 N. W 492, 494, 47 A.L.R. 1128; Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Clausen v. State, 21 Wyo. 505, 133 P. 1055, 1056. Thinking, speaking, or acting according to the dictates of reason; not immoderate or excessive, being synonymous with rational; honest; equitable; fair; suitable; moderate; tolerable. Cass v State, 124 Tex. Cr R 208, 61 S. W 2d 500."

Accordingly, it is our opinion that in addition to the costs described in subsection (a) and (b) of § 18(2) you would be justified in deducting from funds coming into your hands under chapter 391, Acts 62nd G. A., such additional expenses as you actually fairly and necessarily incur in administering such Act including the expense of additional personnel employed to carry out your responsibilities under such Act. Presumably such charges will be geared to and bear some relationship to the value of each piece of unclaimed property coming into your hands.

February 19, 1968

CITIES AND TOWNS: City council's authority to change the use of property from a Memorial Building to a municipal hall. § 368.39, Code of Iowa, 1966. § 368.39 empowers a municipality to change the use to which public lands are devoted in the absence of a dedication by a private land owner. (Martin to Riehm, Hancock County Attorney, 2/19/68) #68-2-5

Mr. Curtis Riehm, Hancock County Attorney: I have received your recent letter in which you request an attorney general's opinion as follows:

"Can a Memorial Hall created under Chapter 37 be abolished by action of the City Council, or the Memorial Commission or the joint action of both, and the property used for a new municipal building, or must this question be submitted to the voters under the same procedure by which it was established?"

This office has received the following factual information from you, City Council of the City of Britt, City Clerk of the City of Britt, the Memorial Commission of the City of Britt, and the chairman of the building committee, American Legion Post 315 located in Britt:

1. The previous owner of the land involved was the Independent School District of Britt.

2. The form of the ballot used on November 8, 1920, to submit the question of issuing $20,000 in bonds for the purchase of the property from the school district was as follows:

"Shall the Incorporated Town of Britt, Iowa, purchase and equip the Liberty Memorial Building as provided in Chapter 170, of the laws of the 38th General Assembly and issue bonds therefor in the amount of Twenty Thousand Dollars ($20,000)?"

3. The voters in the bond election approved the measure.

4. An agreement to purchase the property was entered into on February 24, 1921 between the City of Britt and the Independent School District of Britt.

5. The title for the property was taken by the "Incorporated Town of Britt."

6. A Memorial Commission was appointed by the City Council of the City of Britt on May 7, 1928.

7. The $20,000 in Liberty Memorial Bonds issued to purchase the property have been redeemed and there now exists no outstanding indebtedness in connection with the property.

8. Britt's Post 315 of the American Legion has elected to move out of the Memorial Building due to its dilapidated condition. Specific mention deficiencies included:

a. Portions of the plaster in every room have fallen, and continued occupancy would result in unnecessary personal risk.

b. Antiquated wire renders continued use unsafe.

c. Heating deficiencies render the building unfiit for use in cold weather.

9. Objections to the building's conditions have been lodged by a Highway Patrol Examiner.

10. A deputy State Fire Marshal, in an inspection report, stated that the wiring is in poor condition.

11. The city council of Britt and the Memorial Commission of Britt are in agreement that the building should be razed and a new Municipal Building constructed on this site, designed to house municipal offices.

Section 368.39, Code of Iowa, 1966, provides as follows:

"They [the City Council] shall have power to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in

such manner and upon such terms as the council shall direct. In addition, any city or town may donate real estate to the state for public purposes. However, where exercise of said power deprives or restricts the abutting property owners from free access to their property, so as to decrease the value thereof, the corporation shall be liable in damages therefor. Notice of any proposal to dispose of real property under the provisions of this section shall be given by publication, once each week for two consecutive weeks in the manner provided by section 618.14. The last of said publications shall appear not less than ten days before the meeting of the council at which said proposal is to be acted on."

The Iowa Court in *Carson v. State*, 240 Iowa 1178, 38 N. W. 2d 168 (1949), examined the issue of whether a municipality may change the use to which public land is devoted. The Court there noted the distinction between manner of the municipality's original acquisition as follows:

"The distinction between dedications made by private owners of property to public use and the appropriation of publicly owned ground to some specific public purpose is logical and supported by authority, both judicial and text book."

The court there in holding that the contemplated change of use could take place stated:

"With full realization of the fact that there are judicial pronouncements to the contrary we hold that where land, already publicly owned, is designated for some particular public use no contractual trust arises in favor of the general public that precludes subsequent diversion of it by proper legislative authority to some other and different public use; at least, where no special private rights have in the meantime arisen by purchase or improvement of adjacent property in reliance on the permanency of the public use in question."

They further stated:

"We apprehend the principle holds good however the original public ownership arose, whether by purchase, condemnation or grant (as here) from the public domain."

These doctrines were reaffirmed in the case of *Collis v. Board of Park Commissioners of City of Clinton et al*, 240 Iowa 946, 38 N. W. 2d 635 (1949). In this case the reasoning of the Carson case was emphasized. It was noted that section 403.11, Code of Iowa, 1946, which is the antecedent of our present section 368.39, above set out, empowered cities and towns to "dispose of and convey" realty. With reference to this power the court stated as follows:

"So too we can say the right 'to dispose of and convey' found in the present statute (sec. 403.11, Code of 1946, I.C.A.) would include the lesser right to divert to another public use."

While the language of § 368.39 has been changed over the years, there can be little doubt that the power now referred to in § 368.39 as the power "to dispose of the title or interest" still includes the power to divert to another public use.

Leading secondary authorities are in agreement with the Iowa court's philosophy. Volume 3 Antieau, Municipal Corporation Law, page 64, § 20.14, 1967; Volume 10, McQuillin, The Law of Municipal Corporation, page 60, § 28.24, Third Edition (1966 revised volume).

It is the opinion of this office that the City of Britt may change the use to which its land is devoted, without, prior thereto, holding a special election.

February 19, 1968

EXECUTIVE COUNCIL: Grimes Office Building — H.F. 756, 62nd G. A., Ch. 47, Acts of the 62nd G. A. Moving expenses as used in the foregoing numbered Act are such as are involved in the improvements described therein. It does not include paying moving expenses of departments moving into the new building. (Strauss to Robinson, Sec., Executive Council, 2-19/68) #68 2-6

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of December 6, 1967, in which you submitted the following:

"The Executive Council, in meeting held December 5, 1967, directed that I obtain from you a formal, official opinion in regard to the James W. Grimes Office Building — Site Development. In this regard, please find enclosed a copy of the request and proposal from Frank Bunker, State Architect, and the recommendation of the State Comptroller in his letter to the Council dated December 1, 1967

"The question has arisen as to what is involved under 'moving expenses' as set out in H.F. 756. Does 'moving expenses' include moving of partitions and other equipment into the building and exclude the moving expenses of each department into the building or does the term include both of these alternatives?"

The statute under which the foregoing question arises is H.F. 756, 62nd G. A., providing as follows:

"An Act to appropriate from the general fund of the state of Iowa to the executive council for capital planning commission recommendations.

"Be it enacted by the General Assembly of the State of Iowa:

"Sec. 1

There is hereby appropriated from the general fund of the state of Iowa to the executive council the sum of three hundred thousand (300,000) dollars, or so much thereof as may be necessary, to be used for landscaping, seeding and sodding, sidewalks, driveways, interior partitions, painting, and moving expenses of the new state office building authorized by the Sixty-first General Assembly.

"Sec. 2.

Before any of the fund appropriated by this Act shall be expended, it shall be determined by the state architect with the approval of the budget and financial control committee that the expenditures shall be for the best interest of the state. All contracts shall be let in accordance with chapter seventy-three (73) of the Code.

"Sec. 3

Any unencumbered balance as of June 30, 1969 of the funds appropriated by this Act shall revert to the general fund of the state as of June 30, 1969.

"Approved June 30, 1967."

It will be noted that the statute appropriates funds to pay expenses involved in landscaping, seeding and sodding, sidewalks, driveways, interior partitions, painting and "*moving expenses of the new state office building*" authorized by the 61st G. A. It does not say "moving expenses

for moving the various governmental agencies into the new state office building" (Grimes Building). As a matter of law such terms are related to the whole Act and the legislative intent derived therefrom. The pertinent rule is stated in Sutherland Statutory Construction, 3rd Edition, Vol. 2, §§ 4703 and 4704. which, as far as applicable, provide as follows:

" 'To discover the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn. . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly and ought to be so construed as to make it a consistent whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.'

"The presumption is that the lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with that purpose; that these are needful to accomplish it; and that, if that is the intended effect, they will, at least, conduce to effectuate it. That purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. This intention affords the key to the sense and scope of minor provisions. From this assumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. 'A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.' Thus Chancellor Kent observed: 'In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion.' "

In view of the foregoing, I am of the opinion that the moving expenses *"of the new office building"* are such as are involved in the improvements described in H.F. 756. There is no authority for using such appropriation to pay the moving expenses of each department moving into the new building.

February 27, 1968

STATE OFFICERS AND DEPARTMENTS — Merit Employment Department — H.F. 572, 62nd G. A., § 8.38, 1966 Code of Iowa. Director has authority under Sec. 8(4) of H.F. 572 to employ experts to conduct pay and classification study. Cost of such study may not be paid, voluntarily or otherwise, by state agencies affected by such study. (Turner to Al Meacham, Chairman and Gerald L. Howell, Director, Merit Employment Department, 2/27/68) #S68-2-2

Mr. Al Meacham, Chairman, Mr. Gerald L. Howell, Director, Merit Employment Department: Reference is had to your recent communications with reference to the authority for and manner of reimbursing a consulting firm to conduct a job classification and pay study in order to implement the provisions of House File 572, 62nd G. A.

Your most recent request poses the following three questions:

"1. Can the Director of Merit Employment contract to provide services in conducting the classification and pay studies with other agencies of state government under the authority provided in Section 16 of House File 572?

"2. Can the agencies participating in the classification and pay studies enter into a joint contract with a consulting firm to conduct the studies, with the Merit Employment Department serving as the prime contractor?

"3. Can the Merit Employment Department accept funds proffered by other state agencies, on a per position cost basis, for the purpose of underwriting the cost of retaining a consulting firm to conduct the classification and pay studies?"

The authority to employ such a consulting firm is established by Sec. 8(4) of said House File 572, which reads as follows:

"To appoint such employees of the department and such experts and special assistants as may be necessary to carry out effectively the provisions of this Act. Staff employees shall be appointed in accordance with the provisions of this Act."

I consider this subsection as requiring the director to determine the necessity for and employment of such a consulting firm, and it is clear from your correspondence that Mr. Howell has made such a determination.

The three questions posed in your letter of February 13, 1968, are answered as follows:

1. The agencies of state government to which you refer in question #1 with which you propose to contract at this time for classification and pay studies are not "municipalities or political subdivisions of the state." Rather, they are a part of state government itself. Even House File 572, in Sec. 10, recognizes such distinction. See also *Graham v. Worthington*, ... Iowa ....., 146 N. W. 2d 626 (1966). The answer to question #1 is in the negative.

2. Sec. 8(3) of House File 572, places a duty on the director as follows:

"To establish and maintain a roster of all employees in the state merit system in which there shall be set forth, as to each employee, the class title, pay or status, and other pertinent data."

Sec. 9 places a duty on the merit employment commission to adopt and amend rules and regulations as follows:

"1. For the preparation, maintenance, and revision of a position classification plan from a schedule by separate department for each position and type of employment not otherwise provided by law in state government as approved by the executive council for all positions in the merit system, based upon duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class, in the same geographical area. After such classification has been approved by the commission, the director shall allocate the position of every employee in the merit system to one of the classes in the plan. Any employee or agency officials affected by the allocation of a position to a class shall, after filing with the director a written request for reconsideration thereof in such manner and form as the director may pre-

scribe, be given a reasonable opportunity to be heard thereon by the director. An appeal may be made to the commission or to a qualified classification committee appointed by the commission.

"Whenever the public interest may require a diminution or increase of employees in any position or type of employment not otherwise provided by law, or the creation or abolishment of any such position or type of employment, the governor with the approval of the executive council, acting in good faith, shall so notify the commission. Thereafter such position or type of employment shall stand abolished or created and the number of employees therein reduced or increased. Schedules of positions and type of employment not otherwise provided by law shall be reviewed at least once each year by the governor and submitted to the executive council for continuing approval."

"2. For a pay plan within the purview of an appropriation made by the general assembly and not otherwise provided by law for all employees in the merit system, after consultation with appointing authorities and after a public hearing held by the commission. Such pay plan shall become effective only after it has been approved by the executive council after submission from the commission. Review of the pay plan for revisions shall be made in the same manner at the discretion of the director, but not less than annually. Each employee shall be paid at one (1) of the rates set forth in the pay plan for the class of position in which employed and, unless otherwise designated by the commission, shall begin employment at the first step of the established range for his class."

§ 8.38, 1966 Code of Iowa, reads as follows:

"8.38. Misuse of appropriations. No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purpose other than that for which the money was appropriated, except as otherwise provided by law. A violation of the foregoing provision shall make any person violating same, or consenting to the violation of same liable to the state for such sum so expended, together with interest and costs, which shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action may be brought in any county of the state."

The responsibility for establishing and maintaining the plan which would result from the study you propose, and the rules governing implementing such plan, lies with the merit employment department and its director. No other agency, board, office or department has any such duty or authority with the exception of the joint merit system referred to in Sec. 8.5(6)(b), 1966 Code of Iowa, which is phased out under the terms of House File 572.

Under the prohibitions of § 8.38, 1966 Code, expenditures by other agencies of state government for the purposes suggested, would be improper because of the lack of legislative authorization or duty.

Question #2 is therefore answered in the negative.

3. Question #3 is also answered in the negative for the reasons set out under #2.

February 29, 1968

TAXATION: Personal Property Tax Credit — H.F. 686, Acts 62nd G. A. A taxpayer who sells property before July 1, 1967, is entitled to the tax credit provided by H.F. 686, because the property sold was listed as his on January 1, 1967, and the allowance of the credit follows automatically from the act of listing. H.F. 686 does not give the County Auditor any authority to establish a final filing date for the allowance

of the credit. § 45 of H.F. 686, when read in *pari materia* with § 443.4, Code of Iowa, 1966, establishes December 31st as the final date for action by the County Auditor in determining the amount of personal property taxes available for this credit. (Murray to Faches, Linn County Attorney, 2/29/68) #68-2-7.

Mr. William G. Faches, Linn County Attorney: This is in reply to your letter dated January 3, 1968, wherein you request the opinion of this office on the following questions:

"1. Is the personal property tax credit provided for in House File 686, to be allowed to taxpayers who have prepaid taxes on property sold before July 1, 1967?

"2. Can County Auditors establish a final filing date to allow credit before billing 1967 taxes and not allow tax credit after the date established?"

Your first question is answered in the affirmative despite the anomalous result such answer appears to produce. Section 42 of H.F. 686 provides, inter alia, as follows:

"The aggregate assessed value of personal property for each assessing district as established in the 1967 assessment year, after adjustment for equalization, shall be the basic taxable value upon which the credit granted herein shall be determined, subject to the following *annual* adjustments:

"1. Add: additional personal property brought into each assessing district, but not to include replacement of personal property with like personal property, in accordance with section four hundred forty-one point twenty-one (441.21), Code of Iowa.

"2. Subtract: personal property removed from each district by reason of transportation therefrom, personal property destroyed, and personal property consumed or *disposed* of and not replaced." (Emphasis added)

The property to which the credit is to be applied is that listed or reported to the County Assessor as of January 1, 1967. Conversely, if the property was not listed as of January 1, 1967, it will not qualify for the credit in that year, unless it is omitted property as provided in Section 443.6, Code of Iowa, 1966. Section 42, quoted above, states that the adjustments (additions and subtractions) to the assessed value are to be made *annually*. We construe this to mean that such adjustments must be made on the following January 1st, viz, January 1, 1968. Perhaps the potential adjustments may be determined at designated times during the year, but the actual act of making the necessary computations takes place as of January 1st of each year. For the purposes of the credit, property listed as of January 1, 1967, may be sold, destroyed, consumed or purchased during the year and such acts will not affect the "aggregate assessed value" of the property listed as of January 1, 1967. However, as of the next succeeding January 1st, in this instance, 1968, the additions and subtractions are taken into consideration.

It should be pointed out that no matter which tack is taken, an anomaly will result. For example, if, in this opinion, we were to hold that the seller is not entitled to the credit, and if the property were purchased for use in Iowa, the purchaser also would not be entitled to the credit for the reason that it was not listed as his at the first of the year. Although it is an anomaly, when a man receives a credit for property which he no longer owns, it is our opinion that less injustice will be achieved, by pur-

suing this reasoning. Consequently, we are of the opinion that the seller is entitled to the credit prescribed by H.F. 686.

In answer to the second question raised in your letter dated January 3, 1968, Section 45 of H.F. 686 provides:

"Sec. 45. *On or before January 1* of each year, the auditor of each county shall prepare a statement listing for each taxing district in the county all personal property upon which taxes shall not be collected due to the tax credit granted in this Act. The statement shall show the tax rates of the various taxing districts and the total amount of taxes which shall not be collected in each district because of the tax credit. The auditor shall certify and forward one (1) copy each of the statement to the state comptroller and to the department of revenue on or before January 15 of such year."

You will note that Section 45 of H.F. 686 does not fix a date for filing a claim for the personal property tax credit, but rather prescribes dates for action to be taken by County officials. In this regard, Section 45 of H.F. 686 differs from the provisions of § 425.2, Code of Iowa, 1966 (date for filing claim for homestead tax credit) and § 427.6, Code of Iowa, 1966, (date for claiming exemption for military service). However when Section 45 of H.F. 686 is read in paria materia with § 443.4 of the Code of Iowa, 1966, it appears that the County Auditor must have entered the property on the tax list by December 31, 1967. §§ 443.4 provides, in part, as follows:

"443.4 Tax list delivered — informality and delay. He shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. "

It is to be noted, under the above quoted statute, the only action required of the auditor is that he must deliver the tax list to the County Treasurer on or before December 31 of each year. Since this is so, it is the opinion of this office that claims for personal property tax credit must be in the auditor's office at a time on or before December 31 while said lists are within the auditor's control. We believe it to be a reasonable interpretation of the statute that the auditor must have the tax lists in his office in order to enter the claim for credit and that a claim form filed after December 31 cannot be allowed.

March 1, 1968

SCHOOLS — Reorganization — §275.12(2)(d). One Man, One Vote principle is not violated by language of §275.12(2)(d) if factor of population is given proper attention. §275.35 contains provisions for submission of election of directors from director districts to voters. (Nolan to Goeldner, Keokuk County Attorney, 3/1/68) #68-3-1.

Mr. Albert F. Goeldner, Keokuk County Attorney: I have received your letter of December 4, 1967, which presents the following questions:

"1. Does the one-man, one vote principle apply to election and selection of board members of school districts, and particularly to those schools organized as provided in Section 275.12(2d)?

"2. If so, how are boundaries adjusted to comply?

"3. Whose responsibility shall it be to re-establish the boundary lines of those director districts not substantially in conformity with the aforementioned principle?"

In answer to your first question it appears that §275.12(2)(d) is not in violation of the constitutional requirement of the "one-man, one vote" rule if the factor of population is given its proper attention as under §275.12(2)(b) which provides: "The boundaries of such director districts and the area and population included within each district shall be such as justice, equity, and the interests of the people may require."

In answer to your second question it appears that any change or adjustment in the boundaries to comply with "one-man, one vote" principle would have to be effected under §275.35, which provides for the "submission of a proposal, stating the proposed new method of election and describing the boundaries of the proposed director districts. . . ."

The code does not provide an answer to your third question but it is my view that the directors of the school district as a legislative body would be responsible for redrawing subdistrict boundary lines within such district. Further, any citizen of the district could initiate such action by petition to the board. In the event that a circulation of a petition for change is not feasible, quo warranto proceedings might be considered as a suitable alternative.

I note from the record of your call on February 14, 1968, that reference is made to *Meyer v. Campbell,* 152 N. W. 2d 617. The court held there that the portions of Chapter 273, Code of Iowa, 1966, providing for present apportionment of county boards is unconstitutional and then stated:

"This declaration shall be prospective in effect and its effective date shall be fixed by this court."

March 2, 1968

LABOR DEPARTMENT — Work permit. §92.11, Code of Iowa, 1966. A 15-year old boy may not receive a work permit for employment in a restaurant. (Zeller to Parkins, Comm. of Labor, 3/2/68) #68-3-4.

Mr. Dale Parkins, Commissioner of Labor, Department of Labor: Reference is made to your recent letter of February 12, 1968, in connection with an application for a work permit for a boy fifteen years of age. You have stated that his school counselor, the court, and the local police would like the boy to commence training at a restaurant under the supervision of the operator of the Holiday House. You also state that the boy would like to become a chef and that his training would be adapted to fulfill that ambition. You have also stated that his hours of work would be from 3:00 to 7:30 p.m. on week days and all day on Saturday.

However, §92.11, Code of Iowa, 1966, in pertinent part provides:

"No person under sixteen years of age shall be employed * * * in or about any hotel, cafe, restaurant * * *."

Accordingly, I am of the opinion that no exception can be made even if the school counselor or court recommends his employment. There is

no authority for the issuance of a special work permit to a boy of fifteen years of age under such circumstances. See also a similar opinion of our Department in 1930 O.A.G. 169.

March 2, 1968

STATE OFFICERS AND DEPARTMENTS — Board of Control — Warden — §§246.38, 246.39, 246.41, 246.43. The warden of a state institution may, with the approval of the Board of Control, deprive a prisoner of good and honor time earned although the prisoner is acquitted of a crime arising from the same conduct. (Claerhout to Brown, Adm. Ass't., Board of Control, 3/2/68) #68-3-2.

Mr. M. J. Brown, Administrative Assistant, Board of Control of State Institutions: This is in response to your letter of December 14, 1967, wherein you state:

"We would like an attorney general's opinion, formal or informal, as to the right of the officials of the State Penitentiary under Section 246.41, Code of Iowa, to take away good and honor time from a prisoner who violated prison rules by leaving his place of assignment and participating in an escape with other prisoners.

"This inmate was found not guilty of 'escape' when tried under Section 745.1 upon testimony of another inmate partner in the crime that he was 'kidnapped' even though this prisoner was wearing a prison guard's uniform, stolen from the penitentiary, when captured.

"We feel that the responsibility of prison officials to assess forfeiture of good and honor time, with the approval of the Board, for infraction of prison rules need not be contingent upon a conviction for the more serious offense."

No consideration of Section 246.41 of the 1966 Code of Iowa would be complete without prior recognition of two other sections. Section 246.38 states in part:

"No convict shall be discharged from the penitentiary or the men's reformatory until he has served the full term for which he was sentenced, less good time earned and not forfeited, unless he be pardoned or otherwise legally released. . . ."

Section 246.39 says in part:

"Each prisoner who shall have no infraction of the rules of discipline of the penitentiary or the men's or women's reformatory or laws of the state, recorded against him, and who performs in a faithful manner the duties assigned to him, shall be entitled to a reduction of sentence as follows . . ."

Section 246.41 as amended states:

"A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him, as follows:

"1. For the first violation, two days.

"2. For the second violation, four days.

"3. For the third violation, eight days.

"4. For the fourth violation, sixteen days and, in addition, whatever number of days more than one that he is in punishment.

"5. For the fifth and each subsequent violation, or for an escape, or attempt to escape, the warden shall have the power, with the approval of the board of control, to deprive the prisoner of any portion or all of the good time that the convict may have earned."

It is well established that a statutory provision as to diminution of imprisonment does not confer a right upon a prisoner, but a privilege which is earned by observance of certain standards of conduct. The Supreme Court of Iowa long ago considered both the rule and its limitations in *State v. Hunter*, 1904, 124 Iowa 569, 574-575, 100 N. W. 510, 512, where the Court said:

"No doubt, the forfeitures provided by Code, §5704 [246.41], may be imposed by the warden without a judicial determination as to the facts constituting a violation of the rules, regulations, or laws for the government of the penitentiaries. But if no such forfeiture has been declared until the prisoner has served for such length of time that, with the diminution of sentence provided for, he can, without question, secure his discharge in a legal proceeding. We reach the conclusion therefore, that the diminution of imprisonment provided for by statute is a privilege of which the prisoner can be deprived only in accordance with the provisions of the statute . . ."

Assuming the forfeiture of good time in the instant question has been timely declared, the key issue arises as to what effect an acquittal for the crime of escape has upon the forfeiture of time for violation of a prison rule concerning leaving the place of assignment.

A careful review of Section 246.39, quoted above, shows three general categories of violations for which reduction of sentence may be forfeited. That portion which refers to infraction of "laws of the state" apparently requires a determination by a court of law. However, the other two parts regarding "the rules of discipline of the penitentiary" and performance of assigned duties "in a faithful manner" seem to rely solely upon the discretion of the warden with the approval of the Board of Control. The fact that the Legislature provided for forfeiture of earned good time based on infraction of either "laws of the state" or the penitentiary "rules of discipline," it does not follow that the warden is given only an alternative power, to exercise in lieu of criminal process. Thus, forfeiture may be subsequent to a conviction for violation of "laws of the state" or completely independent of criminal matters where prison rules are violated.

Further support for such a conclusion becomes obvious by comparing the standard necessary to find one guilty of a crime and the standard provided by the Legislature for imposing forfeiture of "good time." The general rule regarding the standard used in criminal procedure is found in Section 785.3, 1966 Code of Iowa, where it states:

"Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

Conversely, a prisoner does not become a "defendant" for mere violation of prison rules and no additional sentence punishment is provided for such infractions. There is no special standard of proof imposed upon the warden by Section 246.41, to assist in his determination of infractions. Obviously, the Legislature granted him the "power" to inflict forfeiture, subject only to the approval of the Board of Control. Therefore, it seems quite possible that the warden might find an infraction of prison rules while a jury could not agree beyond "a reasonable doubt" that a crime had been committed.

The fact that the warden and the Board of Control refer to "leaving

place of assignment" rather than "escape" or "attempt to escape" presents no practical difference. However, it should be obvious that use of the words of "leaving the place of assignment" might lead to some confusion on behalf of prisoners who might not grasp the idea that such a phrase merely describes the same conduct that is prohibited by Chapter 745 of the Iowa Code.

It further appears that "honor time" has been withheld from the prisoner. Such special reduction is provided by Section 246.43, 1966 Code of Iowa, where it states:

"Any prisoner in either of said institutions who may be employed in any service outside the walls of the institution, or who may be listed as a trusty, may, with the approval of the board of control, be granted a special reduction of sentence, in addition to the reduction heretofore authorized, at the rate of ten days for each month so served."

While there is no statutory provision regarding forfeiture of "honor time" similar to Section 246.41 over "good time," the Board of Control has passed Rules and Regulations establishing procedure for administering special reduction. One of the rules applicable to "honor" or "trusty" prisoners states:

". . . that any prisoner violating the rules and regulations governing the institution, or violating the law who has earned special deduction on the term of his sentence, shall be removed from the honor roll until such time as re-instated by the Warden and approved by the Board of Control."

Therefore, while there is clearly no provision in the Code for forfeiture of "honor time," there is also no question that the repeated use of the word "may" in Section 246.43 indicates legislative intent to permit special reduction only to those prisoners found to be acceptable of such classification by the warden with the approval of the Board of Control. However, it does appear that the practice of informing incoming prisoners of the amount of reduction possible resulting from "honor time," may lead the prisoner to the mistaken belief that when he is removed from the honor or trusty position, that the warden is withdrawing "honor time" rather than the correct conclusion that reduction accrues only when earned.

The Iowa Supreme Court has considered the purpose of reduction of sentence statutes in *Masteller v. Board of Control of State Insts.*, 1959, 251 Iowa 234, 240, 100 N. W. 2d 111, where the court said:

". . . these statutes . . . were enacted in the interests of better discipline and in support of the efforts to reform the inmates of the institution and improve their chances of becoming good citizens. Such statutes no doubt have done incalculable good in making the prisoners responsive to all efforts to rehabilitate them."

There may be an honest difference of opinion as to the method of most effectively administering the provisions of Chapter 246 to reach the ends recognized by the court above. 53 Iowa L. Rev. 671, 693-694. However, regardless of theories of penology, I am of the opinion that the warden may, with the approval of the Board of Control, cause forfeiture of "good time" earned by a prisoner for conduct which violated prison rules although a jury acquitted the person of a crime arising from that conduct. It is also my opinion that the warden may, with the approval of

the Board of Control, prevent accrual of "honor time" by removing the prisoner from the honor roll in accordance with the Rules and Regulations adopted by the State Board of Control.

March 2, 1968

TAXATION: Documentary Stamp Tax; §§428A.1, 428A.2, 428A.3, 428A.5: The Veterans Administration is not subject to the documentary stamp tax nor are such stamps required to be affixed to deeds given by the Administration. However, those who are not exempt from the documentary stamp tax by §428A.2 and who grant, assign, transfer, or convey any land, tenement, or realty by deed to the Veterans Administration where the consideration, pursuant to §§428A.1 and 428A.2(6) exceeds one thousand dollars would be liable for the tax pursuant to §428A.3 and would be required to affix the documentary stamp or stamps to the deed in accordance with the provisions of §428A.5. (Griger to Daly, Attorney, 3/2/68) #68-3-6

Mr. W. D. Daly, Attorney, Veterans Administration Center: In your letter of January 24, 1968, you requested an opinion from the Attorney General's Office as follows:

"I would appreciate a ruling from your Office as to whether the Veterans Administration is subject to a documentary stamp on Deeds given by the Veterans Administration or Deeds received from outside the Veterans Administration. It is our under standing that the United States Government or its instrumentalities are not subject to a State Tax."

§428A.1, Code of Iowa, 1966, imposes the Iowa documentary stamp tax as follows:

"Amount of tax on transfers. There is hereby imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner. When there is no consideration or when the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, is one thousand dollars or less, there shall be no tax. When the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one thousand dollars, the tax shall be one dollar ten cents plus fifty-five cents for each five hundred dollars or fractional part of five hundred dollars in excess of one thousand dollars."

§428A.3, Code of Iowa, 1966, provides who is liable for the tax imposed by §428A.1:

"Who liable for tax. Any person who grants, assigns, transfers, or conveys any land, tenement, or realty by a deed, writing, or instrument subject to the tax imposed by this chapter shall be liable for such tax but no public official shall be liable for a tax with respect to any instrument executed by him in connection with his official duties."

§428.5, Code of Iowa, 1966, provides that the tax shall be paid by the affixing of a documentary stamp or stamps in the amount of the tax to the document or instrument with respect to which the tax is paid.

§428A.2(6), Code of Iowa, 1966, provides for an exemption from the tax where the United States or any agency or instrumentality thereof is a party to the deed:

"Any deed, instrument, or writing in which the United States or any agency or instrumentality thereof or the state of Iowa or any agency, instrumentality, or governmental or political subdivision thereof is the grantor, assignor, transferor, or conveyor; and any deed, instrument or

writing in which any of such unit of government is the grantee or assignee where there is no consideration or where the consideration does not exceed one thousand dollars."

There is no question but that the Veterans Administration is an agency or instrumentality of the United States Government. 38 U.S.C.A. §202 (1959) provides as follows:

"The Veterans' Administration is an independent establishment in the executive branch of the Government, especially created for or concerned in the administration of laws relating to the relief and other benefits provided by law for veterans, their dependents, and their beneficiaries."

By the clear language of §428A.2(6), the Veterans Administration is not subject to the documentary stamp tax nor are such stamps required to be affixed to deeds given by the Administration.

Also, by the clear provisions of §§428A.1 and 428A.2(6), there is no tax nor are stamps required to be affixed to deeds received by the Veterans Administration where there is no consideration or the consideration, exclusive of any lien or encumbrance remaining thereon at the time of sale, is one thousand dollars or less. However, it is our opinion that those who are not exempt from the documentary stamp tax by §428A.2 and who grant, assign, transfer, or convey any land, tenement, or realty by deed to the Veterans Administration where the consideration, pursuant to §§428A.1 and 428A.2(6) exceeds one thousand dollars would be liable for the tax pursuant to §428A.3 and would be required to affix the documentary stamp or stamps to the deed in accordance with the provisions of §428A.5.

March 2, 1968

MOTOR VEHICLES: Implements of Husbandry; chauffeur's license, feed grinder. §§321.1(17), 321.1(43), 321.18, Code of Iowa, 1966. A feed grinder or portable mill is not considered "special mobile equipment." A licensed chauffeur is required if gross weight classification exceeds five tons, except in case of a farmer using it exclusively in connection with transportation of his own property. (Zeller to MacDonald, Kossuth County Attorney, 3/2/68) #68-3-9.

Mr. Walter B. MacDonald, Kossuth County Attorney: Reference is made to your letter of February 9, 1968, inquiring "whether you have any Attorney General's Opinions covering the question whether a feed grinder, 321.118, is either a motor truck, road tractor, or other vehicle listed in Chapter 321.1(43) which requires the necessity of having a chauffeur's license."

Your question requires a reading of §§321.1(17), 321.1(43), and 321.118.

Section 321.1(43) provides that "'chauffeur' means . . . any person who operates a truck tractor, road tractor or any motor truck which is required to be registered at a gross weight classification exceeding five tons, . . ."

Portable mills or feed grinders are excluded from the classification of "special mobile equipment" under §321.1(17). Accordingly, they are classifiable as ordinary motor trucks or other motor vehicles for highway purposes. If the feed grinder has a gross weight classification of *over*

five tons it must be operated by a licensed "chauffeur" as provided by §321.1(43). An exception is provided only for a farmer or his hired help when the truck is used exclusively "in connection with the transportation of his own products or property."

March 2, 1968

TAXATION: Homestead Tax Credit — H.F. 686, Acts of the 62nd G. A. (1967). The 62nd General Assembly created a new and additional homestead tax credit for owner-taxpayers who are over 65 and whose income is less than $3,500 per annum. Such credit is measured by the difference between the tax currently levied on the homestead property and that levied in 1967 or 1968, whichever is lower, that levied in the year in which he acquired the homestead or when he reached the age of 65, whichever is latest. (McLaughlin to Heronimus, Ass't. Grundy County Attny., 3/2/68) #68-3-5.

Mr. T. J. Heronimus, Assistant Grundy County Attorney: In your letter dated December 20, 1967, you requested an opinion of the Attorney General as follows:

Can the credit established by §48 of House File 686, Acts of the 62nd General Assembly (1967) be based on a year prior to 1967 if the taxpayer became 65 years of age or acquired his homestead in a year prior to 1967?

§48 of House File 686 provides for an additional homestead tax credit as follows:

"Sec. 48. Section four hundred twenty-five point one (425.1), Code of Iowa, is hereby amended by adding a new subsection as follows:

" 'In addition to the homestead credit of twenty-five (25) mills on twenty-five hundred (2,500) dollars of assessed valuation allowable under this chapter, in the event the owner, as defined in this chapter, is over sixty-five (65) years of age, and provided that the income of such owner, when included with that of his spouse(if any, is less than three thousand five hundred (3,500) dollars per annum, there shall be credited against the tax levied on his eligible homestead [*an amount in dollars equal to the difference between such tax levied in the current year and such tax levied in the year 1967 or 1968, whichever year resulted in the lowest tax, or in the year in which he became sixty-five (65) years of age, or in the year in which he acquired the homestead, whichever is latest, if the tax levied in the current year is greater.*] Said credit shall be paid to each taxing district from the homestead tax credit fund in the same manner as other homestead tax credits and all other nonconflicting provisions and computations in this chapter shall be applicable to the credit provided by this subsection, and in the event of conflict this subsection shall obtain.

" 'Each owner making application for credit because of age shall annually, on or before July 1, file a verified statement with the county assessor, showing:

" 'a. He was sixty-five (65) years of age before midnight on December 31 of the year immediately preceding the year of the tax levy.

" 'b. His income, when included with that of his spouse, if any, during the last preceding twelve-month income tax accounting period is less than three thousand five hundred (3,500) dollars.

" 'c. The real value of all additions or improvements made to the homestead during the preceding year, and describing them. If any such addition or improvement, exclusive of repairs and maintenance, has been

made the assessor shall determine whether the assessed valuation of the homestead shall be increased and if so the amount thereof. The additional credit provided herein shall not be allowed if such increases in valuation are in excess of one thousand (1,000) dollars, in the aggregate, during each five-year period commencing with the year in which application is first made under this subsection.

" 'The tax credit under this subsection shall also be allowable where there is more than one (1) "owner" as defined in this chapter, if any one of them is more than sixty-five (65) years of age and is occupying the premises as a homestead within the meaning of this chapter. The state tax commission shall determine the evidence requirements for all matters of fact to be shown by each owner making application for credit.

" 'For the purpose of this subsection "income" means taxable income for federal income tax purposes plus income from securities of state and other political subdivisions exempt from federal income tax and income from social security and other tax-exempt retirement or pension plans.' " (Emphasis supplied)

The answer to your question depends upon the interpretation of the italicized words of the statute quoted above which state the method to be used in determining the amount of the tax credit. We are of the opinion that the amount of the additional homestead tax credit is measured by the difference between the amount of property tax levied in the current year, and the lowest of three alternatives set forth hereinafter. The three alternatives enumerated in the statute are: "such tax levied in the years 1967 or 1968"; "the year in which he became sixty-five (65) years of age" and "the year in which he acquired the homestead." The clause "whichever is latest" explains the application of these three (3) alternatives. This clause means that in determining the amount of the credit, a comparison between the current year's levy and the latest, in point of time, of these three alternatives is to be made. The clause "whichever year resulted in the lowest tax" explains whether one or the other of the two years, "1967 or 1968," is to be used in making this determination for one of the three alternatives. The statute must be construed to give it a realistic and logical construction and the foregoing achieves those purposes. Accordingly, the credit cannot be based upon a year prior to 1967, notwithstanding that the taxpayer may have become sixty-five years of age or acquired his homestead in a year prior to 1967.

In adidtion, you will note that Section 48 requires that an application for the homestead tax credit be filed before July 1st. However, the statute was not enacted until after July 1, 1967, which can only mean that the first year the credit can be claimed is 1968.

March 2, 1968

MOTOR VEHICLE: Highway — Implement of Husbandry. §§321.1(1), 321.1(16), 321.1(17), Code of Iowa, 1966. A Ford motor truck with a 900 gallon tank attached to transport liquid fertilizer is not considered an instrument of husbandry, but should be licensed for its gross weight. (Zeller to Walker, Marshall County Attorney, 3/2/68) #68-3-8

Mr. James W. Walker, Marshall County Attorney: Reference is made to your letter of February 28, 1968, which encloses a letter from a farmer dated February 7, 1968. In this letter the writer states:

"I have a 1948 Ford truck or self-propelled vehicle with a 900 gallon tank on it that I have used since 1960 to fill the corn planter with liquid

fertilizer in the field when I plant corn. For several years this truck was classified as a husbandry vehicle and used as such and still is.

* * *

"It does not haul products on the road and it only travels about 20-30 miles during the whole year on a country road to get from one field to the other or from one farm to the other."

Your question is whether the farmer is now required to obtain a gross weight vehicle license for this truck when moving on any road or highway.

In January to April, 1965, §321.1(16), Code of Iowa, 1962, provided that an "implement of husbandry" includes "equipment of any kind for the storage, transportation, application * * * of anhydrous ammonia or other liquid commercial fertilizer used by owners of agricultural operations." But on May 5, 1965, this definition was amended by striking out the above provision, in Chapter 268, Acts of the 61st General Assembly.

Accordingly, the Ford truck with its 900 gallon tank attached is no longer to be classified as an implement of husbandry, nor is it special mobile equipment, as defined in §321.1(17), Code of Iowa, 1966.

Accordingly, your farmer is required to license the truck, for its gross weight, if it moves on a county road or highway.

An opinion of our Department, dated July 6, 1965, 1966 O.A.G. 240, is attached to this letter and also supports our conclusion that the truck with its attached tank should be licensed for its gross maximum weight when driven upon any road or highway.

March 2, 1968

LABOR: Agricultural migratory labor; drinking water; health rules. §§88A.1, 88A.11, 88.6, Code of Iowa, 1966. Rules may be written regulating drinking water for migratory labor. (Zeller to Parkins, Comm. of Labor, 3/2/68) #68-3-7

Mr. Dale Parkins, Commissioner, Bureau of Labor: Reference is made to your recent letter reading in part as follows:

"I would like to request a formal attorney general's opinion on the authority of the Iowa Employment Safety Commission to write rules in the area of water for migratory labor.

"It has been brought to my attention that the water supply that certain migrants have to drink is contaminated.

* * *

"Therefore I would like an opinion as to whether or not the Iowa Employment Safety Commission by virtue of Chapter 88A, Sections 10 and 11, Code of Iowa, 1966, has authority to write rules to cover this situation as it applies to agricultural pursuits and migrants, especially.

"As an alternative, I would also like to know if the Public Health Department has any authority to do anything about the sanitary conditions of the water these migrants are forced to drink."

Section 88.6, Code of Iowa, 1966, provides in pertinent part that the provisions of this chapter shall not apply to agricultural pursuits.

However, Chapter 88A, Code of Iowa, 1966, with different provisions became law on April 22, 1965 and provides at §88A.1 for additional safety laws and rules and reads as follows:

". . . that every employer . . . shall cause all places of employment to be in all respects . . . equipped, arranged, operated and maintained so as to provide reasonable and adequate protection for the lives, health and safety of all persons employed or working therein. . . ."

Section 88A.11, Code of Iowa, 1966, also stated as follows:

"The commission shall adopt reasonable rules, regulations and codes to carry out and give effect to the policy and provisions of the employment safety laws, including but not limited to section 88A.1. . . ."

Moreover, these sections have no provisions excluding agricultural pursuits. Accordingly, I am of the opinion that the Bureau of Labor may write rules, controlling and regulating the sanitary conditions of the drinking water which is provided for the use of migratory labor."

March 4, 1968

MUNICIPAL CORPORATIONS—Article IX, §2(4), Constitution of Iowa; §§366.1 and 602.32, Code of Iowa, 1966. A municipality may adopt an ordinance relating to the same subject matter as a state statute and any fine imposed for a violation of such ordinance is accounted for to the city. Strauss to Atwell, Sup., County Audits, 3/4/68) #68-3-10.

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: Reference is herein made to your letter of February 5, 1968, in which you submitted the following:

"May a city or town by ordinance duplicate any state laws so that when the law is violated in a city or town and the person is apprehended and fined, the money will go to the city and not to the County Treasurer?"

The power to enact or adopt ordinances is contained in Chapter 366, Code of Iowa, 1966. §366.1 thereof provides:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days."

In the form your question is submitted a bare legal question defining the areas of legislation in several public legislative bodies is presented. In that aspect I advise that as early as 1889 in the case of *Bloomfield v. Trimble*, 54 Iowa 399, the court stated:

"The ordinance in question is in substance the same as Sec. 1548 of the Code, which provides for the punishment of persons found in a state of intoxication. Both the State Law and the ordinance provide for the punishment of the same offense. That an ordinance of this character is not void, see Cooley's Const. Lim., 198, where it is said: 'Indeed the same act may constitute an offense against both the State and the municipal corporation, and may be punished under both without violation of any constitutional principle.' "

The rule was considered by this department in an opinion appearing in the Report for 1962 at page 17 where it is stated:

"The law is well established that a municipality, when not expressly prohibited, has the power to enact an ordinance dealing with the same subject matter as that dealt with by state law, Des Moines v. Reiter, 251 Iowa 1206, 102 N. W. 2d 363 (1960); Des Moines v. Rosenberg, 243 Iowa 262, 51 N. W. 2d 450 (1962); Neola v. Reichart, 131 Iowa 492, 109 N. W. 5 (1906); Bloomfield v. Trimble, 54 Iowa 399, 6 N. W. 586 (1880)."

A copy of this opinion is hereto attached.

In view of the foregoing I am of the opinion that punishment for a violation committed in violation of an ordinance in terms a duplicate of a state statute is punishable under that ordinance. A fine imposed thereunder shall be accounted for to the school fund if the fine is imposed under a statute; if imposed under an ordinance it is accounted for to the city. See Constitution, Article IX, Section 2(4); and §602.32, Code of Iowa, 1966.

March 4, 1968

STATE OFFICERS AND DEPARTMENTS: Industrial Commissioner — authority to enter into agreements with other agencies of government — §§259.4, 259.5 and Chapter 28E, Code of Iowa, 1966. The industrial commissioner and the division of rehabilitation education and services of the state board of public instruction may enter into an agreement for the referral by the industrial commission of injured employees covered by the workmen's compensation law to the division of rehabilitation education and services and the exchange of information about their progress without bringing the labor commissioner into the agreement. (Haesemeyer to Dahl, Industrial Comm., 3/4/68) #68-3-16.

Mr. Harry W. Dahl, Industrial Commissioner, Workmen's Compensation Service: By your letter of February 13, 1968, you have requested an opinion of this office with respect to the following:

"The Industrial Commissioner and the Division of Rehabilitation Education and Services of the State Board of Public Instruction are discussing a program for the referral by the Industrial Commissioner of injured employees covered by the Workmen's Compensation Law to the Division of Rehabilitation Education and Services and the exchange of information about their progress. We want to set down in writing the methods and procedures our two departments will follow in this program.

"Can the Industrial Commissioner and the Division of Rehabilitation Education and Services enter into a written agreement for such cooperative action under either Chapter 28E or Sections 259.4 and (5) and 259.5, or both Chapters 28E and 259, without bringing into the agreement the State Labor Commissioner, who is mentioned in Section 259.5, Code?"

It is our opinion that the industrial commissioner can enter into a written agreement for cooperative action with the division of rehabilitation education and services under either Chapter 28E or Chapter 259, Code of Iowa, 1966, without bringing into the agreement the state labor commissioner.

§259.5 provides:

"259.5 Plan of co-operation. It shall be the duty of the state board for vocational education and the state labor commissioner and the state industrial commissioner as administrator of the workmen's compensation law to formulate a plan of co-operation in accordance with the provisions of this chapter and said Act of Congress, such plan to become effective when approved by the governor of the state."

While the language of the foregoing statutory provision might at first glance appear to require that the state labor commissioner be a party to any agreement between the industrial commissioner and the division of rehabilitation education and services it is our view that such provision should not be construed so narrowly. Viewing Chapter 259 as a whole and particularly the broad grant of power contained in §259.4 it is our opinion that your commission and the division of rehabilitation education and services could enter into an agreement for cooperative action to further the purposes of Chapter 259 under §259.4, subsection 12, which provides:

"12. Co-operate with any agency of the federal government or of the state, or of any county or other municipal authority within the state, or any other agency, public or private, in carrying out the purposes of this chapter."

In any event there is no question but that you could enter into an agreement of the type you describe under Chapter 28E.

March 4, 1968

DOMESTIC RELATIONS — Application for marriage license — §§595.3, 595.4 and 595.8. Application for marriage license should be received if from the application the clerk could determine that the parties would meet the age requirements at the date of issuance. (Sell to Hill, State Representative, 3/4/68) #68-3-19.

Hon. William Hill, State Representative: This will acknowledge receipt of your letter requesting an opinion as follows:

"Can a county clerk of court receive an application for a marriage license if one of the parties is under age as of the date of application but who would be eligible as to age on the third day after application was made, being the date the license was issued, all other requirements being met?"

Or, to put it another way:

"Which is controlling as to the taking of an application for a marriage license — section 595.3 or 595.8 of the code?"

Section 595.3 of the Iowa Code provides in part:

"Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case.

"1. Where either party is under the age necessary to render the marriage valid.

"2. Where the male is a minor, or the female is under eighteen years of age, unless a certificate of consent of the parents is filed . . ."

Section 595.4 provides in part:

"Previous to the issuance of any license to marry, the parties desiring such license shall sign and file a verified application with the clerk of court which application either may be mailed to the parties at their request or may be signed by them at the office of the clerk of the district court in the county in which the license is to be issued. . . . After the expiration of three days from the date of filing the clerk shall issue the license to the parties if he is satisfied as to the competency of the parties to contract a marriage."

It is obvious that one of the purposes of sections 595.3 and 595.4 is to insure that there is a sufficient capacity to contract a marriage. With regard to age, section 595.3 provides that marriage licenses must not be granted where the male is a minor, or the female is under eighteen years of age, unless a certificate of the consent of the parents is filed. As provided by section 595.4 the clerk shall issue a license to the parties if he is satisfied as to the competency of the parties to contract a marriage.

Section 595.8 provides:

"If either applicant for a license is a minor, a certificate in writing of the parents or guardian as the case may be, of consent, as provided in section 595.3, must be filed in the office of the clerk, and be acknowledged by them or proven to be genuine, and a memorandum thereof entered in the license book. The false making of such certificate shall be punishable as forgery."

This section interpreted literally would require a consent certificate from the parent or guardian even if the applicant attained his majority within the three day waiting period. However, this interpretation of the statute would bring about an end at variance with the purpose of the chapter, for it is the time of issuance of the license that the clerk must satisfy himself as to the competency of the parties to contract a marriage.

Section 595.8 contemplates the situation where either applicant is a minor and would not reach majority by the date of issuance of the license. Sections 595.3 and 595.4 construed in pari materia with section 595.8 justified this conclusion. In seeking the meaning of a statute, the entire chapter and related acts should be considered. *Manilla Comm. School Dist. v. Halverson*, 251 Iowa 496, 101 N. W. 2d 705 (1960); *Davis v. Davis*, 246 Iowa 262, 67 N. W. 2d 566 (1954).

These sections emphasize that an applicant must be of age and qualified to contract a marriage at the time of issuance of the license. Therefore, if from the application the clerk could determine that the parties would meet the age requirements at the date of issuance, an application should be received. Thus, the clerk may issue a license to the parties if they meet the age requirements, notwithstanding the fact that either one of the parties may have been under age at the date of application.

March 4, 1968

STATE OFFICERS AND DEPARTMENTS — Term of Office — Supervisor of Savings and Loan Associations. §§69.11, 534.41, Code of Iowa, 1966. A person appointed to fill a vacancy in the office of supervisor of savings and loans caused by the death, resignation or removal of his predecessor is appointed only for the unexpired portion of his predecessor's term and not for a new four-year term. (Haesemeyer to Smith, State Auditor, 3/4/68) #68-3-13

The Hon. Lloyd R. Smith, Auditor of State: By your letter of February 22, 1968, you have requested an opinion of this office with respect to the following:

"Chapter 534.41 of the 1966 Code of Iowa provides for appointment by the Auditor of State of a Deputy to be known as 'Supervisor of Savings and Loan Associations, etc.' It is also provided by the above quoted section that 'commencing with July 4, 1959, said supervisor or his successor shall be appointed for a term of four years, subject to removal, etc.'

"The Deputy Supervisor as above designated has resigned effective February 15, 1968. A copy of a letter dated May 1, 1966, addressed to Lloyd Jackson, Secretary, Iowa State Executive Council, Des Moines, Iowa on file in the State Auditors' office is as follows:
" 'Dear Mr. Jackson:

Please be advised that on this date, May 1, 1966, I have appointed in accordance with Section 534.41, Mr. Donald Duncan a deputy, known as Supervisor of Savings and Loan Associations. His term shall extend for four years from this date and his salary has been fixed at $12,000. Mr. Duncan is qualified and meets the experience required by the law.

/S/ Lorne R. Worthington.'

"Your opinion as to whether the term of a deputy to replace the resigned deputy should be for a four year term, or for the unexpired portion of the term of the resigning deputy, and if such appointment is for the unexpired term, should the term be computed from May 1, 1966 or on the basis of successive four year terms commencing July 4, 1959."

§534.41 to which you have referred provides:

"534.41 Examinations — supervisor.

"1. Supervisor. The auditor of state shall appoint as a deputy, to be known as 'supervisor of savings and loan associations,' a person who shall be required to have at least five years practical experience in savings and loan association management, examination or supervision. Commencing with July 4, 1959 said supervisor or his successors shall be appointed for a term of four years, subject to removal by the executive council for good cause, after due hearing. Such supervisor's salary shall be fixed by the auditor of state, subject to the approval of the comptroller and governor. In addition thereto he shall receive his necessary traveling expenses."

§69.11, Code of Iowa, provides:

"69.11 Tenure of vacancy appointee. An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. *Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified.*" (Emphasis added).

Under the foregoing statutory provisions the term of the first person appointed supervisor of savings and loan associations should have terminated on July 3, 1963, the second term on July 3, 1967, and so on. And if any incumbent of the office were to have been removed, die or resign, as apparently was the case in 1966, his successor could only have been appointed to serve out the unexpired balance of his predecessor's term.

Thus the purported appointment of Mr. Donald Duncan to a four year term on May 1, 1966, was not effective. Any appointment you now make to this office will be only until the end of the current four year term, viz. July 3, 1971.

We have been unable to find any decisions of the Iowa supreme court wherein this question as it applies to appointive, as opposed to elective, officers was decided. However, in *Wilson v. Shaw*, 194 Iowa 28, 188 N. W. 940 (1922), a case involving the term of office of an elected district court judge, the following language is to be found:

"whoever is appointed or elected is appointed or elected for an unexpired portion of a prescribed term. The term prescribed is a unit of time. A new term is not created. The appointee simply steps into the shoes, so to speak, of him who was elected for the constitutional term of four years, and is entitled to perform the duties and receive the emoluments of the office until the end of that term, or until a successor shall have been elected.

* * *

"One term cannot follow another term through death or resignation of the first incumbent of the term. One term follows another term with far more certainty than day follows night in the division of time that marks the luminous line of demarcation.

* * *

"It is quite generally held that a vacancy in office is within the term, and not in the office. It is the term which survives.

* * *

"The time which a person holds over beyond his term of office is so much of an encroachment on the term of his successor. State v. Galusha, 74 Neb. 188, 104 N. W. 197; State v. Breidenthal, 55 Kan. 308, 40 Pac. 651; In re Advisory Board, 65 Fla. 434, 62 South. 363, 50 L.R.A. (N.S.) 365. The word 'term' in a legal sense means the fixed and definite period of time which the law prescribes that an officer may hold office, and a holder over does not change the length of a term, but results in shortening the term of his successor."

Decisions from other jurisdictions are more directly in point. *Hoke v. Richie*, 100 Ky. 66, 38 S. W. 132 (1896), and *Castleman v. Meglemry*, 138 Ky. 313, 127 S. W. 1010 (1910), were cases involving appointive officers. In the *Hoke* case the court declared:

"The statute provides (section 2204, St. Ky.) that the 'inspector shall remain in office for four years, unless removed by the court,' etc. The question is whether the words used mean, and were intended by the legislature to mean, that the inspector's term should be four years from the time when the first inspector might be appointed under the statute, with successive terms of four years each, or whether on each occasion of a vacancy, however caused, a new full term was to commence at that date; in other words, whether the legislature intended to create a regular term of office, disconnected from the person of the incumbent, or a personal franchise which attaches to him. After carefully reconsidering the argument of counsel and the authorities cited, we have concluded that the intent of the statute was to designate consecutive periods of four years following each other in regular order, the one beginning where the other ends.

* * *

"If the contention of appellant were to prevail, it would permit the appointing power to extend the terms of his appointees, by causing them to resign on the last day of his own term of office, and thereupon reappointing them for new terms of four years. We cannot believe that the legislature so intended."

Castleman followed *Hoke* citing with approval the opinion in the latter case. A Montana case, *State v. Knight*, 76 Montana 71, 245 P. 267 (1926) which involved the term of office of an appointive city attorney stated the rules as follows:

" 'As a general rule one appointed to fill a vacant office holds only until the expiration of the regular term.' 28 Cyc. 425. An examination of the

cases cited to sustain the foregoing text shows that most of them have reference to elective offices. But where the term of an appointive office and the commencement and ending of the term have been made definite, it seems to us the same rule of construction necessarily follows. Where the length of the term and its beginning — and consequently its ending — are definite, and successive terms have followed each other in regular order, the one beginning where the other ended, and an incumbent has died, thus creating a vacancy, it logically must be held that he who is appointed to succeed the incumbent may hold only for the unexpired term for which he is appointed. A number of recent, well-reasoned decisions are to this effect."

I trust that the foregoing answers the question you have presented.

March 4, 1968

BOARD OF SUPERVISORS: §331.20, 1966 Code of Iowa — Claim for monies erroneously paid to county for care of mentally ill patient is a proper claim to be considered by County Board of Supervisors under §331.20, 1966 Code of Iowa. (Seckington to MacDonald, Kossuth County Attny., 3/4/68) #68-3-11.

Mr. Walter B. MacDonald, Kossuth County Attorney: I am in receipt of your letter of January 12, 1968, in which you ask the following:

"Is the county liable to refund sum of money erroneously paid?"

The specific question arose upon the following factual situation.

The parents of a mentally retarded child, thinking they were fully responsible for the financial support of the care, treatment and support of said child while the child was in a state institution, overpaid their actual liability by $1,800.00. Upon discovering that they had overpaid, they are demanding a refund.

You stated in your letter that you were satisfied that the parents were entitled to a refund.

You also set forth all the applicable statutes, and I assume that you have taken those into consideration in figuring the refund.

I assume also that you do not feel that these payments come within the last sentence of §222.78, 1966 Code of Iowa, which is as follows:

"Nothing in this section shall be construed to prevent a relative or other person from voluntarily paying the full actual cost as established by the board for caring for such mentally retarded person."

There is no provision in the Code of Iowa which specifically allows a refund for overpaying the cost of care for a mentally retarded person.

A similar situation was presented to this office, and answered by the opinion of Mr. Turner on April 4, 1967, to Mr. Marvin Selden, Jr. A copy of that opinion is enclosed for your reference. I believe that the situations are similar and that the reasoning used in that opinion applies in your case also.

The claim for a refund must be approved by the Board of Supervisors of your county. In connection with the above, I direct your attention to §331.20, 1966 Code of Iowa which states as follows:

"Claims filed shall be numbered consecutively in the order of filing, and

shall be entered on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered on the claim register."

In this case, the refund, if allowed by the Board of Supervisors, should be paid out of the fund normally used for paying the cost of institutional care by the county.

The situation which you describe is not an unusual one as can be seen by a reading of the enclosed opinion. Because of the last sentence of §222.78, 1966 Code of Iowa, we feel it is a good practice for the auditor to show the total cost, but such statement should also note that the law requires that only a percentage of the full debt must be paid. In this way, the responsible person could pay the full amount if he wished, but would know that only a percentage of that amount must be paid.

It is therefore the conclusion of this office that if you feel the amount overpaid should be refunded, §331.20, 1966 Code of Iowa, is the proper statute under which to proceed.

The Board of Supervisors must of course approve the claim, but we feel that decision is somewhat dictated by the cases cited in the enclosed opinion.

March 4, 1968

ELECTIONS — Model Cities Program — There is no statutory authority for the holding of an election involving the project designated Model Cities Program. (Strauss to Flatt, State Senator, 3/4/68) #68-3-12

The Hon. Joseph B. Flatt, State Senator: Reference is herein made to your letter of February 10, 1968, in which you submitted the following:

"I would request an immediate opinion on the following matter: as the elections described March 2, 1968, Des Moines, Iowa.

"An area described as Walnut Hills, Forest Hills and Oak Ridge, has qualified for a Model Cities planning grant. It is proposed that the citizens of this locale elect by popular vote, ten representatives from the area. These ten representatives are to serve to 'oversee' the activities of the Model Cities program.

"Voting machines shall be used along with paid-volunteers to man the polls.

"At least one eighteen year old is to be elected. All persons eighteen years or older would be eligible to vote. (there is a possibility this age will be lowered to sixteen years)

"No registration is required prior to, or on, election day.

"Query: Since the project involves Federal Funds, State and Urban Renewal laws, and involvement of the Des Moines municipality, is it necessary that only qualified voters, as described by State law be eligible to vote? Would it be possible for persons under the age of 21 to vote? What protection is there against anyone voting as often as he wishes in any of the districts unless some registration is held or disinterested persons named as election judges?"

I find neither state constitutional nor statutory authority for the holding of any election incident to the adoption of the project known as the Model Cities Program and therefore I am unable to answer the several questions propounded in your letter. While the holding of an election involving the project designated Model Cities Program without constitutional or statutory authority is an exercise in futility, such election may serve a valuable purpose in the launching of the project.

Generally an election is a statutory method whereby qualified voters or electors pass upon various public matters submitted to them. Qualifications of voters and office holders within the state are reserved to the state by the federal constitution and are exclusively under state control. The right to vote is not a natural or inherent right, but exists only as conferred by the constitution or statute. The legislature may provide who shall have the right of sufferage and the time, place and manner of exercising it when not expressly or impliedly prohibited by the terms of the constitution. *Coggeshall v. City of Des Moines*, 138 Iowa 730, 117 N. W. 309; *Morrison v. Springer*, 15 Iowa 304; *Iowa-Illinois Gas & Electric Company v. Bettendorf*, 241 Iowa 358, 41 N. W. 2d 1; *State ex rel Dean v. Haubrich*, 248 Iowa 978, 83 N. W. 2d 451.

March 5, 1968

MOTOR VEHICLE FUEL TAX: Interstate truckers claims of fuel purchase. §§324.54, 324.55, Code of Iowa, 1966. A departmental rule which disallows evidence of proof of payment of motor vehicle fuel taxes other than original sales invoices meeting detailed specifications is unreasonable and arbitrary and therefore void. (Martin to Fullmer, Dir., Motor Vehicle Fuel Tax Division, 3/5/68) #68-3-14

Mr. Wayne Fullmer, Director, Motor Vehicle Fuel Tax Division, Office of Treasurer of State: Your office has requested an attorney general's opinion on the following issue: May the motor fuel tax division of the Office of Treasurer of State accept, as evidence of payment of fuel taxes by interstate truckers, proofs which do not meet the specifications contained in 1966 IDR 766-767.

Section 324.54, Code of Iowa, 1966, as amended, provides in pertinent part as follows:

"Fuel tax liability under this division shall be computed on the total number of gallons of each kind of motor fuel and special fuel consumed in the operation in Iowa of commercial motor vehicles subject to this division at the same rate for each kind of fuel as would be applicable thereto if taxed under divisions I or II of this chapter. Credit against the tax liability so computed shall be allowed in the amount of *fuel taxes paid* under division I or II of this chapter on motor fuel and special fuel used in commercial motor vehicles the operation of which is subject to this division." (Emphasis added)

If a dispute were to arise between an interstate trucker and the office of Treasurer of State over the amount of credit claimed, the matter would become the subject of judicial examination in a suit brought to collect the tax due or to compel a refund of taxes paid.

At this point, the rules of evidence would determine the admissibility of evidence aimed at proving payment of fuel taxes through purchase of fuel.

The quantum of proof needed will not be examined here. The effect of the judge or jury in weighing and balancing matters of fact are not such as make a proper subject for an attorney general's opinion. This opinion will attempt to discover the types of items which are admissible; which a court or jury would thus examine in arriving at a decision.

One of the classic modes of proof of purchase could be through the oral testimony of the trucker who made the purchase, the oral testimony of the station attendant who sold the fuel, the oral testimony of a witness who saw and overheard the transaction, or, under certain conditions, the oral testimony of the service station's bookkeeper. For authority permitting this direct testimonial type of proof see §622.28, Code of Iowa, 1966; *Berg v. Ridgeway*, ...Iowa....., 140 N. W. 2d 95 (1966); *Reeve v. Ness et al*, 135 N. W. 575 (1912).

The other classic mode of proof is through introduction of documentary evidence of the purchase. The original sales invoice, carbon copy, photographic copy, or other representation of the original would be among the types of ducuments which, under certain circumstances, would be admissible to prove purchase. There is little question concerning the admissibility of the original invoice. §622.28, Code of Iowa, 1966.

To introduce copies of original documents one must comply with the best evidence rule.

Simply stated, the rule provides as follows:

"The best evidence rule requires production of original documents unless their absence is satisfactorily explained." *Barron v. Pigman*, 250 Iowa 968, 95 N. W. 2d 726, 729 (1959).

The lack of original documents has been considered by the Iowa Court to be satisfactorily explained if one of the following has occurred:

1. The original has been lost or destroyed. *Schroedl v. McTague*, 256 Iowa 772, 129 N. W. 2d 19 (1964); *Olesen v. Henningsen*, 247 Iowa 883, 77 N. W. 2d 40 (1956); *Griebel v. Griebel*, 242 Iowa 1229, 50 N. W. 2d 15 (1951).

2. The original is outside the jurisdiction of the court and is in possession of one who refuses to part with it. *Noble v. United Ben. Life Ins. Co.*, 230 Iowa 471, 297 N. W. 881 (1941); *Coad v. Pennsylvania Ry. Co.*, 187 Iowa 1025, 175 N. W. 344 (1919).

As a purely evidenciary matter the modern trend of authority in the area of admissibility of carbon copies appears to be to admit them without requiring explanation of lack of production of the originals. McCormick, *Evidence*, page 420 §206, 1954, states as follows:

". . . [T]he fact that many counterparts today are made by the use of carbons and the notion that writings made by the same stroke are like counterparts has caused a growing number of courts to treat all carbons, when authenticated as true reproductions, as if they were *duplicate originals*, i.e., as admissible without accounting for the original." (citing cases; emphasis added)

The Iowa Court would not admit documentary evidence, even if one of the above conditions is satisfied, if there is evidence of fraud. *Schroedl v. McTague, supra.*

All of this evidence of purchase would, under the proper circumstances, be considered by a court or jury in making a determination of the ultimate fact, of whether there had been payment of fuel taxes by purchase of fuel. Each is as reliable, prima facie at least, as another.

Section 324.55, Code of Iowa, 1966, as amended, provides in pertinent part as follows:

"Every person operating within the purview of this division shall make and keep for a period of three years *such records as may reasonably be required by the treasurer for the administration of this division.*"

By departmental rule, 1966 IDR 766-767, filed January 18, 1961, the office of treasurer of state required that proof of purchase be made by specified means which do not include the production of carbon copies:

"The state recommends that the same motor vehicle fuel sales invoices as required by section 324.17 of the Iowa motor vehicle fuel tax law for sales invoices subject to tax refund be used for sales to truckers. The state however will accept sales to trucker invoices meeting simpler specifications as follows:

"a. Name and address of the filling station must be printed and name and address of the purchaser must be written or stamped on each invoice.

"b. It must be the original top invoice prepared by the seller with double-faced carbon paper under the original. Carbon copies are not acceptable.

"c. Invoices must bear serial numbers. General merchandise sales pads bearing numbers 1 to 50 only, are not acceptable.

"d. Credit card invoices are acceptable if issued as credit sales. Credit card invoices issued covering cash sales are not acceptable.

"e. Date, type of fuel, and gallons must be shown on the invoice."

Although the rule commences with the words "the state however will accept sales to trucker invoices . . . ," the language of the rule is clearly mandatory in operation.

The wide variety of proof acceptable in a court of law, of which the above is only a mesne sample, which our common law heritage has indicated is reliable in the most serious of men's affairs, indicates that a rule disallowing all evidence except that provided for by the rule is unreasonable and arbitrary.

Rules which are unreasonable and arbitrary are not valid. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364 (1937); *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L.R.A. (NS) 639 (1908); *Anzalone v. Metropolitan Dist. Commission*, 257 Mass. 32, 153 N. W. 325, 47 A.L.R. 897 (1926); *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798, 22 A.L.R. 1178 (1921); *Foley v. Benedict*, 122 Tex. 193, 55 S. W. 2d 805, 86 A.L.R. 477 (1932); *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 A. 693, Ann Cas. 1915C 1269 (1913).

It is the opinion of this office that evidence other than that set out in 1966 I.D.R. 766-767, may be accepted by the motor vehicle fuel tax division of the office of Treasurer of State, but only upon compliance with conditions inherent in the rules of evidence.

March 6, 1968

LIQUOR BEER AND CIGARETTES — Section 123.46, Code of Iowa, 1966. Suspension and revocation of a liquor license according to §123.46 may be based on the violation or conviction of a liquor control license holder, his agents and employees. (Claerhout to Edelen, Chrm., Iowa Liquor Control Comm., 3/6/68) #68-3-15.

Mr. Walter E. Edelen, Chairman, Iowa Liquor Control Commission: This is in response to your letter of February 13, 1968, wherein you have requested an opinion of the Attorney General regarding §123.46 of the Iowa Liquor Control Act. Your question may be briefly restated as follows:

"Does the conviction of an employee of a liquor license holder cause automatic revocation of the license according to the provisions of Section 123.46 the same as if the licensee had suffered the conviction?"

Chapter 123 of the 1966 Code of Iowa, known popularly as the Iowa Liquor Control Act, states in §123.46(2):

"No person or club holding a liquor control license under this chapter, his agents or employees, shall:

"a. Knowingly permit any gaming, gambling, solicitation for immoral purposes, immoral or disorderly conduct on the licensed premises, or

* * *

"d. Keep on the licensed premises any spirits or wine in any container except the original package purchased from the commission, except mixed drinks or cocktails mixed on the premises for immediate consumption, provided that this shall not apply to common carriers holding a class 'D' liquor control license, or

"e. Re-use for the packaging of any spirits or wine any bottle or other container which has been used for the packaging of alcoholic beverages or possess any such bottle or container, or in any manner alter or increase, by the addition thereto of any substance, any portion of the original contents remaining in such bottle or container in which any portion of the original contents has been so altered or increased, or

* * *

"h. Knowingly sell, give, or otherwise supply any alcoholic beverage or beer to any person under the age of twenty-one years, or knowingly permit any person under the age of twenty-one years to consume any alcoholic beverage or beer."

The last paragraph of §123.46 provides:

"However, if any liquor control license holder shall be convicted of any violation of paragraphs 'a,' 'd,' 'e,' or 'h' of subsection 2 of this section, the liquor control license shall automatically be revoked and shall immediately be surrendered by the holder, and the bond of the license holder shall be forfeitured to the commission."

Ordinarily, where the language of a statute is clear and unambiguous as the last paragraph of §123.46 appears, there is no room for interpretation. However, there are several cogent reasons for believing that the letter of law in that paragraph is not clear, but ambiguous in the context of that section and others in the same chapter.

The first indication that something is not proper, is a comparison between §§123.46(2) and 123.46(5). The first mentioned section forbids "person or club" licensees and "agents or employees" from doing the miscellaneous acts included thereafter. A separate paragraph in §123.46 (5) then places a possible one hundred dollar fine or not more than thirty days in the county jail or both for "whoever" violates those provisions. The last two paragraphs in that section then refer only to the consequences of a conviction of any "liquor control license holder" based upon the violation of the provisions of the section. The obvious question is, did the legislature intend to exclude any sanction upon the license privilege except where the individual whose name is on the license is convicted? The only possible answer to that question is that the legislature did not intend to so restrict the enforcement of the law.

The public policy of the Iowa Liquor Control Act is well stated in §123.1 to be:

". . . for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose . . ."

A literal reading of only the last two paragraphs of §123.46(5) would provide effective immunity from sanction for all corporate and club licensees and individual licensees who take no active part in operation of the licensed establishment. Clearly, the actions prohibited in the various parts of §123.46(2) such as "knowingly permit," "sell or dispense," "keep," "re-use," "employ," and "allow" would be virtually impossible to impute to corporations, clubs, and many individual licensees without recourse to an agency relationship. It has long been recognized that a statute should be interpreted to give effect to the spirit of the law rather than the letter, especially where adherence to the letter would result in absurdity or would defeat the plain purpose of the Act. *Case v. Olson*, 1944, 234 Iowa 869, 14 N. W. 2d 717.

If the legislature did intend to allow such special privilege to corporations and other licensees with an impersonal business relationship, to flout the keen public interest in the enforcement of the liquor law, it was an opposite intent from that expressed in the declared public policy. Furthermore, there is a distinct possibility that such preferred treatment for certain licensees would create demonstrable discrimination in violation of the constitutional guarantee to equal protection of the laws. The Iowa Supreme Court has often recognized that, if possible, a statute should be construed in a manner that would preserve its constitutionality. *Calkins v. Adams County Cooperative Electric Co.*, 1966, ... Iowa....., 144 N. W. 2d 124.

The Iowa Liquor Control Commission recognized and clarified the ambiguity in §123.46 by adopting Rule 1.2 (123) on October 1, 1963, in accordance with the broad power over licenses granted to it by §123.17. That rule states:

"Any violation of the within Rules and Regulations of the Iowa Liquor Control Act as amended, by any employee, agent, or servant of a licensee shall be deemed to be the act of said licensee and shall subject the liquor license of said licensee to suspension or revocation."

It is interesting to note that the above rule has been used for several years without judicial or legislative consideration.

Therefore, to avoid absurdity, to uphold the declared public policy, to recognize the spirit of the law and the constitutional presumption, it is my opinion that "liquor control license holder," as used in §123.46, includes agents and employees for purposes of suspension and revocation of the license by the commission and for automatic revocation by operation of law.

March 6, 1968

COUNTIES AND COUNTY OFFICERS — Deductions for IPERS and social security; "wages" defined — §§97B.11, 97B.41(1) and 97C.2(1), Code of Iowa, 1966. The term "wages" for purposes of computing IPERS includes in addition to cash, the cash value of all remuneration paid in a medium other than cash except such non-cash remuneration as is paid or furnished for the convenience of the employer. For social security (FICA) purposes non-cash remuneration is also included irrespective of whether or not the same is furnished for the employer's convenience or otherwise. (Haesemeyer to Smith, Auditor of State, 3/6/68) #68-3-18

The Hon. Lloyd R. Smith, Auditor of State: By your letter of February 12, 1968, you have requested an opinion of this office with respect to the following question:

"Is IPERS and Social Security on County employees figured on the salary plus maintenance where they receive both?"

Insofar as IPERS is concerned §§97B.11 and 97B.41(1), Code of Iowa, 1966, as amended by §§3 and 9(1) respectively of Chapter 121, Acts of the 62nd G. A., provide:

"97B.11 Each employer shall deduct from the wages of each member of the system a contribution in the amount of three and one-half (3½) percent of the covered wages paid by the employer until the first of the month after the member's seventieth (70) birthday or his termination or retirement from employment, whichever is earlier. The contributions of the member shall be matched by the employer."

"97B.41(1) a. 'Wages' means all remuneration for employment, including the cash value of remuneration paid in any medium other than cash, but not including the cash value of remuneration paid in any medium other than cash necessitated by the convenience of the employer, such amount as agreed upon by the employer and employee and reported to the commission by the employer shall be conclusive of the value of remuneration in a medium other than cash; . . ."

It is clear from the foregoing that maintenance would not be included for IPERS purposes in those cases where such maintenance was furnished primarily for the convenience of the employer. In those cases where it was determined that such maintenance was not furnished for the convenience of the employer then the amount agreed upon between the employer and employee as to the value of non-cash remuneration would be conclusive for IPERS purposes.

Chapter 97C, 1966 Code of Iowa, is the federal social security enabling act and §97C.2(1) provides:

"The term 'wages' means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were for 'employment' within the meaning of the Federal Insurance Contribution Act, would not constitute 'wages' within the meaning of that Act."

The federal insurance contribution act merely provides with exceptions not relevant to your inquiry that "the term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." 26 U.S.C.A., Sec. 3121(a). Sec. 31.3121 (a)-1 of the regulations promulgated pursuant to 26 U.S.C.A., Sec. 3121(a) provides in part as follows:

"(e) Generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment.

* * *

"(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment as such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the the total remuneration of such employees."

In determining whether the value of meals and lodging should be included for social security tax purposes it is immaterial that such meals and lodging may have been furnished for the convenience of the employer. *Pacific American Fisheries, Inc., et al v. U. S.*, 138 F 2d 464 (1943); *S. S. Kresge Company v. U. S.*, 218 F. Sup. 240 (1963); Min. 5657, March 17, 1944; Rev. Rul. 57-471 (CB 1957-2, 630); Rev. Rul. 62-150 (CB 1962-2, 213). Since it is the cash value of accommodations which are included in the term "wages" the employer's cost of board and lodging is not necessarily controlling. S.S.T. 96 (CB 1937-1, 439). In making a cash value determination the following guidelines are found in S.S.T. 51 (CB XV-2, 421 (1936)):

"No specific value has been placed on meals furnished employees as part of their compensation, but the approved valuation of meals by the several states which have laws or regulations relative to such valuation is taken into consideration. Where the states have no such laws or regulations providing for such valuation, an amount which is the reasonable prevailing value of such meals is recognized, taking into consideration all of the surrounding circumstances, such as the value which the employer charged on his books of account, if such accounts were regularly kept, any agreement which might exist between the employer and the employee relative to the value of such meals, the place where such meals were served, and the nature of the service, etc.; provided, however, that no one of the above mentioned conditions is conclusive but is merely a factor in determining the true value to be placed on the meals so furnished."

From the foregoing it is evident that with one exception the term "wages" for both IPERS and social security purposes is essentially the

same and includes the cash value of remuneration paid in a medium other than cash. It should be noted that the convenience of the employer has no application to non-cash remuneration for social security purposes even though §97B.41, Code of Iowa, 1966, specifically excludes from the term "wages" for the purposes of that chapter remuneration paid in a medium other than cash necessitated by the convenience of the employer.

I trust that the foregoing answers the questions you have raised.

March 6, 1968

SECRETARY OF STATE — **Primary Nomination Petitions.** Ch. 105, Acts of the 62nd G. A. Signatures for nomination papers for the office of representative in Johnson County are required to by those of electors of a district (subdistrict). (Strauss to Synhorst, Sec. of State, 3/6/68) #68-3-17

The Hon. Melvin D. Synhorst, Secretary of State: Reference is herein made to your letter of January 30, 1968, in which you submitted the following:

"Shall the candidates for state representative from Johnson County, obtain signatures on their nomination petitions from qualified electors, residing in the districts as set out in Chapter 105, Acts of the Sixty-second General Assembly, section four (4), subsection twenty (20)."

Answer to your request is found in an opinion of this department, Turner to Gaudineer, 1-8-68, in which it was stated:

"Considering §43.20 in its entirety and construing it in pari materia together with this new redistricting law and the other election laws and practices of this state, and under the requirements of the 'one man, one vote' principle required by the United States Supreme Court in *Reynolds v. Sims*, 1964, 377 U. S. 533, 84 S. Ct. 13, 12 L. Ed. 2d 506, it may be necessarily and fairly implied that signatures of electors residing outside of the district (subdistrict) and who do not otherwise participate in the selection of the candidate or vote for him in either the primary or general election, are not requisite to the validity of his nomination papers. While an amendment to §43.20(3) could have better clarified the problem where the district is less than a county, outsiders have never historically participated in the selection of candidates except in their own districts and for whom they are entitled to vote. See O.A.G. 6-13-67, mentioned above, and the cases cited therein. Thus, in a district (subdistrict) smaller than a county, it is not necessary that the number of signers be equal to two percent of the party vote in the whole county but the nomination papers will be sufficient if signed by two percent of the party vote in the district (subdistrict)."

If it should subsequently be judicially determined that errors in the legal description of the Johnson County districts (subdistricts) can be corrected only by the legislature, and that in the meantime, candidates for the legislature from that county must run and be elected at large by the voters of the entire county, requisite signatures must be obtained from the entire county.

March 6, 1968

TAXATION: Personal Property Tax Credit — §42, Chapter 356, 62nd General Assembly (1967). The personal property tax credit for 1968 and subsequent years is computed on the aggregate assessed value established in the 1967 assessment year and which value after equalization and the adjustments set out in Section 42, Chapter 356, 62nd General Assembly (1967) is the basic taxable value upon which the credit

is determined. (Turner to Selden, Comptroller) (3-6-68) (S68-3-1) **NOTE:** This opinion replaces the one written to Selden dated February 29, 1968, S68-2-3, which is hereby withdrawn.

Mr. Marvin R. Selden, Jr., Comptroller: You have requested the opinion of the Attorney General on the following question:

"In determining the personal property tax credit for 1968 and subsequent years on which the amount of state aid is to be based, is the aggregate assessed value, certified to the state by the county auditor, plus or minus the adjustments to such aggregate assessed value set out in Section 42, Chapter 356, limited to the aggregate assessed value certified to the State Comptroller for the 1967 assessment year?"

This is complementary to an opinion issued by this office on February 29, 1968, to Linn County Attorney, William G. Faches, on other phases of the personal property tax credit, a copy of which is hereto attached. It is suggested that this opinion be read in conjunction with that opinion.

Section 42 of Chapter 356 of the Code of Iowa, as amended by the 62nd General Assembly, provides:

"* * * The aggregate assessed value of personal property for each assessing district *as established in the 1967 assessment year*, after adjustment for equalization, shall be the basic taxable value upon which the credit granted herein shall be determined, subject to the following annual adjustments:

"1. Add: additional personal property brought into each assessing district, but not to include replacement of personal property with like personal property, in accordance with section four hundred forty-one point twenty-one (441.21), Code of Iowa.

"2. Subtract: personal property removed from each district by reason of transportation therefrom, personal property destroyed, and personal property consumed or disposed of and not replaced. . . ." (Emphasis supplied)

This section establishes the formula to be used in making the personal property tax credit computation. It further states that the "aggregate assessed value of personal property . . . as established in the 1967 assessment year . . . shall be the basic taxable value upon which the credit granted herein shall be determined, ..." The language of the statute, on this point, is clear and unambiguous. The 1967 assessment year is to be used as the basic year in making this computation. Consequently, the question you have posed to this office is answered in the affirmative.

March 7, 1968

MOTOR VEHICLES: Motorcycle license. §321.186 and §321.193, Code of Iowa, 1966. On new applications or license renewals, operator may be required to pass test for motorcycle driving, otherwise license may be restricted to motor cars only. (Zeller to William Hill, State Representative, 3/7/68) #68-3-20.

The Hon. William Hill, State Representative: Reference is made to your letter of January 31, 1968, wherein you request an opinion of this office. This letter reads as follows:

"Would you please render an opinion as to whether or not the Department of Public Safety has authority under any section of the Code of Iowa, and particularly under Section 321.193, to require and issue a special license other than a regular operator's license for all motorcycle operators in the State of Iowa."

Under the provisions of §321.186, Code of Iowa, 1966, the Department of Public Safety may examine every new applicant for an operator's license, or any person, when the Department of Public Safety has reason to believe that such person may be physically or mentally incompetent to operate a motor vehicle, or whose driving record appears to justify such an examination.

Now with regard to motorcycle operation, §321.193, Code of Iowa, 1966, provides:

"The department upon issuing an operator's * * * license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle * * * which the licensee may operate * * *."

It appears that the statute has always provided authority for the Department of Public Safety to provide restrictions upon the licensee suitable to the licensee's driving ability. After observing many different operators of motorcycles, as well as reports of accidents, the Commissioner of Public Safety has determined that good cause exists for restricting an operator's license to cars, unless he passes an examination or test for driving motorcycles. If an operator wishes to be licensed for motorcycles, he will be required hereafter to pass this test, and show his proficiency. Otherwise, his license will be stamped or typed "not valid for motorcycle." No additional license fee will be demanded whether his license is restricted or not.

Section 321.193, Code of Iowa, 1966, authorizes the Department to impose restrictions suitable to the driver's ability and experience. The Department is authorized to determine when good cause exists for the purpose of imposing restrictions upon an operator's license. It is our opinion that the Department may require the operator to show his proficiency by passing a test on motorcycles whether on renewals or on new license applications. However, operators holding current valid unrestricted licenses at the present time may continue to operate either cars or cycles without further examination until the date of expiration.

The statute was written by the legislature in order to assure safe driving on the public highways by a qualified operator. Applicants who have no car and wish a license for cycles only will be given the complete examination, both vision and complete cycle driving test, and their license will be restricted "valid for motorcycles only." It is our conclusion that a restricted license may be limited to either motor cars or motorcycles or both, and is within the authority granted by the legislature to the Department of Public Safety.

March 11, 1968

SCHOOLS: State aid to area vocational school districts and area community college districts, Chapter 286A, Code of Iowa, as amended by Chapter 244, Laws of 62nd General Assembly. State board of public instruction may reject enrollment estimates which are not the "best bona fide estimate" of boards of directors of merged area school districts when reviewing the budgets of said districts. First three quarterly payments of state aid to merged area school districts are made on or about November 1, February 1 and May 1, and the final quarterly payment on or about August 1 of each year, the final payment to be included in school budgets for the fiscal year ending June 30 preceding said August 1. (Cullison to Johnston, Superintendent of Public Instruction, 3/11/68) #68-3-21

Mr. Paul F. Johnston, Superintendent, Department of Public Instruction: You requested our opinion concerning the method of allocating state aid to merged area schools pursuant to Senate File 616, 62nd General Assembly. Specifically, you requested our opinion as follows:

"1. Under Senate File 616, 62nd General Assembly, is the aid payment made in any given year, pursuant to certification made by the merged area to the state department after the close of the fiscal year, that payment which is required to be made on about the 1st of August?

"2. Should the amount so computed for the final payment be included in the budget estimate for the fiscal year in which said payment is received by the merged area?

"3. Would the best bona fide estimate of the same data for the ensuing budget year, as that actual data upon which the fourth quarterly payment is computed and paid, be the basis for determining the 22½% payments for the next three-quarters following said final payment; and would said three 22½ payments be the ones made in November, February and May of a given year?"

You also asked whether, pursuant to Section 12 of Senate File 616,

". . . the State Board of Public Instruction, as they review the area budgets, [are] to determine the validity of the amount of aid estimated in such budgets upon the basis of the amount of funds available to pay such aid as compared with the estimated enrollment, individually and collectively of the several area schools, and approve or disapprove such a budget upon such basis? Does the authority granted the state board include the power to recommend estimate of a smaller or larger amount of aid, upon basis of comparison of the individual and collective data in the budgets submitted with funds available, and return the budget for further consideration in the light of such recommendation as a condition to resubmission and approval?"

Senate File 616, 62nd General Assembly, provides for state aid to area vocational school districts and area community college districts. Aid to merged areas is substantially based upon days of attendance during the school year by Iowa students times $2.25. Since this information is not available until the end of the school year, the statute provides that the board of directors of each such school district or merged area shall, not later than July 5, certify to the state department of public instruction its best bona fide estimate of the information for the ensuing year. The first three quarterly payments, each consisting of 22½% of the anticipated annual entitlement, arrived at on the basis of such estimates, are made on or about November 1, February 1 and May 1. The final quarterly payment is based upon actual enrollment figures, adjusted to compensate for over payments or under payments, which were based upon prior estimates, and pro-rated according to the amount of funds actually appropriated and available for this purpose. The actual enrollment information is certified not later than July 5 of each year, together with the estimates for the ensuing year.

Section 5(3) states that the quarterly payments will be made on or about August 1, November 1, February 1, and May 1. Since the August 1 payment is the first payment following certification in which adjustment is made according to actual figures, as opposed to estimated figures, and proration is made according to funds actually available. Payments of November 1, February 1 and May 1 are based upon estimates certified on or before the preceding July 5.

The final quarterly payment made on or about August 1 should be computed as part of the school budget for the preceding school year. Although this payment is made after the close of the fiscal year, it is clear that the payment is *for* the preceding year, and it is delayed only because the necessary calculations cannot be made until the end of the year.

Section 5(1) states:

"At the close of each school year but not later than July 5, the board of directors of each such school district or merged area shall certify to the state department of public instruction the information necessary to compute the aid entitlement, as hereinabove provided, *for the school year ending on June 30 immediately preceding* the said July 1. In addition thereto, each said board shall certify to the state department, its best bona fide estimate of what the same data and information will be for the school year that commences upon the said July 1, and ends on the following June 30." (emphasis added)

Section 5(2) states:

"On the basis of estimates certified, as provided in subsection one (1) hereof, twenty-two and one-half (22½) percent of the anticipated aid entitlement for each such school district or merged area shall be paid to the district or merged area at the end of each of the first three quarters of the school year for which said estimates have been certified. The aid payment *for the fourth quarter* shall be equal to the difference between the aggregate aid payments for the first three quarters and the total amount of aid entitlement computed on the basis of the actual information required for calculation, as certified in the following July, plus or minus such prorata amount as may be necessary to make the aggregate total of general school aid paid to all such school districts or merged areas, as the case may be, *for the said year* equal to the respective amounts of aid funds appropriated for payment to such districts or areas in the said year." (emphasis added)

Section 5(3) states:

"Forms for the purpose of reporting the information and estimates required under subsection one (1) hereof shall be supplied by the state department. After quarterly payments have been calculated they shall be certified to the state comptroller for payment. Such certification shall be made to the comptroller on or about August 1, November 1, February 1, and May 1 for aid payable *for the preceding quarter.* The comptroller shall pay the quarterly amounts so certified forthwith." (emphasis added)

Section 5(2) requires that the information certified on July 5 for the ensuing year shall be the boards' "best bona fide estimate" of what the actual enrollment information will be at the end of the school year. A bona fide estimate is one arrived at in good faith, without an ulterior purpose. *Appanoose County Farm Bureau v. Board of Sup'rs.,* (1934) 218 Iowa 945, 256 N. W. 687. An inflated estimate of enrollment, made for the purpose of increasing state aid, to finance a hoped for increase in actual enrollment would not be the boards' "best bona fide estimate." This is particularly true in the case of Senate File 616, where increased enrollment has the effect, not only of increasing state aid to the particular school, but also of decreasing the amount of aid which is available to other schools. Actual enrollment figures for the preceding school year are entitled to significant weight in determining whether a board has submitted its "best bona fide estimated."

Section 12 of Senate File 616 confers upon the board of public instruction the duty and authority to review the budgets of merged areas, as follows:

"[the] budget of each merged area shall be submitted to the state board no later than June 1 preceding the next fiscal year for approval. The state board shall review the proposed budget and shall, prior to July 1, either grant its approval or return the budget without approval with the comments of the state board attached thereto. Any unapproved budget shall be resubmitted to the state board for final approval. . . ."

An inherent element of budget review is consideration of the reasonableness of expenditures in the light of available funds. The amount of available funds, in turn, depends in part upon the amount of state aid, which the merged area will receive. This cannot be determined until the boards of directors have certified their estimates of enrollment for the year.

Section 12 requires approval or disapproval of budgets by the state board prior to July 1. On the other hand, Section 5(1) does not require certification of enrollment estimates until July 5. We are aware that it can be argued that the state board is not authorized under Section 12 to pass upon enrollment estimates certified by the merged areas, because the budgets must be reviewed prior to July 1, whereas the enrollment information need not be certified until July 5.

However, budget review envisioned in Section 12 would be a mere gesture without consideration of proposed sources of revenue, including state aid. Inherent to the question of state aid is whether or not the merged areas will submit their "est bona fide estimate[s]" of enrollment information for the ensuing year. It is therefore our opinion that the state board may require boards of directors of merged areas to include in their budgets, which are reviewed by the state board pursuant to Section 12, the estimates required by Section 5(1).

It is clear that the state board has the ultimate administrative responsibility to determine whether merged areas have certified their "best bona fide estimate" and, if not, to refrain from making payments of state funds based thereon. It is therefore our opinion that the state board is authorized, when it reviews the merged area budgets, pursuant to Section 12, to disapprove such budgets that do not contain the boards' "best bona fide estimate" of enrollment information for the year for the reason that payments of state aid will not be forthcoming on the basis of estimates contained therein. The state board may include with its rejection of the budget its comments, including an explanation of its reasons for determining that the estimates were not "bona fide."

March 11, 1968

SCHOOLS: Allocation of state aid to area vocational school districts and area community college districts, Chapter 286A, Code of Iowa, 1966, as amended by Chapter 244, Laws of 62nd General Assembly. First three quarterly payments of state aid to merged area schools is based on prior estimates of enrollment for that year. The final quarterly payment is based upon actual enrollment for said year, adjusted according to over payments or under payments based upon prior estimates, and prorated according to the amount of funds actually available. (Turner to Conklin, State Representative, 3/11/68) #S68-3-2

The Hon. W. Charlene Conklin, State Representative: You requested my opinion concerning the method of allocating state aid to merged area schools which has been adopted by the State Department of Public Instruction pursuant to Senate File 616. You stated that aid to merged areas is being allocated as follows:

"Each area school submits to the Department an estimate of student enrollment. The Department then divides the appropriation, quarterly, among the Area Schools. Because the appropriation will not meet, at a 100% level, the $2.25 per student per day as set forth in S.F. 816, the pro rata of 80.1569% is necessary.

"Each Area School then receives 22½% of his own estimated aid based on the original estimation of enrollment. This is done at the end of each of the first three quarters.

"Finally at the end of the fourth quarter the actual enrollment, or as the Department terms it — the actual FTEE — is submitted. I understand the method to this point — but now comes the need for interpretation of the law.

"The Department says that if the enrollment of a given school was as high as their estimation, then they will receive the last quarterly payment in an amount equal to the original estimated total aid. *But* if their actual enrollment was less than estimated, they will receive their last quarter's payment at a higher pro rata — perhaps at the full $2.25 per day.

"In other words, one school may receive aid to students the last quarter at $2.00 a day, some $1.80 a day (if their estimate were low and they had more actual students), or at $2.25 a day if their estimate high.

"This method surely encourages Areas to estimate on the projected maximum expectation rather than using a realistic approach. Schools that try to be realistic are penalized.

"Now, the argument is used by the State Board, and Department, that Section 4 of S.F. 616 is justification for this inequal distribution of the appropriation:

" 'Merged areas operating an area vocational school or community college shall be entitled to general school aid . . . The state aid computation shall be made separately for each area vocational school or area community college.'

"I am most certain that those of us who worked extensively on this piece of legislation had no thought of unequal distribution.

"But my question is, what, in your opinion, does the *law* say as to allocation? Section 5 must necessarily be included in the determination, too, of course."

You also requested my opinion as to why the Department of Public Instruction has not submitted its rules concerning the above method of allocation to the Legislative Rules Review Committee for approval.

In response to your questions, the method of allocating state aid to merged areas described above is not authorized by Senate File 616. Since rules adopted by the Department of Public Instruction which would effectuate this method of allocation would be illegal, your second question is moot.

Section 4 of Senate File 616 sets forth the method for computing the amount of state aid *allocable* to merged areas operating a vocational school or community college. It states,

"The general school aid funds allocable to each merged area operating an area vocational school or community college shall be determined by multiplying two (2) dollars and twenty-five (25) cents by the average daily enrollment of students who are residents of the state and who are carrying twelve (12) or more semester hours of work plus the full-time equivalent of students carrying less than twelve (12) semester hours of work. Multiply this product by the actual number of days the school or college was officially in session to determine the total aid entitlement for each year for each merged area. The state aid computation shall be made separately for each area vocational school or area community college. For the purposes of this section, 'work' means subjects or courses; for which credit may be earned and applied toward fulfillment of the requirements for a certificate, diploma, or degree; and which are approved by the state department of public instruction for state aid."

Section 5 sets forth the method for payment of allocable state aid. It states,

"Payment of the aid provided in sections three (3) and four (4) of this Act shall be made to each merged area, and to each school district operating a junior or community college on a quarterly basis, at the end of each quarter of the school year, which commences on July 1 and ends on the following June 30, in the following manner:

"1. *At the close of each school year* but not later than July 5, the board of directors of each such school district or merged area shall certify to the state department of public instruction the information necessary to compute the aid entitlement, as hereinabove provided, *for the school year ending on June 30 immediately preceding the said July 1.* In addition thereto, each said board shall certify to the state department, its best bona fide estimate of what the same data and information will be for the school year that commences upon the said July 1, and ends on the following June 30.

"2. On the basis of estimates certified, as provided in subsection one (1) hereof, twenty-two and one-half (22½) percent of the anticipated aid entitlement for each such school district or merged area shall be paid to the district or merged area at the end of each of the first three quarters of the school year for which said estimates have been certified. The aid payment for the fourth quarter shall be equal to the difference between the aggregate aid payments for the first three quarters and the total amount of aid entitlement computed on the basis of the *actual information required for calculation, as certified in the following July,* plus or minus such prorata amount as may be necessary to make the aggregate total of general school aid paid to all such school districts or merged areas, as the case may be, for the said year equal to the respective amounts of aid funds appropriated for payment to such districts or areas in the said year." (emphasis added)

It is clear from these sections that the amount of state aid allocable to merged areas is substantially based upon days of attendance during the school year by Iowa students times $2.25. Since this information is not available until the end of the school year, and the amounts appropriated for state aid may not be sufficient to distribute a full $2.25 for each day of attendance by an Iowa student, section 5 provides a method for three quarterly payments of state aid based upon preliminary enrollment estimates, and a final quarterly payment after the close of the school year, based upon actual enrollment figures, prorated according to the amount of funds available for that purpose.

I am not unmindful of the fact that this procedure may present difficulties for the schools in formulating their budgets, when the amount of state aid which they will receive is uncertain, and it may present an opportunity for expansion of enrollment in some schools at the expense of others.

Section 12 provides for review of merged area budgets as follows:

"[The] budget of each merged area shall be submitted to the state board no later than June 1 preceding the next fiscal year for approval. The state board shall review the proposed budget and shall, prior to July 1, either grant its approval or return the budget without approval with the comments of the state board attached thereto. Any unapproved budget shall be resubmitted to the state board for final approval."

Within the authority granted by section 12 is the authority to disapprove estimates of data and information required by section 5(1) for computing the first three quarterly payments for the succeeding school year. To require the use of such estimates in computing the final quarterly payment is not authorized by section 12, and it is contrary to the specific terms of sections 4 and 5.

March 11, 1968

STATE OFFICERS AND DEPARTMENTS: Chapter 391, Laws of 62nd General Assembly, §532.2, Code of Iowa, 1966. Unclaimed property in possession of the clerk of court, before disposition pursuant to Chapter 391, Laws of 62nd General Assembly, may be deposited, pursuant to court order, with a trust company, state or savings bank. (Cullison to Norland, Worth County Attorney, 3/11/68) #68-3-22

Mr. Phillip N. Norland, Worth County Attorney: You requested our opinion as to House File 101 "Uniform Disposition of Property Act" passed by the 62nd General Assembly, as it relates to money deposited with the Clerk of Court. Specifically, you asked for our opinion as to whether the Clerk has authority, express or implied, to deposit money in interest bearing savings certificates or accounts. You also asked what form the account registration should take, and, in the event investment is possible, to whom the proceeds belong at the time the property might be claimed by the heirs or other eligible persons, or at the time it would be turned over to the State Treasurer at the end of the ten years required by the act.

House File 101 contains no express provisions relating to these questions, but Section 532.2, Code of Iowa, 1966, authorizes the deposit of such funds in a "trust company, state or savings bank." The section states as follows:

"Any court having appointed, and having jurisdiction of any receiver, executor, administrator, guardian, assignee, or other trustee, upon the application of such officer or trustee, after such notice to the other parties in interest as the court may direct, and after a hearing upon such application, may order such officer or trustee to deposit any moneys then in his hands, or which may come into his hands thereafter, and until the further order of said court, with any such trust company, state or savings bank, and upon deposit of such money, and its receipt and acceptance by such corporation, the said officer or trustee shall be discharged from further care or responsibility therefor. Such deposit shall be paid out only upon the orders of said court."

The account file should reflect the fact that the deposit was made by the Clerk of Court as trustee, and it should further indicate the estate from which the funds were derived.

Interest earned by the funds during deposit go with the corpus whether it be to a person having a valid claim or to the state in the event that such claim is not made within the stipulated period. *McKeown v. Morrow* (1918) 183 Iowa 454, 167 N. W. 193, *In re Welter's Estate* (1961) 253 Iowa 87, 111 N. W. 2d 282.

March 14, 1968

SPECIAL ASSESSMENTS. §§391.60 and 391.61, Code of Iowa, 1966. The provisions of the foregoing numbered sections respecting the payment of installments of assessments are in full force and effect according to the terms thereof. The authority to pay property taxes 91 days after certification of the tax list to the county treasurer is not applicable. (Strauss to Smith, State Auditor, 3/14/68) #68-3-23

The Hon. Lloyd R. Smith, Auditor of State: Reference is herein made to your oral request for an opinion as to whether payment of special assessment installments of cities and towns are controlled by the rule that property taxes may be paid at any time within ninety-one days after certification of the tax list to the county treasurer without cost or penalty. See opinion of Griger to Wehr, November 20, 1967. I advise the statute concerned with the levy and payment of special assessments is §391.60, Code of Iowa, 1966, providing as follows:

"The first installment, or total amount of assessment if less than twenty-five dollars, shall mature and be payable thirty days from the date of such levy without interest, and the other assessments, with interest, from the date of levy by the council, on the whole amount unpaid, annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes. However, the total assessments may be paid without interest thirty days after levy by the council.

"Any or all installments not yet paid together with accrued interest thereon may be paid on the due date of any installment.

"All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest with the same penalties as ordinary taxes, and when collected the said interest and penalties shall be credited to the same fund as the said special assessment.

"Upon the payment of any installment, there shall be computed and collected interest on the whole assessment remaining unpaid up to the first day of June following."

I am of the opinion that the foregoing numbered statute and the payment of installments are not controlled by the rule heretofore stated concerning the payment of property taxes. The case of *Ankeny v. Henningsen*, 54 Iowa 29, 6 N. W. 65 has described the distinction between property taxes and special assessments. There the treasurer of Clinton County was proceeding to sell for a special assessment a lot in the city of Clinton belonging to the plaintiff, Ankeny. Injunction was sought by the plaintiff alleging that he tendered the amount of assessment with the interest but the tender was refused by the defendant upon the ground that he was entitled to collect the penalties in addition to interest. In holding that the treasurer was not authorized to make this sale the court stated:

"We have the question, then, as to whether the council could have conferred upon the city treasurer the power to collect the statutory penalties. The defendant insists that it could; that the power of taxation carries with it, by implication, the power to impose and collect penalties. In support of this view our attention is called to the *City of Burlington v. B. & M. R. R. Co.*, 41 Iowa, 134 (142). In that case Beck, J., said: 'The authority to prescribe penalties for the nonpayment of taxes is necessary and proper to carry into effect the power to levy and collect taxes. Penalties are the common means resorted to as an incentive to the prompt payment of taxes and assessments. The city can properly provide for their imposition.' In that case, however, the question was in regard to the collection of penalties upon general taxes. Now, a person who is delinquent in the payment of his general tax is not to be viewed in precisely the same light as a person who is delinquent in the payment of a special assessment. A general tax is a general burden imposed at stated intervals. A special assessment is a special burden; it may be imposed unexpectedly; and the amount is often large as compared with the ability of the person to pay it. It appears to us, therefore, that some discrimination might properly be made in respect to the penalties that should be imposed, and we think that the legislature has made a discrimination. Section 479 of the Code provides, in respect to a special assessment, that 'where payment shall have been neglected, or refused at the time when the same was required, any municipal corporation may be entitled to demand and recover in addition to the amount assessed and interest thereon at ten percent from the time of assessment, five per cent to defray the expenses of collection.' This, it appears to us, is the limit of the penalties which the city is entitled to collect. We must assume that in the judgment of the legislature no greater penalty ought to be collected.

"But it is said that sections 481 and 495 of the Code do provide for the collection of greater penalties where the assessment is collected by the county treasurer."

The foregoing distinction is not the only one that can be made between special assessments and property taxes. In that respect it is said in 12 Drake Law Review Number 1, page 4:

" '[A special assessment] is a special imposition or liability arising out of the benefit conferred upon the property assessed.' Special assessments are taxes for some purposes, but not necessarily for others. Constitutional provisions relating to taxation and to debt limits are not applicable, although those relating to due process and to uniformity of laws of general applicability must be considered. With minor exceptions no statute is of general application to all special assessment situations. There is no uniform procedure to be followed for all types of projects, and in the principal area of discussion various alternative procedural steps are available for a particular type of project."

Pertinent to this rule is an opinion of this department appearing in the Report for 1956 at page 24:

"Certification of special assessments as authorized by Code Section 391.61 is not affected by the provisions of Section 404.3 requiring the certification on annual levies by cities to be made prior to August 15th of each year.".

In view of the foregoing, installments of special assessments are payable in conformity with the provisions of §391.60 heretofore set out and §391.61 providing as follows:

"A certificate of levy of such special assessment, stating the number of installments, the rate of interest, and time when payable, certified as correct by the clerk, shall be filed with the auditor of the county, or of

each of the counties, in which such city is located, and thereupon said special assessment as shown therein shall be placed on the tax list of the proper county."

Compliance with the foregoing sections is unaffected by the time provisions for the certification of the property tax list to the county treasurer.

March 20, 1968

TAXATION: Sales Tax Refund — Ch. 348, Acts 62nd G. A., Division VI, and §422.67, Code of Iowa, 1966. Even a child who has been claimed as an exemption and for whom his father has claimed or received a refund is entitled to a sales tax refund providing he can qualify as otherwise provided in the Act. The refund has been allowed as a credit against the personal income tax and if it exceeds the income tax it shall be refunded . . . by the department of revenue. But sales tax must have been paid by the person claiming the refund in an amount at least equivalent to the amount of the refund. (Turner to Willett, Tama County Attorney, 3/20/68) #S68-3-3.

Mr. Walter J. Willett, Tama County Attorney: By your letter of February 16, 1968, you have requested an opinion of the Attorney General as follows:

"Can a child with some Iowa income file an Iowa tax return and obtain a sales tax refund even though such child was claimed as a dependent for income tax purposes on his parent's Iowa income tax return?"

Your question arises from Division VI of the new tax bill (H.F. 702, new Chapter 348, Acts 62nd G.A.) which provides for a sales tax refund as follows:

"Sec. 18. Chapter four hundred twenty-two (422), Code of Iowa, is amended by adding the following sections:

" 'In addition to the other provisions of this chapter, every resident individual shall be entitled to a sales tax refund for each taxable year with respect to himself and each of the persons for whom he would be entitled to claim as a personal exemption for purposes of the personal income tax imposed under division two (II) of this chapter, whether or not such resident individual is required to file a personal income tax return or pay such tax.

" 'The amount of refund shall be computed in accordance with the following table:

If the taxable income of the resident individual for the taxable year is:	The refund allowed to resident individual for himself and for each person for whom he is entitled to claim a personal exemption is:
Under $1,000	$12
Over $1,000, but under $2,000	11
Over $2,000, but under $2,500	10
Over $2,500, but under $3,000	9
Over $3,000, but under $3,500	8
Over $3,500, but under $4,000	7
Over $4,000, but under $5,000	6
Over $5,000, but under $5,500	5
Over $5,500, but under $6,000	4

Over $6,000, but under $6,500	3
Over $6,500, but under $7,000	2
Over $7,000	0

" 'The amount of the refund provided in this section shall be allowed as a credit against the personal income tax imposed under this chapter, provided the resident individual claims the refund on his income tax return required to be filed under section four hundred twenty-two point thirteen (422.13), Code of Iowa. If the income tax due a resident individual shown by his tax return is less than the full amount of the refund to which he is entitled under this section, the excess of the refund over the income tax otherwise due shall be refunded to him by the department of revenue.

" 'If any resident individual entitled to a refund under this section is not otherwise required by section four hundred twenty-two point thirteen (422.13), Code of Iowa, to file an income tax return, the refund to which he is entitled shall be refunded to him upon furnishing the department of revenue with proof of his taxable income and the number of his personal exemptions.

" 'For the purposes of this section, the term "resident individual" is defined as a person who has resided in the state of Iowa for the full taxable year. The term "taxable income" shall have the same meaning as defined in section four hundred twenty-two point four (422.4), Code of Iowa. The term "personal exemption" shall have the same meaning as defined in section four hundred twenty-two point twelve (422.12), Code of Iowa.

" 'The department of revenue shall make all rules and regulations with respect to the refunds for this section, including the manner and requirements for claiming credit for or refund of the amount thereof in the same manner as state income tax refunds, and in accordance with the provisions of sections four hundred twenty-two point sixteen (422.16) and four hundred twenty-two point sixty-seven (422.67), Code of Iowa.' "

In lieu of rules and regulations, the Department of Revenue has mailed to all tax practitioners of the state a circular, dated 26 January 1968, entitled "Sales Tax Refund — 1, Requirements for Claiming Sales Tax Refund," and which provides, in part:

"According to the authority granted by the above section, the department directs that any claim for sales tax refund filed by a resident individual shall be subject to the following restrictions:

"1. No resident individual may receive more than one sales tax refund.

"2. The sales tax refund must be claimed by the individual on his income tax return and such individual must claim the sales tax refund for all dependents claimed on such return.

"3. No individual claimed as a dependent exemption on the return of another is entitled to file an independent sales tax refund claim."

Your question inquires as to the legality of the department's prohibition or disallowance of a sales tax refund for a class of persons, the class being those claimed as dependent exemptions on the return of another. You contend the department is reading a limitation into the law which does not exist. The law says "every *resident individual* shall be entitled to a sales tax refund with respect to himself and each of the persons for whom he would be entitled to claim as a personal exemption for purpose of personal income tax" (subject to limitations not pertinent to your

question). It does not say, as the department seems to suggest: "every resident individual *who has not been claimed as an exemption* shall be entitled."

"In construing statutes the courts search for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Rule 344(f) (13), Iowa Rules of Civil Procedure; *State v. Downing*, ____Iowa____, 155 N. W. 2d 519 (1968).

As stated in *State v. Downing*, supra:

"We must rule according to the meaning of what the legislature has said and done."

A "resident individual" is specifically defined as "a person who has resided in the state of Iowa for the full taxable year" and would include those persons claimed as an exemption on the return of another. If the legislature meant to exclude a child claimed as an exemption, from this broad definition, it should have said so.

Thus, contrary to the department's limitation, "every resident individual," even a child who has been claimed as an exemption, and for whom his father has claimed or received a refund, is entitled to claim a refund providing he can qualify as otherwise provided in the Act. It makes no difference that the child has had no income because the Act says "such resident individual is entitled to claim a sales tax refund whether or not such resident individual is required to file a personal income tax return or pay such [income] tax."

But the words "sales tax refund" contain their own limitation. A "refund" is defined as "a return of money." *Gregerson Bros. v. J. G. Cherry Co.*, 1930, 210 Iowa 538; 231 N. W. 350. Consequently, it follows, at least in absence of clear statutory authority, that no one can obtain a refund of sales tax unless he has paid sales tax in the taxable year for which the refund is claimed. Nor could the state, in absence of an appropriation, pay anyone a sales tax refund in excess of sales tax paid to it by such person. Article III, §24, Constitution of Iowa, provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

I have found no specific appropriation for a sales tax refund. §422.67, Code of Iowa, 1966, provides as follows:

"Wherever in any division of this chapter a refund is authorized, the commission shall certify the amount of the refund and the name of the payee to the state comptroller. Upon certification from the commission, the state comptroller shall draw his warrant on the state general fund in the amount specified payable to the named payee, and the state treasurer shall pay the same."

Whether that section, which is part of the chapter on Income, Corporation, and Sales Tax, could be construed to constitute a standing appropriation, a question I find it unnecessary to decide, it does not purport to authorize payment of a refund in excess of money previously received from the taxpayer. The refund has been allowed as a credit against the personal income tax and if it exceeds the income tax it "shall be refunded to him by the department of revenue." But sales tax paid must have been paid by the person claiming the refund in an amount at least equivalent to the amount of the refund. When it has been so paid, the

refund must be made to those who qualify, regardless of whether there is an appropriation. O.A.G. Turner to Selden, April 4, 1967, and authorities cited therein.

Perhaps the department is denying some sales tax refunds partly because no sufficient showing has been made by the taxpayer that he paid sales tax in the taxable year equivalent to the refund claimed. If such is the case, it is my opinion that the department may, in the proper exercise of its discretion, require such proof of payment as is reasonable and, in absence of such proof, the department is justified in denying the refund.

March 25, 1968

SECRETARY OF STATE. PATENTS. There is no authority in the Secretary of State to void an outstanding patent bearing a misdescription. The Secretary of State should issue a new patent, at the same time requiring a return to him of the outstanding patent before delivery of the new. He should in addition make a memorandum in his records of the action of the council in ordering the original patent and ordering the new patent and should require the grantee in the original patent to execute and deliver a quit claim deed conveying said property to the State. (Strauss to Synhorst, Secretary of State, 3/25/68) #68-3-26.

The Hon. Melvin D. Synhorst, Secretary of State: Reference is herein made to your letter of January 26, 1968, in which you submitted the following:

"The accompanying file of papers relating to the issuance of a patent for property owned by the Highway Commission to Floyd Avey of Adair, Iowa are self-explanatory.

"It appears that the steps taken to date by the Highway Commission are in accordance with the letter of advice from Assistant Attorney General Oscar Strauss dated December 13, 1967.

"There is one remaining point of major importance which we feel needs clarification prior to any further action in this matter. A patent has already been issued to and delivered to Mr. Avey, and we feel that we should have authorization to void the presently outstanding incorrect patent prior to the issuance of a new correct one.

"We would appreciate your opinion as to whether or not we would have the authority to void the outstanding patent and issue a new one upon being so directed by the Executive Council; furthermore, would it be proper to issue a new patent without voiding the presently outstanding one? Presumably the voiding of the existing patent would also involve an entry in the Governor's Journal.

"To sum it all up, I would greatly appreciate your advice as to how this situation can be straightened out step by step."

I advise the following:

1. There is no authority in you to void the presently outstanding patent. The new patent should issue in accordance with the executive council's direction. You should require the return to you of the outstanding patent before delivery of the new patent.

2. In order to clarify this situation of record you should make a memorandum in your records of the action of the executive council in ordering the original patent and also the action of the council in ordering the new patent.

3. You should require the grantee in the original patent to execute and deliver to you a quit claim deed to the state of Iowa of the property described containing therein an explanation why such quit claim deed is executed.

March 25, 1968

COUNTIES AND COUNTY OFFICERS: Board of Supervisors — §332.10. Board of supervisors has final decision as to what equipment is necessary to perform functions of any given county office and on budget cuts. The elected officeholder has control of the procedures by which his official duties are performed. (Nolan to Samore, Woodbury County Attorney, 3/25/68) #68-3-24

Mr. Edward F. Samore, Woodbury County Attorney: In your letter dated September 27, 1967, you submitted the following questions:

"1. What is the limitation of the jurisdiction of the Board of Supervisors in the control of funds which are allocated to the budget of the elected official: In other words, how far can they cut the budget asking and still expect the official to perform the functions of his office, and who has the final decision as to what equipment is necessary to perform the functions?

"2. After approving a certain monetary budget for an elected office holder, how much authority does the elected official have as to procedures within his office to accomplish the task? Does he have the control over his own approved budget in regard to equipment used, etc., so long as he operates within the approved budget allocated to him?

"3. Can an elected official enter into a contract for equipment to handle the task, or with another governmental unit or private business, in order to accomplish a particular job, or must this be accomplished by Board approval? Does the Board specify the type of machinery required to do the job?

"4. Can the Board of Supervisors enter into a contract with another governmental unit or private business, for handling of a particular elected officer's duties, without consent of the department elected official?"

In answer to your first question we wish to direct your attention to 1948 O.A.G. 166, wherein you will find the following:

"The powers of the county board of supervisors are either express powers, conferred upon them by the legislature, or such implied powers as may be required to effectuate the intent and purpose of the express powers. The powers so conferred are either discretionary or ministerial. One distinction in the character of those separate powers is that the ministerial duties of the board of supervisors may be delegated, while their discretionary powers are not the subject of delegation. . . .

* * *

"That the making of the budgetary estimates, required by chapter 24, Code of 1946, and the appropriations to be made by the board of supervisors to each elective and appointive officer to meet the expenditures of his office or department, require the exercise of discretion, seems too clear to require case justification. Determining the amount of money that may be collected from the taxpayers and the amount thereof to be expended for the maintenance of government, cannot be otherwise. Such power as a discretionary power may not be delegated. . . ."

Essentially the requirement of what the board of supervisors must furnish by way of supplies and equipment to each of the county officers is set out in §332.10 of the Code. Were this section to be strictly con-

strued it might be said that it would not be necessary to furnish such office with telephones. However, 1954 O.A.G. 3, advised that items such as furniture and telephones are necessary and proper and must be furnished by the board of supervisors from the county general fund. With the exception of items specified in §332.10, it is our view that the board of supervisors has the final decision as to what equipment is necessary to perform the functions of a given county office and consequently has the final decision as to what budget cuts can be made in all offices except those which are certifying offices or boards e.g. county public hospitals' boards of trustees.

Section 343.10 has been considered in connection with the second question which you raised. This section prohibits any county officer from expending or entering into any contract for an expenditure from any county fund in excess of the amount equal to the collectible revenues in said fund for the year plus any unexpended balance in the fund from any previous years. Within the limitation of the budget and the receipts, it is our view that the elected office holder rather than the board of supervisors has control over the procedures within the office to carry out the duties of such office as prescribed by statute.

The answers to your third and fourth questions are contained in the preceding paragraph. In addition I am enclosing a copy of a letter to Senator Ernest Kosek issued by this office on November 27, 1967, which deals with a somewhat similar problem and which I hope will be of further help to you in disposing of the problem which arises in your county.

March 25, 1968

TAXATION: School tax; house trailer; person in military service — §427.3, Code of Iowa, 1966. An individual who purchased a house trailer, parked it on his father's farm and left shortly thereafter for military duty overseas is subject to school tax on the house trailer and to delinquency penalties for not paying the tax on its due date. (McLaughlin to Saur, Fayette Co. Atty., 3/25/68) #68-3-31.

Mr. Walter L. Saur, Fayette County Attorney: In your letter dated March 5, 1968, you have requested an Attorney General's Opinion on the following question:

Is a house trailer, purchased by an individual and parked, but not occupied, on his father's farm in Iowa, subject to the school tax and penalty, for the period of time that the individual is engaged in overseas military service?

You have requested an opinion on the foregoing question which is based on the following facts: Servicemen entered military service from Iowa; he purchased a house trailer on June 15, 1965, while stationed at Fort Levenworth, Kansas; he returned to Iowa, parked his trailer on his father's farm and left for duty overseas on or about June 1965. He has been assessed a school tax of $39.00 per half year for that period from July 1, 1965, to July 1, 1968, inclusive, together with penalties thereon of $195.00.

You concede that this individual is subject to a small use tax, license taxes for the house trailer, plus penalties on the license tax and a reflector fee and in this we are in agreement since, with the exception of

the use tax these are items of regulation and not revenue raising measures. *California vs. Buzard,* 382 U. S. 386.

The Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C.A. Sec. 574, as amended, provides that the state of residency may tax the personal property, income or gross income of a person in military service, except for personal property used in a trade or business. It is apparent that the house trailer is not personal property *used in a trade or business.*

The military service tax exemption applies to individuals who have been separated from active military service, but not to those still on active duty. Sec. 427.3, Code of Iowa, 1966.

Since neither the state nor the federal law provides tax relief for this individual, he must pay the tax levied against him and no refund would be available to him for such taxes.

March 25, 1968

TAXATION: Personal Property Tax Lien — Priorities — §445.29, Code of Iowa, 1966. Where the county treasurer has taken no steps to protect an inchoate personal property tax lien on personal property and a chattel mortgage on the property is then recorded prior to the recording of the tax lien, the chattel mortgagee is entitled to priority of payment from the proceeds of the sale of the personal property. (Griger to Riehm, Hancock County Attorney, 3/25/68) #68-3-30

Mr. Curtis G. Riehm, Hancock County Attorney: This will acknowledge receipt of your letter of February 20, 1968, in which you requested our opinion as follows:

"Thorp Credit Inc. took a mortgage for over $13,000.00 on various items of farm machinery and equipment, filed this chattel mortgage on January 28, 1967 in the Recorder's Office, Hancock County, Iowa. The mortgagor became somewhat insolvent and Thorp Credit Inc., with the consent of the mortgagor, had a farm sale at which time the equipment and machinery was sold for a lesser amount than the total mortgage.

"The Hancock County Treasurer on February 15, 1968, in accordance with Section 445.29, filed a tax lien with the County Recorder of Hancock County, setting forth that taxes, personal property tax, for the years 1961 through 1966 in the amount of $1856.29, which included interest and penalty, were unpaid and on the basis of Section 445.29 and more specifically that part of Section 445.29 which was enacted by the 58th General Assembly in Chapter 306 thereof, which provides that personal property tax, together with any lien, penalty or cost shall be a lien in favor of the County upon all the taxable personal property and right to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which said personal property is assessed.

"My question is, is the $1856.29 for personal property tax, interest and penalties, due and payable to the County prior to any payment to Thorp Credit, Inc.?"

§445.29, Code of Iowa, 1966, provides as follows:

"445.29 Lien of personal taxes. All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration

of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer, such lien to relate back to and exist from the first day of January of the year in which such personal property is assessed. Such a lien shall not be effective or applicable, however, as against the rights of purchasers or mortgagees who acquired an interest in or lien against real estate owned by the resident against whom such tax is assessed before the date that the treasurer files notice of such lien."

The situation posed by your letter raises the same basic issues that were involved in an informal opinion dated March 17, 1965, and written by a former Special Assistant Attorney General. As you will note, that opinion, a copy of which is enclosed, states that the purchaser at an execution sale takes the personal property free of liability for the unpaid personal property taxes since the lien for personal property taxes created by §445.29 is not a prior and superior lien. Your attention is also directed to 1956 O.A.G. 106 wherein the Attorney General ruled that §445.29 does not create a first or prior lien upon personal property.

In *Bibbins vs. Clark*, 90 Iowa 230, 57 N. W. 884 (1894), the Iowa Supreme Court set forth the test as to whether a statute created a first or prior lien upon property at 90 Iowa 236:

"The statute does not say so, the legislature has not so declared, nor can any such result be reached by applying to this provision of the statute the same rule of construction applied to like language used elsewhere in the Code. Why should a special rule of construction be created for this particular statute? What reason is there for saying that this provision, simply creating a lien, means more than it says?"

In view of the above mentioned opinions and the test set forth in *Bibbins vs. Clark*, supra, it is clear that §445.29 does not create a first or prior lien upon personal property.

In the absence of statutory provisions to the contrary, liens take precedence in order of time; the first in point of time being superior. *Des Moines Brick Mfg. Co. vs. Smith*, 108 Iowa 307, 79 N. W. 77 (1899). The facts set forth in your letter denote that the mortgagee recorded its chattel mortgage before the County Treasurer filed notice of the county's personal property tax lien. Also, it does not appear that the County Treasurer took any other steps, as set forth in the opinion of March 17, 1965, to protect the county prior to the recording of the chattel mortgage. Therefore, the mortgagee's lien is prior and superior to the personal property tax lien of the county on the farm machinery and equipment.

It is the opinion of this office that where the County Treasurer has taken no steps to protect an inchoate personal property tax lien on personal property and a chattel mortgage on the property is then recorded prior to the recording of the tax lien, the chattel mortgagee is entitled to priority of payment from the proceeds of the sale of the personal property.

March 25, 1968

COUNTIES: Welfare — §252.27. There is no authority for the use of the county poor fund for the operation of a day care center or to pay the salaries for persons necessary to staff such center. (Nolan to Peterson, Blackhawk County Attorney, 3/25/68) #68-3-25.

Mr. Roger F. Peterson, Black Hawk County Attorney: On September 15, 1967, you requested an opinion from this office as to whether or not the Black Hawk County Board of Supervisors can continue the operation of a day care center by the use of funds from the poor fund and/or the general fund. Your letter also stated that such a center was established in Black Hawk County and operated under the supervision of the Black Hawk County Department of Social Welfare in the year 1965 and was subsequently financed with federal and state funds which were used to hire personnel, purchase equipment, purchase food and pay rent for the operation of the program.

Section 252.27 provides that the county board of supervisors shall determine the standards of assistance of relief afforded to the poor. Such relief may be in the form of food, rent or clothing, fuel and lights, medical assistance or in money. §252.34 and §252.35 provide for the board of supervisors to examine into all claims and if they are satisfied that the claims are reasonable and proper they shall be paid out of the county treasury.

It is our view that the board of supervisors may not properly consider the maintenance of a day care center as a justifiable expense for the care and support of the poor. Applying the doctrine of expressio unius est exclusio alterius as a doctrine of statutory construction we must take the position that while §252.27 may be liberally construed to take care of the needs of persons who are determined to be poor under Chapter 252, the assistance provided to such persons must be in the form allowed by the statute, namely, food, rent or clothing, fuel and lights, medical assistance, or money.

Therefore there appears to be no authority for the use of the county poor fund to operate a day care center or to pay the wages or salaries under this Chapter or elsewhere for the persons who might be necessary to staff such a center.

March 25, 1968

BANKING: §§524.11, 524.12 and 524.13, Code of Iowa, 1966. The appeal provided for in §524.12 includes a date to be fixed by the council for hearing, which hearing shall be de novo, and findings of fact are required to be made by the council as a result thereof. Jurisdiction in the council to hold such hearing has no place in such administrative appeal. (Strauss to Robinson, 3/25/68) #68-3-34.

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to your letter of February 21, 1968, in which you submitted the following:

"RE: NOTICE OF APPEAL
Certain Applications for
Bank Merger, Acquisition,
Bank Offices, and To Change
Principal Place of Business
of Bank.

"Enclosed please find copy filed with the Executive Council regarding the 'Notice of Appeal,' also filed with this office in the above matter.

"The Council directed, in meeting held February 20, 1968, that I obtain from you an official opinion as to whether or not the questions raised by this Appeal are required to be acted upon by the Executive Council."

The Notice of Appeal is exhibited as follows:

"The undersigned aggrieved persons do hereby appeal to the Executive Council of the State of Iowa from the action and decision of the Superintendent of Banking in approving and granting Applications providing for: (1) statutory merger of Security State Bank, Allerton, into The Citizens State Bank, Humeston, and application by The Citizens State Bank for a Certificate to Operate a Bank Office at Allerton, (2) purchase of certain of the assets and assumption of the liabilities of Lineville State Bank, Lineville, by The Citizens State Bank, Humeston, and application by The Citizens State Bank for a Certificate to Operate a Bank Office at Lineville, and (3) amendment to the articles of incorporation of The Citizens State Bank, Humeston, to change its principal place of business to Corydon, Iowa, and application by The Citizens State Bank for a Certificate to Operate a Bank Office at Humeston; all of the aforesaid Banks and towns being in Wayne County, Iowa.

"And you are notified that said appeal will be heard before the Executive Council of the State of Iowa as provided by law and the rules of said Council."

As a part of the record before the council is the Objection to Appeal filed by The Citizens State Bank, Humeston, Iowa, as follows:

"The undersigned as attorney for The Citizens State Bank of Humeston, Iowa, appears as an interested party in the appeal filed by certain individuals and moves the Executive Council to dismiss said appeal for the reason that the Council lacks jurisdiction of the subject matter for each of the following reasons:

"1. That said appeal is apparently founded on Section 524.12 of the 1966 Code of Iowa, which Section authorizes appeal to the Executive Council only in granting or refusing to grant a certification of authority to engage in banking, whereas the Superintendent of Banking in his order has merely authorized an amendment to the Articles of Incorporation to The Citizens State Bank to change its principal place of business; further to operate banking offices under the Statutes at the same places where banking is presently conducted.

"2. That the Statute provides no appeal for any other purpose.

"3. That Section 524.11 grants authority to the Superintendent to approve Articles of Incorporation and amendments thereto but does not grant appeal from said approval by the Superintendent of Banking to the Executive Council under Section 524.11."

The statutes involved in the foregoing appeal are §524.11 providing as follows:

"Before any state or savings bank shall be permitted to incorporate under the laws of this state, it shall present its articles of incorporation to the superintendent of banking for approval. All amendments to such articles and the renewal articles of incorporation shall also be submitted to and approved by the superintendent of banking."

and §524.12 which provides:

"Any person aggrieved by the action of the superintendent of banking

in granting or refusing to grant a certificate of authority to engage in banking may appeal to the executive council of the state by filing with the secretary of the council a notice of appeal, in writing, and serving the same upon the superintendent of banking or some employee of the office."

and §524.13, providing as follows:

"Such appeal shall be taken within ten days after the action of the superintendent of banking. When notified of such appeal the executive council shall fix a time and place for the hearing and its findings in the matter shall be final."

The foregoing statutes provide for an administrative hearing by an agency of the state and that upon such hearing such agency shall make findings and such findings according to the statute are final. Since the finality attaching to such appeal precludes appeal of such findings to the courts neither statutes nor rules provide guidelines for such hearing.

In that situation it was stated in *Howell School Board, District No. 9 v. Hubbartt*, 246 Iowa 1265, 1273, 70 N. W. 2d 531:

"'. . . Boards, commissions, and other public bodies have only such power and authority as are expressly conferred by law or as arise from necessary implication, and any power sought to be exercised must be found within the four corners of the statute under which they proceed.'"

* * *

"And in 42 Am. Jur., Public Administrative Law, section 26, pages 316, 317, it is stated: 'Administrative boards, commissions, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. General language describing the powers and functions of an administrative body may be construed to extend no further than the specific duties and powers conferred in the same statute.'"

As pertinent to this statute in 2 Am. Jur. 2d, Administrative Law, section 540, page 349, it is stated:

"A statute providing for revision of the action of one administrative officer or body by another may provide for an appeal, for review, or for redetermination. While very commonly the statutes provide for an 'appeal,' strictly speaking, appeals refer to appellate proceedings in the judicial process and the use of the word 'appeal' in connection with an administrative proceeding has been said not to be accurate. The term is adopted partly because of the analogy between judicial and administrative review proceedings and partly because of want of language apt for denominating it.

"There are different types and kinds of administrative appeal or review. There is the power of administrative review which inheres in the relation of administrative superior to administrative subordinate where determinations are made at lower levels of the same agency or department, and in this connection there may arise questions whether the administrative superior actually exercises original rather than appellate jurisdiction. There is also the administrative appeal or review embraced in statutes which provide for a determination to be made by a particular officer or body subject to appeal, review, or redetermination by another officer or body in the same agency or in the same administrative system."

§546 at page 354 of 2 Am. Jur. 2d is pertinent to the stated situation:

"Although administrative review is in some respects analogous to an appeal in the judicial process there may be basic and fundamental dis-

tinctions between the process of internal review administratively and that of appellate review judicially. Each court is generally free and independent from other courts even though the first is an inferior court and the second is a superior court and the action of the first is subject to review by the second. On the other hand, where administrative review takes place within the same agency there is generally a superior-subordinate relationship. The scope and extent of review in the administrative system will depend upon the statutory scheme of distribution of powers as between the officer or body making the initial decision and the officer or body making the decision on review and the provisions of the statute and administrative rules in regard to the review itself. In any event the reviewing tribunal has only such power and authority as is conferred upon it by statute. . . .

"The word 'appeal' in a statute governing administrative proceedings will be deemed, in the absence of tokens of a contrary legislative intention, to be used with its strict and ordinary meaning. When a statute provides for an 'appeal' and does not prescribe how the 'appeal' shall be tried it is deemed to provide for a trial de novo upon the merits just as though it never had been tried. A statute specifically providing that the commission shall hear an appeal de novo and shall enter such order therein as it may deem just and reasonable means that the commission shall hear the matter anew, afresh, just as if nothing had theretofore transpired, and as if the matter had been originally filed with it."

As far as procedure by an Iowa administrative agency is concerned, in the case of *Browneller v. Natural Gas Pipe Line Co.*, 233 Iowa 686, 8 N. W. 2d 474, at page 479 it is stated:

"In the hearings before a board such as a commerce commission strictness of proceedings is not required, and such a board is clothed with broad latitude as to matters of procedure. It is not required that such a body proceed with the strict formality of a court of record. It has been held that such proceedings are neither technical nor formal and that a substantial compliance with the statute is sufficient. We hold that in the proceedings before the commerce commission in which appellee was granted the permit, there was a substantial compliance with the statute. Mohr v. Civil Service Commission, 186 Iowa 240, 172 N. W. 278; Dickey v. Civil Service Commission, 201 Iowa 1135, 205 N. W. 961."

The foregoing exhibited statutes concerned with the review of the actions of the superintendent of banking are by such statutes designated as an appeal, however the meaning of such term insofar as administrative matters are concerned does not bear the approval of the authorities. In *Christgau v. Fine*, 223 Minn. 452, 27 N. W. 2d 193, 197, it stated:

"The argument in support of the view that the time allowed has the same effect as the time allowed for taking an appeal in a judicial proceeding is that, because the time allowed for taking the latter is jurisdictional, so is the time allowed for taking an administrative appeal under the statute in question, and therefore the time allowed for an employer to file the application and make the payment is jurisdictional also. There is no basis for such views, as we shall presently show.

"The so-called appeals under §268.06, subd. 20, are in reality simply procedures for administrative rehearing and review. Orchard v. Alexander, 157 U. S. 372, 15 S. Ct. 635, 39 L. Ed. 737; Knight v. United Land Ass'n, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974; 42 Am. Jur., Public Administrative Law, §§182 to 184. Their purpose is to expedite and facilitate the dispatch of business within the administrative setup of which they are a part. Except as provided by statute, they lack the attributes of appeals in judicial proceedings, even though the terminology and the procedure may be similar. Barlau v. Minneapolis-Moline Power Imp. Co., 214 Minn. 564, 9 N. W. 2d 6. The fact that the administrative

procedure is called an appeal does not afford any basis for an inference that the time prescribed for doing acts to comply with such procedure is jurisdictional."

The same court in State v. Civil Service Board, 226 Minn. 240, 32 N. W. 2d 574, 578, stated:

"Strictly speaking, appeals refer to appellate proceedings in judicial proceedings, and, because that is true, the use of the word 'appeal' in connection with an administrative proceeding is not accurate. The use of the word 'appeal' in referring to administrative review proceedings is adopted partly because of the analogy between judicial and administrative review procedures and partly because of want of language apt for denominating it. And in statutes relating to administrative proceedings as well as those of a judicial nature the word 'appeal' is used with different meanings. As always, the meaning in the particular statute depends upon the legislative intent. As in the case of statutes governing judicial proceedings, the word 'appeal' in a statute governing administrative proceedings will be deemed, in the absence of tokens of a contrary legislative intention, to be used with its strict and ordinary meaning. City of Rockford v. Compton, 115 Ill. App. 406; Babcock v. City of Grand Rapids, 308 Mich. 412, 14 N. W. 2d 48. Where a contrary legislative intention is manifested, it will be given effect, as in the case of appeals from a referee to the industrial commission under a statute assimilating the rules under the statute governing ordinary appeals in civil actions (Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 9 N. W. 2d 6), and of so-called appeals which lack the attributes of judicial appeals and are nothing more than administrative procedures designed to facilitate and expedite action with rehearing and review within the administrative set-up of which they are a part. Christgau v. Fine, 223 Minn. 452, 27 N. W. 2d 193.

* * *

". . . 'We believe that when the word "appeal" is used without any limitations as to the nature or method of review, in a statute or charter, it means a trial de novo.' "

As far as findings by the banking board are concerned as required by §524.12 it is said in 42 Am. Jur., Public Administrative Law, §151, page 499:

"Findings should be a recitation of the basic facts established by the evidence as found by the trier of the facts, from which may be inferred the ultimate facts in terms of the statutory criterion required as a basis for a particular order, and not a recitation of the evidentiary facts or a conclusion drawn from the established facts."

The legal affect of the statute that makes the decision of an administrative board final was stated in the case of *Ind. Sch. District v. State Appeal Board,* 230 Iowa 924, 299 N. W. 440, as follows:

"The case before us has its foundation in the action of the appellee under chapter 24, §351 et seq., of Code, 1939, the Local Budget Law. By chapter 91, acts of the Forty-Seventh General Assembly, section 390.5, Code, 1939, was added to the Law as it theretofore existed. This declared, among other provisions: 'Review by and powers of board. It shall be the duty of the state board to review and finally pass upon all proposed budget expenditures, tax levies and tax assessments from which appeal is taken and it shall have power and authority to approve, disapprove or reduce all such proposed budgets, expenditures and tax levies so submitted to it upon appeal, as herein provided; but in no event may it increase such budget, expenditure, tax levies or assessments or any item contained therein.'

"And this too was added:

" 'Decision certified to county. After a hearing upon such appeal, the state board shall certify its decision with respect thereto to the county auditor, and such decision shall be final. The county auditor shall make up his records in accordance with such decision and the levying board shall make its levy in accordance therewith.' Section 390.7, Code, 1939.

"The language of the statute brings it within the principles announced in Home Owners' L. Corp. v. District Court, 223 Iowa 269, 272 N. W. 416, and cases therein cited. We there quoted from Gisin v. Farmer's Automobile Inter-Insurance Exchange, 219 Iowa 1373, 261 N. W. 618, 620, as follows: 'The Legislature writes the laws, we construe them, and in that construction we are bound to follow the laws as laid down by the Legislature, if we can discover what the legislation meant.' See also State ex rel, Fletcher v. Webster County, 209 Iowa 143, 227 N. W. 595.

"We are not unmindful of the provisions of section 12456, Code, 1939, which deals with certiorari, nor do we overlook the fact that we have said that is a proper remedy where no appeal is provided for and there is no plain, speedy or adequate remedy elsewhere."

In view of the foregoing I advise:

1. That the appeal of the several persons named in the notice of appeal, represented by their attorneys Wm. H. Miles and W. W. Reynoldson, is entitled to be heard by the council on a date to be fixed by the council with notice thereof given.

2. That such hearing shall be a de novo hearing in review of the actions of the superintendent of banking recited in the notice of appeal by the appellants.

3. That the objection to the appeal filed by the Humeston State Bank claiming that the council has no jurisdiction to entertain the appeal has no statutory place in this administrative appeal and should be dismissed.

4. That the council, as a result of such hearing and the evidence taken, make findings of fact which shall be final.

March 25, 1968

STATE OFFICERS AND DEPARTMENTS — Treasurer of State, authority to invest temporarily idle state funds — Chapter 74, Code of Iowa, 1966; §452.10, Code of Iowa, 1966, as amended by §1, Chapter 359, Acts of the 62nd G. A.; §453.1, Code of Iowa, 1966, as amended by §3 of Chapter 301, and §2 of Chapter 359, Acts of the 62nd G. A. The treasurer of state is not authorized to invest temporarily idle state funds in warrants of municipal corporations of the State of Iowa which have been presented for payment and not paid for want of funds. (Turner to Franzenburg, State Treasurer, 3/25/68) #S68-3-4

The Hon. Paul Franzenburg, Treasurer of State: You have requested an opinion of this office on the question of whether or not you in your legal capacity as state treasurer may invest temporarily idle funds in warrants of municipal corporations of the State of Iowa which have been presented for payment and not paid for want of funds. In accordance with chapter 74, Code of Iowa, 1966, such warrants bear interest at the rate of 4% per annum.

§452.10, Code of Iowa, 1966, as amended by §1 of chapter 359, Acts of the 62nd G. A., provides:

"The state treasurer and the treasurer of each political subdivision shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. *However, the treasurer of state* and the treasurer of each political subdivision *shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America; or make time deposits of such funds in banks as provided in chapter 453 and receive time certificates of deposit therefor.*" (Emphasis added)

§453.1, Code of Iowa, 1966, as amended by §3 of chapter 301, Acts of the 62nd G. A., and §2 of chapter 359, Acts of the 62nd G. A., provides as follows:

"453.1 Deposits in general. The treasurer of state, and of each county, city, town, county public hospital, merged area hospital and school corporation, and each township clerk and each county recorder, auditor, sheriff, each clerk and bailiff of the municipal court, and clerk of the district court, and each secretary of a school board shall deposit all funds in their hands in such banks as are first approved by the executive council, board of supervisors, city or town council, board of hospital trustees, board of school directors, or township trustees, respectively; provided, however, that the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investments permitted by section four hundred fifty-two point ten (452.10) of the Code. The list of public depositories and the amounts severally deposited therein shall be a matter of public record. The term 'bank' shall embrace any corporation, firm, or individual engaged in a general banking business."

The foregoing provisions of law are quite specific in limiting the authority of the treasurer of state with respect to the investment of temporarily idle public funds. Hence, I must advise you that in our opinion there is no authority for you to invest such funds in the warrants of municipal corporations of this state.

March 25, 1968

LIQUOR, BEER AND CIGARETTS: Minors, serving beer — §§124.21, 124.34, 1966 Code of Iowa. §124.21 does not prevent cities and towns from adopting an ordinance which would prohibit minors from serving beer in a place where the sale of beer constitutes less than fifty percent of the gross business transacted therein. (Claerhout to Glenn, State Rep., 3/25/68) #68-3-27.

The Hon. Charles Glenn, State Representative: This is in response to your letter of January 30, 1968, wherein you have requested an opinion regarding Chapter 124, 1966 Code of Iowa. Your specific question is:

"According to Section 124.21 of the 1966 Code of Iowa, a minor is prohibited from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than 50% of the gross business transacted therein. My specific question is whether a city or town may pass an ordinance which would prohibit a minor from serving beer in such an establishment if the business of selling beer does not constitute more than 50% of the gross business transacted therein."

Section 124.21 of the 1966 Code of Iowa, to which you have referred, states:

"Minors are prohibited from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than fifty percent of the gross business transacted therein."

Section 124.34 provides in part:

"Cities and towns are hereby empowered to adopt ordinances for the enforcement of this chapter . . . and are empowered to adopt ordinances, not in conflict with the provisions of this chapter, governing any other activities or matters which may affect the sale and distribution of beer under Class 'B' permits and the welfare and morals of the community involved."

The Iowa Supreme Court has not faced an identical situation to the one here in question but it has provided a valuable interpretation of §124.34 in *City of Des Moines v. Reisman*, 1957, 248 Iowa 821, 83 N. W. 2d 197. A Des Moines city ordinance was upheld in that case which prohibted a person under twenty-one years of age from being in a place where beer is sold unless the major portion of the business of the permit holder was other than the sale of beer. The court stated in 248 Iowa at page 825:

"Nor do we deem the ordinance in question here in 'conflict with the provisions' of the Beer and Malt Liquors chapter 124, even in absence of the concluding broad authorization in section 124.34. The chapter contains no *limitation* upon the discretion of the municipal council or power of the city in regulation of the taverns without respect to the married status of minors who desire to enter them. Section 124.34 purports to grant but not to limit the municipal power of regulation." (Emphasis the Court's).

It further appears in a former opinion of the Attorney General that because there is no specific statutory provision prohibiting minors from the premises where beer is sold, such regulations must emanate from the local governing bodies or from the Iowa Liquor Control Commission. 1964 OAG 283.

The concern of the legislature with minors and intoxicating beverages may be seen in various sections of the liquor and beer laws where the age of twenty-one provides a uniform division between those who may use such beverages and those who may not. **The ordinance anticipated in the present question appears to express a concern for the welfare and morals of the community with particular emphasis on minors. The interest expressed therein would be no less legitimate than the one upheld in the *City of Des Moines* case previously mentioned.**

It is obvious from the Attorney General's opinion noted above that an ordinance may be adopted by a city or town which would prohibit minors from being in establishments licensed to sell beer and liquor. Certainly if an ordinance could prevent a minors presence in such a place, it follows that an ordinance may also be adopted prohibiting an act which would require the minors presence. Therefore, I am of the opinion that a city or town may pass an ordinance which would prohibit a minor from serving beer in any licensed establishment where beer or liquor are sold.

March 25, 1968

STATE OFFICERS AND DEPARTMENTS: Fair Board — §173.14, Code of Iowa, 1966. Power to lease fairground to private individuals for profit. (Zeller to Kruck, State Senator, 3/25/68) #68-3-35.

The Hon. Warren J. Kruck, State Senator: Your letter of March 7, 1968, has been received stating in pertinent part as follows:

"My question is whether or not the Iowa State Fair Board has any authority to lease any of the State Fairground facilities and equipment at times other than State Fair time to private individuals for pecuniary profit."

The powers of the State Fair Board are set forth in Section 173.14, Code of Iowa, 1966, reading as follows:

"The state fair board shall have the custody and control of the state fair grounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

"1. Erect and repair buildings on said grounds and make other necessary improvements thereon.

* * *

"6. The state fair board may grant a written permit to such persons as it deems proper to sell fruit, provisions, and other articles not prohibited by law, under such regulations as the board may prescribe."

While the State Fair Board is specifically authorized to grant permits to sell "fruit, provisions, and other articles not prohibited by law," nothing in the enumerated powers of said board appears to authorize it to lease any of the fair grounds or facilities. Of course, the Board has no power except those specifically authorized by statute or necessarily and fairly implied as incidental to the exercise of an expressed power. In this connection, it would appear that the enumeration of the powers of the board, without enumeration of the power to lease, would impliedly exclude the latter. Expressio unius est exclusio alterius.

But 1940 O.A.G. 272, with reference to this question, holds that the board's authority to "have the custody and control of the state fair grounds," as stated in the opening paragraph of §173.14, "carries with it the authority to rent parts of same when not needed for state fair purposes." That opinion also states: "We find no law forbidding such leasing."

While we have doubts as to the reasoning of the aforesaid opinion, opinions of the attorney general are entitled to weight, and subsequent attorneys general are inclined to give such previous opinions the effect of stare decisis. Furthermore, administrative decisions and practices of long standing are also entitled to weight and it has been a long standing practice of the state fair board to lease the fair grounds for purposes not prohibited by law. In *State ex rel McElhinney v. All-Iowa Agricultural Association*, 1951, 242 Iowa 860, 48 N. W. 2d 281, the Iowa Supreme Court expressly disregarded the expressio unius rule and relied upon the administrative construction of the statute and "contemporary usage" in holding that a non-profit corporation was authorized to lease the amphitheater and quarter mile track on fair grounds owned and operated by it for the purpose of automobile races thereon outside of fair time. While it might be argued that the statute or section thereof (§174.2, Code of

Iowa) there under consideration was broader, we believe the Iowa Supreme Court would follow that case and apply the same reasoning to the powers of the state fair board, particularly in view of the long standing 1940 opinion of the attorney general.

Accordingly, the State Fair Board has authority to lease its fair grounds and facilities for profit whenever they are not needed for state fair purposes.

March 25, 1968

CITIES AND TOWNS: Streets — §391.38 — Ch. 23.2 — Paving costs of intersections in area annexed to city but not included in resolution of necessity for municipal paving program cannot be paid subsequently by the city either paying the contractor directly or indemnifying the subdivider. (Nolan to Bruner, Carroll County Attorney, 3/25/68) #68-3-33

Mr. Robert S. Bruner, Carroll County Attorney: Some time ago you requested this office to give you an opinion on a legal question involving the cost of paving the intersections in subdivisions added to the City of Carroll. In your letter you stated that in the past it had been the policy of the city to assume the cost of paving the intersections as a general obligation and to issue general obligation bonds therefor whether in a subdivision or as a part of older areas in the town. You further stated that in 1966 there was a municipal paving program and additionally there was annexed to the city an addition comprising 160 acres platted into 300 plus plots. Due to the fact that there were some engineering specifications to be made the area was not included in the resolution of necessity for the municipal paving program. However the plat for the area was accepted on September 22, 1966, and required paving on certain streets prior to November 1, 1966, which was done by private contract by the subdivider with another contractor pursuant to city specifications. Your letter then states:

"The City Council wishes to be uniform and would like to indemnify the subdivider for the intersections within the addition. However, due to the size of the addition, the intersections' cost amounts to something in excess of $10,000.00 which is more than the $5,000.00 bidding situation. However, it was the same per cubic yard as the general municipal program.

"The question s wheither or not the City of Carroll would be able legally to either indemnify the subdivider or pay directly the independent contractor for that sum attributable to the intersections. If they are unable to pay the entire sum, would it be legal for them to pay something under $5,000.00? It is the thought of some councilmen that there has been a considerable saving on the part of the City when it s not ai part of a municipal paving program since there is no additional expense for the consulting engineers and the attorneys who handled the bonding procedure. They do wish to know whether Chapter 23 prevents the City from treating ths subdivider, because of lack of timing, different than others."

In response to your question I would advise that I find no authority for the city to either pay the contractor who completed the construction or to indemnify the subdivider. The improvement of streets and roads has been determined to be a public improvement within the meaning of Chapter 23. 1926 O.A.G. 110. Chapter 23.2 provides:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

Inasmuch as the cost of improving the intersections could be assessed against the privately owned property pursuant to §391.38 had the provisions of Chapter 23 been followed it does not necessarily follow that this subdivider, "because of lack of timing" is being treated differently than others. Consequently it is my opinion that it would not be legal for the City of Carroll under the circumstances to pay either the entire sum or something under $5,000.00 toward the cost of the intersections in the area described.

March 25, 1968

BOARD OF CONTROL: §§246.39, 246.40, 246.41, 246.31, 1966 Code of Iowa, and S.F. 525, Acts of 62nd G. A. — Violations of institutional rules are cumulative regardless of transfer from one institution to another. Authorities at the release center created by S.F. 525, supra, are not powerless to impose disciplinary action on rule violators. (Seckington to Brown, Adm. Ass't., Board of Control, 3/25/68) #68-3-29.

Mr. M. J. Brown, Board of Control: Receipt of your letter of February 13, 1968 is hereby acknowledged. In that letter you request an opinion on substantially the following questions:

1. Are the records of rule violations by prisoners continuous, or does the prisoner begin a new record upon being transferred from one institution to another?

2. Can a rule infraction in one institution result in the transfer and punishment of the infraction in another institution?

In response to your first question, your attention is directed to §246.39, 1966 Code of Iowa which reads in part as follows:

"Each prisoner who shall have no infraction of the rules or discipline of the penitentiary or the men's or women's reformatory or laws of the state, recorded against him . . . shall be entitled to a reduction of sentence . . ."

Your first question asks if the above reduction of sentence is applicable if a prisoner with a rule violation in one institution is transferred to another institution where that prisoner has no rule violations.

§246.40, 1966 Code of Iowa, reads as follows:

"The board of control shall cause to be kept at each said institutions the following permanent records:

1. A record of each infraction, by a prisoner, of the published rules of discipline.

2. Such other records for the use of the board of parole as may be approved by the executive council."

It is thus clear that each prisoner has a permanent file in the institution to which he is confined. When that prisoner is transferred, his file and violations are also transferred.

§246.41, 1966 Code of Iowa, reads as follows:

"A prisoner who violates any of such rules shall forfeit the reduction of sentence earned by him, as follows:

1. For the first violation, two days.
2. For the second violation, four days.
3. For the third violation, eight days.
4. For the fourth violation, sixteen days and, in addition, whatever number of days more than one that he is in punishment.
5. For the fifth and each subsequent violation, or for an escape, or attempt to escape, the warden shall have the power, with the approval of the board of control, to deprive the prisoner of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense."

Please note the first sentence of the above quoted section. It is made clear that a violation of *any rule* of *any institution* constitutes a forfeiture of good and/or honor time. The violation of a rule for the first time in any institution is a forfeiture of two days.

If that prisoner is then transferred to another institution, and he subsequently violates a rule, that is a second violation of 'any such rule," and that prisoner forfeits four days.

The answer to your first question is therefore, rule violations are cumulative, and continue to be so despite transfers from one institution to another.

In response to your second question, reference must be had to S.F. 525, Acts of the 62nd General Assembly, which provides for a release center. The purpose of said center is to give inmates intensive training for their transition to civilian living.

Section 4 of S.F. 525 reads as follows:

"The statutes applicable to an inmate at the corrective institution from which transferred shall remain applicable during the inmate's stay at the release center."

It is clear therefore, that all statutes, and rules and regulations passed pursuant to those statutes, remain applicable to the inmates at the release center.

Your second question concerns the right of authorities at the release center to transfer an inmate back to the institution because of a rule violation which calls for solitary confinement.

§246.31 reads in part as follows:

". . . Solitary imprisonment of prisoners shall not be employed except for the purpose of discipline."

Although there is no statutory provision for the transfer of inmates back to the institution from which he came, it is inconceivable that the legislature intended to allow a disciplinary problem at the release center to remain undisciplined.

In view of §246.31, quoted above, and S.F. 525, Acts of the 62nd General Assembly, it is the opinion of this office that a prisoner who violates

any rule at the release center which calls for solitary confinement, may be transferred back to his former institution for disciplinary action.

The imposition of discipline, i.e., forfeiture of good time, withdrawal from the honor roll or solitary confinement is subject to certain limitations. These limitations are found in the case of *State v. Hunter*, 1904, 124 Iowa 569, 100 N. W. 510. The court declared that no such forfeiture could be had if a prisoner had served so much of his term that the taking away of good time would require him to be imprisoned past his release date.

March 25, 1968

TOWNSHIPS: Cemeteries — §359.32. A different purchase price for cemetery lots may be charged to non-residents than that charged to residents if there is rational basis for the distinction — a charge twice the amount for resident purchasers would be arbitrary and illegal. (Nolan to Bedell, Dickinson County Attorney, 3/25/68) #68-3-32.

Mr. Jack H. Bedell, Dickinson County Attorney: This replies to your letter submitting the following:

"I have been asked by the Trustees of Center Grove Township to obtain your official opinion on the following questions:

"On December 11, 1958, the Center Grove Township, Dickinson County, Iowa, Trustees adopted certain rules and regulations governing the use, maintenance and supervision of lots and areas within the township-owned cemeteries. There are two cemeteries which are tax-supported cemetaries in Center Grove Township, supported by a cemetery levy in Center Grove Township and the Incorporated City of Spirit Lake (which is primarily in Center Grove Township). The regulations adopted on December 11, 1958, have two particular paragraphs, the legality of which has been questioned. These paragraphs are as follows:

"OWNERSHIP. Plots and lots in a cemetery may be purchased from the township trustees and a wararnty deed conveying the plot or lot to the purchaser shall be made by the township trustees and delivered to the purchaser only upon payment in full for said plot or lot in amounts to be determined from time to time by said trustees, *except the cost to a non-resident or for burial of a non-resident of Center Grove township shall be twice that of a resident of the township.* The original cost of the plot or lot shall include cost of perpetual care of lots owned by residents of Center Grove township. No interment shall be permitted until the lot has been paid for in advance and all conveyances shall be by deed duly recorded with the clerk of the trustees in a book kept by him for that purpose. *At the time of granting permission for the burial of a nonresident of Center Grove Township, a perpetual care charge in an amount to be fixed by the trustees from time to time shall be paid the trustees unless at the time of purchase of the lot by the nonresident such cost had been paid as herein provided.*

"CONVEYANCE. *The owner of a plot or lot may sell the same only upon written consent of the trustees of Center Grove Township,* which sale shall be by deed, which likewise shall be recorded with the township clerk in a book kept for that purpose. Such consent and approval must be endorsed upon the deed. *A fee of $1.00 payable to the clerk, shall be due upon such endorsement.*' (Italics supplied by writer.)

"My first question is whether or not it is legal for the township trustees to charge nonresidents of Center Grove Township twice the amount charged residents of the township for said cemetery lots and, in connection therewith, whether or not it is permissible for the Center Grove

Township trustees to adopt a perpetual care charge in an amount to be fixed by the trustees from time to time, which is charged only to nonresidents of Center Grove Township.

"My third question is whether or not the township trustees can impose a restriction against subsequent sales of the lots by the owners such as will prohibit any sale without the consent of the trustees of Center Grove Township. My fourth question is whether or not a check of one dollar payable to the clerk is legally chargeable for the endorsement of the approval of the trustees on the sale of a lot from one person to another.

"My fifth question is whether or not the township trustees can refuse to approve the sale of a cemetery lot previously purchased by a person, to any other person, whether he be a resident of Center Grove Township or not.

"My sixth question is: if any of the above rules are legally binding on any of the purchasers of said lots, are they binding on persons who purchased the lots prior to December 11, 1958, when there were no such regulations?

"Does the township clerk have any authority to refuse to record a transfer of title by deed from a previous owner of a township-owned cemetery lot to a third party purchaser from said previous owner if the proper fees for recording are tendered by the third party purchaser, whether he be a resident of Center Grove Township or not?

"So that you might be better informed, I am enclosing copies of the forms of deeds that have been used on the two cemeteries above referred to. It is my understanding that these deed forms have been used both before and after December 11, 1958."

In the order the questions were presented we advise:

1. Insofar as the difference in price of lots sold to residents and to nonresidents represents a rational relation to equalizing the cost of maintaining the township cemetery the classification made by the township trustees would probably meet the test of uniformity within the constitutional meaning i.e. it operates equally upon all within the same class. See *Clarke v. Redeker*, 259 F. Supp. 117 (1966); *Dickinson v. Porter*, 240 Iowa 393, 35 N. W. 2d 66 (1949). However, on the basis of facts supplied in your letter it would be arbitrary and unreasonable to charge a nonresident twice as much for a cemetery lot as is charged a resident. It is true that a tax may be levied against the land within the township for the maintenance of such cemeteries under §359.30, Code of Iowa, 1966, but the tax is levied against lands owned by nonresidents as well as those owned by residents and therefore since it is not the taxes paid by residents only which supports the cemetery it cannot be said that a purchase price discrimination would be justified.

2. There appears to be no authority for the trustees to charge nonresidents an amount for perpetual care in addition to the purchase price of the lot. §359.32 provides:

"*Sale of lots — gifts.* They shall have authority to provide for the sale of lots or portions thereof, in any cemetery under their control, and make rules and regulations in regard thereto, and may provide for perpetual upkeep by the establishment of a perpetual upkeep fund from the proceeds of sale of lots, and may accept gifts, devise or bequest, made to them for that purpose."

Applying the doctrine of expressio unius est exclusio alterius, we must

conclude that any perpetual upkeep fund must be provided "from the proceeds of sale of lots, . . . gifts, devise or bequest" only.

3. In addition to §359.32 authorizing rules and regulations for the sale of lots §359.37 authorizes the trustees to make regulations and "to prohibit any use, division, improvement or adornment of a lot which they may deem improper" but neither of these sections empower the trustees to impose restrictions against alienation on any lot sold to nonresidents. §359.41 provides in part: "All conveyances of subdivisions or lots of a cemetery thus platted shall be by deed from the proper owner, . . ." Aside from the requirement that such deed "shall be recorded," and the obvious requirement that a cemetery lot be used for the purpose of interring the dead there is no authority to impose other restrictions on the ownership of the lot or the conveyance thereof.

4. It is illegal for the clerk to charge more than "a fee of fifty cents for each instrument recorded." §359.41.

5. The answer to your fifth question is contained in paragraph 3 above.

6. Rules and regulations in conflict with the sections of the Code set out herein are not binding on purchasers of cemetery lots regardless of the time of purchase.

7. The statute providing for conveyance of lots by deed provides that the "deed shall be recorded with the township clerk in a book kept by him for that purpose." This language in §359.41 does not give the clerk any discretion in such matter nor does it permit him to refuse to record a conveyance if the fee is "paid by the party desiring the record made" and if the deed is properly acknowledged as provided in §§558.20 and 558.21.

March 25, 1968

SECONDARY ROAD CLAIMS. Ch. 257, Acts, 62nd G. A. — Secondary road claims for construction, reconstruction, improvement, repair, or maintenance of secondary roads do not require notarization. Such claims when and if made under §331.21, Code of Iowa, 1966, require notarization. (Strauss to Atwell, Sup., County Audits, 3/25/68) #68-3-28.

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: Reference is herein made to your letter in which you submitted the following:

"Senate File 861, passed by the Legislature in 1967, amends Section 314.3, Code of 1966.

"Does this mean that the secondary road claims presented by a county to the State Highway Commission for payment do not have to be notarized? Or does this mean that all claims on the secondary road funds need not be notarized before being approved by the Boards of Supervisors for payment? Does this also release all secondary road claims from being notarized, as required under Section 331.21?"

In reply thereto I advise:

1. Senate File 861, now Chapter 257, Acts of the 62nd General Assembly, is exhibited in part as follows:

"Sec. 2. Section three hundred fourteen point three (314.3), Code 1966, is hereby amended by striking from lines five (5) and six (6) the words 'sworn to by the claimants, certified to' and inserting in lieu thereof the words 'certified to by the claimants and.' "

Section 314.3, Code of Iowa, 1966, as amended by the foregoing Senate File, exists as follows:

"All claims for construction, reconstruction, improvement, repair, or maintenance on any highway shall be itemized on voucher forms prepared for that purpose, certified to by the claimants and by the engineer in charge, and then forwarded to the board or commission in control of that highway for final audit and approval. Claims payable from the farm-to-market road fund shall be approved by both the board of supervisors and the state highway commission. Upon approval by the highway commission of vouchers which are payable from the farm-to-market road fund, or from the primary road fund, as the case may be, such vouchers shall be forwarded to the state comptroller, who shall draw warrants therefor, and said warrants shall be paid by the treasurer of the state from the farm-to-market road fund or from the primary road fund, as the case may be.

"If the engineer makes such certificate or a member of the board or commission approves such claim when said work has not been done in accordance with the plans and specifications, and said work be not promptly made good without additional cost, he shall be liable on his bond for the amount of such claim."

2. Section 331.21, Code of Iowa, 1966, referred to in your letter presents the following:

"All unliquidated claims against counties and all claims for fees or compensation in excess of twenty-five dollars, except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

3. Secondary road claims made under the provisions of §314.3, Code of Iowa, 1966, as amended by the 62nd General Assembly, arising out of the construction, reconstruction, improvement, repair or maintenance on any secondary road shall be forwarded to the board of supervisors bearing certification by the claimant and by the county engineer. Notarization is not required.

4. Secondary road claims presented by the county to the highway commission for payment do not require notarization.

5. All secondary road claims made under the provisions of §331.21 require notarization prior to presentation to the board of supervisors.

March 25, 1968

STATE OFFICERS AND DEPARTMENTS — Cost of printing salary book — §16.2(11), Code of Iowa, 1966; Chapter 1, §37, Acts of the 62nd G. A. The cost of printing the annual salary book is to be paid for out of "the general fund not otherwise appropriated" rather than the appropriation of the state printing board. (Haesemeyer to Moore, Supt. of Printing, 3/25/68) #68-3-37

Mr. J. C. Moore, Supt. of Printing, Iowa State Printing Board: You

have requested an opinion of this office on the question of whether or not the costs of printing the Salary Book which you are required to have printed annually pursuant to §16.2, Code of Iowa, 1966, is properly payable out of the appropriation to the state printing board, chapter 1, §37, Acts of the 62nd G. A., or from funds not otherwise appropriated.

§16.2, Code of Iowa, 1966, provides in relevant part as follows:

"The superintendent of printing shall:

* * *

"11. Annually, September 1, cause to be printed in pamphlet form, *to be paid for out of the general fund not otherwise appropriated,* and gratuitously distributed upon request, the name, residence, official title, salary, and traveling and subsistence expense of the personnel of each of the departments, boards, and commissions of the state government, except such personnel as receive an annual salary of less than three hundred dollars. . . ." (Emphasis supplied)

Chapter 1, §37, Acts of the 62nd G. A., provides that, "funds appropriated for the general office by this section, in the discretion of the printing board, may be used to pay the cost of printing of the 'Iowa Official Register,' 'Proceedings of the Iowa Academy of Science,' 'Iowa Welcomes You' booklet, and other miscellaneous items," but makes no mention of the Salary Book.

In view of the foregoing it is clear beyond any doubt that the cost of printing the Salary Book should be paid out of the general fund not otherwise appropriated rather than from the printing board's appropriation.

March 25, 1968

COUNTIES AND COUNTY OFFICERS: **Benefited Fire Districts, preliminary engineering and election costs** — County cannot pay. (Cullison to Willett, Tama County Attorney, 3/25/68) #68-3-36

Mr. Walter J. Willett, Tama County Attorney: You requested our opinion as to whether the Board of Supervisors can pay the engineering expenses and costs of election for the establishment of Benefited Fire Districts under Chapter 357A, Code of Iowa, 1966.

Chapter 357A, which authorizes the establishment of benefited fire districts, does not authorize the county to pay the preliminary engineering expenses and costs of election. Although the rule may be to the contrary in other jurisdictions, see 20 C.J.S. 209, it has been established in Iowa that counties cannot be charged with the expenses of elections in the absence of express statutory authority. *Moussea v. City of Sioux City* (1901) 113 Iowa 246, 84 N. W. 1027; *McBride v. Hardin County* (1882) 58 Iowa 219, 12 N. W. 247, and *P. H. Turner & Co. v. Woodbury County* (1881) 57 Iowa 440, 10 N. W. 827. Since no meaningful distinction can be made between preliminary election expenses and preliminary engineering expenses, it is our opinion that neither can be paid by the Board of Supervisors. We note that the legislature could have provided this authority in the same manner that it did in the case of sanitary districts. See Section 358.8, Code of Iowa, 1966.

April 1, 1968

COURTS — Refund of judge's contributions to judicial retirement fund — Chapter 605A, Code of Iowa, 1966. An active judge who has elected to come under the judicial retirement system may withdraw from the system and obtain a refund of his contribution. (Turner to Selden, State Comptroller, 4/1/68) #S68-4-1

Mr. Marvin R. Selden, Jr., State Comptroller: You have asked my opinion with respect to a request made to you by an Iowa district judge that you return to him the money credited to him in the judicial retirement fund which he has contributed as payroll deductions under Chapter 605A, Code of Iowa (1966). As a condition to the refund requested this judge has stated that he will waive all future benefits which may otherwise accrue under said chapter, and I assume he will not hereafter contribute to any judicial retirement under the present law. You have stated the questions as follows:

1. Can an active judge who has elected to come under the purview of the Judicial Retirement System withdraw from the System and claim a refund of his contributions?

2. Can a judge who has become separated from service as a judge, after he has completed six years of service, waive his future benefits and claim a refund of his contributions to the System?

Chapter 605A of the Code of Iowa (1966) was originally enacted by the 53rd General Assembly in 1949. See Acts 53rd G. A., Chapter 235. The purpose at that time was to create a contributory "retirement system" for Supreme and District Court judges. It was enlarged to include Municipal and Superior Court judges and re-enacted with minor changes by the 58th General Assembly in 1959. Changes made then and subsequently are not significant to the questions you pose. The basic plan and objectives of the statute are the same now as when first enacted.

No judge is required to come into the system but may elect to do so by giving notice to the state comptroller and treasurer of state. §605A.3. Nor is any judge expressly prohibited from withdrawing therefrom. He may bring himself under the plan within one year after the effective date of the act (which has long since passed) or within one year after any date on which he takes oath of office as judge. His contribution to the fund is a percent of his salary for the total period of service as judge before the date of the notice, but in cases of district judges, not more than $4,000 for past service, which must be paid in before retirement. Afterwards the contribution is deducted from his salary. §605A.4.

The limitation to a maximum sum contribution for past service is ambiguous, at least in one respect. The statute says he may qualify within one year after any date upon which he takes oath of office. §605A.1. A literal interpretation of this phrase could mean that he may serve any number of years and upon re-election and taking the required oath of office in later years of service elect to come into the system and qualify by payment of only $4,000, although the required deductions might otherwise have amounted to substantially more. Records in your office will show that there are many active judges who have previously contributed by payroll deductions substantially more than this maximum.

However, the maximum contribution limitation must be held to apply only to service prior to the effective date of the Act because of the provision in §605A.5 which imposes a further qualification that the judge "shall have contributed" to the fund for the "entire period of his service" as judge.

The qualification in §605A.5 read in connection with §605A.4 suggests that service as a judge may be terminated for a period of time and later resumed, in which event he cannot avail himself of an interpretation in service, accept a refund and later requalify by contributing a sum less than that equal to a percentage of total salary based on his "entire period of service."

For the same reason voluntary withdrawal from the system and refund of the contributions while remaining in service as a judge would prevent his re-admission to the system, except upon compliance with §605A.5, by contributions equal to that required for the entire period of service. It is also suggested that these contributions being deductible from salary on a monthly basis would require payment of interest on delayed payments in order for the judge to "have contributed as herein provided, . . ."

It is evident from the foregoing that although not explicitly stated a judge's entire participation in the system is voluntary. What actuarial concept was embraced in providing for a "fund" is not known. But, in any event, only the judges' contributions are funded. The state (after 1950) is required to appropriate money as necessary "to finance the system." See §605A.4. The state's share is not now funded in any sense. In a funded system the contributions to the fund with interest on the fund is actuarially calculated to discharge the expected obligation when due. That part of the total obligation borne by the judges could very easily be funded with the state's share remaining unfunded without doing violence to the concept of a funded system. In other words, part of the total could be funded, part unfunded.

The judges' contributions are carried in separate accounts to the individual credit of each judge. If he fails to serve as judge for a period of six years his total contribution is refunded to him, or his legal representatives. If he has served six or more years and dies before retirement his contributions are refunded to his estate. If he has retired and has received less in annuities during his lifetime than the total of his contributions, the difference is paid to his estate. §605A.8. In the event a judge is removed from office he losses his right to annuity benefits, but his total contribution is refunded to him. §605A.14. In the various instances where refunds are expressly required no provision is made for a refund of interest earned on the contributions, which is normally a significant factor in any funded system. But here the state retains this gain.

Chapter 605A read as a whole implies that the right to annuity benefits is the more valuable right. This right does not accrue until after six years service at an attained age of sixty-five, or service of twenty-five years consecutively at any age. §605A.6. It is not payable while the annuitant is serving as a state officer or employee. §605A.10. Retirement

benefits are forfeited in the event the judge has been removed from office for cause other than disability, but the judge is nevertheless entitled to a return of his contribution. §605A.14.

While the code nowhere explicitly provides that a judge may voluntarily withdraw from the system by resignation as judge or otherwise, there is on the other hand no explicit requirement that his election to participate is irrevocable. It is evident from the foregoing that if he involuntarily surrenders the office by removal or death, he or his executors are entitled to receive back the contribution made by him. Since the right to an annuity is the more valuable right, there seems to be no good reason to say that he must be compelled to remain in the system or forfeit all his contribution as well as his annuity. On the other hand, his withdrawal and refund will relieve the state from its obligation to pay the annuity and permit it to retain the accrued interest.

For the reasons stated, I am of the opinion that any active judge (1) may withdraw from the system and receive back his contributions thereto without interest upon the execution of an acquittance that he will not at any time hereafter claim from the State of Iowa any benefit or annuity under the provisions of Chapter 605A of the Code (1966), nor any future benefit under any subsequent law which is supplemented, derived or provided wholly or in part by funds now on deposit with the State credited to the judicial retirement fund, except by repayment of the funds withdrawn with interest or their equivalent. (2) The foregoing applies to active judges both before and after completion of six years of service.

April 1, 1968

BOARD OF PHARMACY EXAMINERS: Persons authorized to prescribe, dispense and administer prescription drugs. Chapter 203, 204 and Chapter 189, Acts of 62nd General Assembly. Medical practitioners are authorized to prescribe, administer and dispense prescription drugs, but nurses or aids can only administer said drugs and then only under the direction and supervision of a medical practitioner. (Seckington to Crews, Division of Narcotics, 4/1/68) #68-4-1

Mr. Paul Crews, Division of Narcotics: By your letter of March 21, 1968, you ask for an opinion on the following question:

"Can a medical practitioner authorize his nurse or aide to prescribe or dispense prescription drugs for his patients?"

Section 204.2, 1966 Code of Iowa, provides:

"It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, dispense, compound, or propagate any narcotic drug, or any preparation containing a narcotic drug, except as authorized in this chapter."

Section 204.7, 1966 Code of Iowa, is entitled "Professional Use of Narcotic Drugs." That section is as follows:

"1. A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or intern under his direction and supervision.

"2. A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, adminis-

ter, and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

"3. Any person who has obtained from a medical practitioner any narcotic drug for administration to a patient during the absence of such medical practitoner shall return to such practitioner any unused portion of such drug, when it is no longer required by the patient."

This section clearly indicates that a medical practitioner may prescribe, administer and dispense narcotic drugs. However, a nurse or intern can only administer the narcotic drugs prescribed by a physician, under the direction and supervision of the medical practitioner. Read as a whole, this section indicates that a nurse or intern cannot prescribe or dispense narcotic drugs. To do so is a clear violation of the law.

Chapter 204, *supra*, deals only with narcotic drugs. A review of Chapter 203, 1966 Code of Iowa, is necessary to define the responsibilities for other prescription drugs.

Section 203.3, 1966 Code of Iowa, reads as follows:

"Labeling of drugs. Every drug offered or exposed for sale, or sold in package or wrapped form, shall be labeled on the package or container as prescribed in sections 189.9 and 189.10, except that the quantity of the contents need not be stated; and in addition thereto shall have printed on the label the name and the exact quantity or proportion of any alcohol, morphine, opium, heroin, chloroform, cannabis indica, chloral hydrate, acetanilide, or any derivative or preparation of any such substances contained in said drug. In case the principal package or container is inclosed in an outside wrapper or carton, the same label prescribed by this section for the package or container shall also be printed upon said wrapper or carton."

Section 203.5, 1966 Code of Iowa, reads as follows:

"Certain drugs exempted Nothing in section 203.3 shall be construed to apply·

"1. To any drug specified in the United States Pharmacopoeia or National Formulary, which is in accordance therewith, and which is sold under the name given therein.

"2. To the filling of prescriptions furnished by licensed physicians, dentists, or veterinarians, the originals of which are retained and filed by the pharmacist filling the same.

"3. To any drug or medicine personally dispensed by any licensed physician, dentist, or veterinarian in the course of his practice."

It is quite clear that only licensed physicians, dentists, or veterinarians can prescribe drugs to be filled by a pharmacist.

Subsection 3 of §203.5 above clearly indicates that only a licensed physician, dentist or veterinarian can dispense a drug or medicine, and then only in the course of his professional practice.

Only those persons clearly specified by law can legally write or fill prescriptions, dispense, or administer narcotics and other prescription drugs, and then only to the extent specified by law. See, for example, the attached opinions from this office which are found in *Report of Attorney General, 1938*, at pages 634 and 665.

Chapter 189, Acts of the 62nd General Assembly, deals with "dangerous drugs," and a consideration of that Act is necessary to further define the responsibilities of medical practitioners, nurses and aides.

Section 1 (8) of the above Act defines medical practitioner as ". . . a physician, dentist, veterinarian, or any other person licensed in this state to prescribe or administer drugs which are subject to this Act."

Section 3 (1) through (6) of the above Act enumerates prohibited acts

Subsection 2 of said section states as follows:

"It shall be unlawful for any person to:
"Possess any depressant, stimulant, or counterfeit drug unless the drug was obtained upon a valid prescription issued by a medical practitioner licensed under the laws of this state or any other state or territory of the United States and is held in the original container in which the drug was delivered, or the drug was delivered by a medical practitioner in the course of his professional practice and is held in the immediate container in which the drug was delivered."

Section 2 of the above cited Act states that Section 3 shall not apply to the following.

"(5) Medical practitioners acting in the course of their professional practice."

Section 2 (1) (a) states that §3 shall not apply to ". . . dispensing or other use by or under the supervision of a medical practitioner acting in the course of his professional practice. . . ."

The words, "or other use" following the word "dispensing" means other legitimate uses such as prescribing or administering.

Section 7 of the above cited Act reads in part as follows:

". . . Nothing in this Act shall prevent a medical practitioner from issuing a new prescription for the same drug either in writing or orally. Any oral prescription shall be promptly reduced to writing on a prescription blank and filed by the pharmacist filling the prescription."

It is clear that only a medical practitioner can issue, either in writing or orally, a prescription, or refill orders.

A reading of all the above cited sections leads me to the following conclusion.

A medical practitioner is the only authorized person to prescribe, dispense, or administer narcotic and other prescription drugs, but said medical practitioner may allow the administering of said drugs by a nurse or intern if the administering is done under his supervision. In essence, this means that all prescribing and dispensing must be done by the medical practitioner, while he may authorize another duly qualified person to administer prescription drugs as long as said administering is done under the medical practitioner's supervision and direction.

Also enclosed is a copy of a 1960 Attorney General Opinion, from the State of Texas, which deals with this precise question, and which comes to the same conclusion as I have under laws which are very similar.

April 1, 1968

TAXATION: **Property Tax** — Property devised to church after July 1. §427.1(9) and §427.1(25). A church which was devised the use, in trust, of real property, after July 1, 1967, could not obtain a property tax exemption on such property for 1967 taxes payable in 1968. (Griger to Erhardt, Wapello County Attorney, 4/1/68) #68-4-2

Mr. Samuel O. Erhardt, Wapello County Attorney: This will acknowledge receipt of your letter dated December 28, 1967, in which you requested an opinion of the Attorney General on the following question:

Is property devised in trust for the use of a church, so long as needed and used by it, subject to property taxes for the year of the devise, where the formal steps to having the property declared exempt have not been complied with?

The pertinent facts, as related in your letter are:

An individual died testate July 22, 1967, her will was filed for probate July 28, 1967, and admitted to probate the same date; the will provided that the church was to have "full use of my Home Proptrey as a Parsonage Home" so long as needed and used by the church; the use of the property was accepted by the church on September 6, 1967, and the formal Acceptance was filed with the Clerk of the District Court on November 1, 1967.

§427.1(9), Code of Iowa, 1966, provides for a property tax exemption as follows:

"Property of religious, literary, and charitable societies. All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit. All deeds or leases by which such property is held shall be filed for record before the property herein described shall be omitted from the assessment. All such property shall be listed upon the tax rolls of the district or districts in which it is located and shall have ascribed to it an actual fair market value and an assessed or taxable value, as contemplated by section 441.21, whether such property be subject to a levy or be exempted as herein provided and such information shall be open to public inspection."

§427.1(25), Code of Iowa, 1966, provides:

"Delayed claims. In any case where no such claim for exemption has been made to the assessor prior to the time his books are completed, such claims may be filed with the local board of review or with the county auditor not later than July 1 of the year for which such exemption from taxation is claimed, and a property assessment shall be made either by the board of review or by the county auditor, if said property is all or in part subject to taxation."

In 1956 O.A.G. 80, 82, the Attorney General ruled as follows:

". . . Accordingly, we hold that if real property is to be exempt from tax under the provisions of section 427.1(9) it must meet all the qualifications required by that section on the date of levy of tax, including the pre-requisite for recordation of deed or lease, *and in addition must meet the pre-requisites in sections 427.1(24) — 427.1(27) . . .*" (emphasis supplied)

In rendering this opinion, the Attorney General was aware of the case of *Iowa Wesleyan College vs. Knight*, 207 Iowa 1238, 224 N. W. 502 (1929) where the Supreme Court held that an educational institution which was deeded land prior to the levy of the tax thereon was entitled to a property tax exemption for the year of the levy. In Iowa, property taxes are levied by the board of supervisors at its September session. See §444.9, Code of Iowa, 1966. However, at the time *Iowa Wesleyan College vs. Knight*, supra, was decided, there was no statutory provision like §427.1(25). In fact, §427.1(25) was not enacted until 1947. See Ch. 234, Acts of the 52nd General Assembly (1947).

It is at once apparent that the church has not followed the provisions of §427.1(25) in that no claim for exemption was filed on or before July 1, 1967, and consequently, its claim for exemption for 1967 property taxes payable in 1968 on the property described in your letter must be denied.

It is the opinion of this office that a church which was devised the use, in trust, of real property, after July 1, 1967, could not obtain a property tax exemption on such property for 1967 taxes payable in 1968.

April 1, 1968

TOWNSHIPS: Township trustees authority relative to furnishing fire protection — §§359.42, 359.43, Code of Iowa, 1966; Chapter 308 Acts of the 62nd General Assembly. Township trustees may, in their discretion, subdivide a township into fire districts and make different levies in the various township districts. Township trustees may not anticipate tax revenues by contracting for their expenditure prior to the levy's being made. (Martin to Blum, Franklin County Attorney, 4/1/68) #68-4-3.

Mr. Lee B. Blum, Franklin County Attorney: I have received your request for an attorney general's opinion in which you state as follows:

"Morgan Township in Franklin County, Iowa, has a town of Coulter at the Northeast corner and the town of Dows at the Southwest corner. About five years ago Morgan Township voters approved a levy of not to exceed one and one-half mills for fire protection under Section 359.43 Iowa Code. Both towns want to contract with Morgan Township to furnish fire protection in the township and they seem to prefer that the township be divided into specific territories to be served by each town. Your opinion is requested as to the following matters:

"1. May the township trustees sub-divide the township and sign a contract with each town to furnish fire protection to a certain geographical area?

"2. If so, is this entirely a matter of discretion, or can the towns force such a sub-division?

"3. If the township is divided for fire protection purposes, must the levy under Section 359.43 be uniform throughout the township or may it be different in the two different territories?

"4. Must any levy for fire protection be uniform throughout the township regardless of whether the township is sub-divided or whether any resident is allowed to call either fire department?

"5. Can the trustees contract with the towns to make a certain levy and to pay a certain percentage of the money produced by such levy to each town?

"6. Can the trustees contract to pay a certain percentage of the expenses of maintaining fire apparatus in each town and then levy accordingly so that the levy will produce the amount required for making the payments contracted for? (The annotations under Section 359.43 in Iowa Code Annotated refer to an Attorney General's opinion dated August 6, 1962 indicating that this is permissible.)

Sections 359.42 and 359.43, Code of Iowa, 1966, as amended by Chapter 308, Acts of the 62nd General Assembly provide in pertinent part as follows:

"359.42 *Authorization.* The township trustees of any township may, *for the township or portion thereof, exclusive of any portion included in a benefited fire district,* purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa, independently or jointly with any adjoining township or townships, *or portions thereof,* likewise authorized as herein provided, or with any city or town or benefited fire districts, within the state or outside of the territorial jurisdiction and boundary limits of the state of Iowa." (Emphasis added)

"359.43 *Levy.* The township trustees may levy an annual tax not exceeding one and one-half mills on the taxable property in the township, *or portion thereof,* without the corporate limits of any city or town. . . ." (Emphasis added)

The underscored language was added by Chapter 308, Acts of the 62nd General Assembly. Prior to the addition of this language this office had consistently interpreted these sections to preclude township trustees from subdividing the township into fire districts or from apportioning tax levies between certain areas of a township. 64 O.A.G. 440, 64 O.A.G. 435. The legal basis for the cited opinions was that there was a lack of statutory authority which would permit such a division or such an apportionment. The reason for this was that the authorization covered the entire township, and made no reference to a portion of a township.

As can be readily seen by examination of the statute as amended, the legislature has acted to remedy this specific deficiency of authority.

Thus, in answer to your first question, the township trustees may subdivide the township for the purpose of furnishing fire protection.

In answer to your second question you will note that §359.42, above set out, provides as follows.

"The township trustees of any township *may,* for the township or portion thereof, . . ." (Emphasis added)

The use of the word "may" in this section, makes the subdivision of any township a wholly discretionary matter with the township trustees. See *John Deere Waterloo Tractor Work of Deere & Company v. Deerfield,* 252 Iowa 1389, 1392, 110 N. W 2d 560, 562 (1961); *Application of National Freight Lines, Inc.,* 241 Iowa 179, 185, 40 N W 2d 612, 616 (1950).

As indicated above, the addition of the words "or portion thereof," to §359.43, empowers township trustees to apportion township levies among the various districts. Your third and fourth questions, being essentially the same, are therefore answered in the affirmative: Township trustees may levy different amounts in different fire districts within the township.

There are certain restrictions which must be placed upon the contract you refer to in your fifth and sixth questions. In 58 O.A.G. 315, 316, it was noted that §359.45, Code of Iowa, 1958, provides the only statutory authority for incurring a debt for the purchase and ownership of fire equipment by the trustees. This section involves the anticipation of tax revenues through the issuance of bonds. The opinion noted, however, that by rule of law, limited anticipation of the collection of taxes levied is authorized. Quoting from 30 O.A.G. at 54 the opinion stated:

"'A municipal corporation may anticipate the taxes levied under the rule that *taxes levied are taxes in praesenti.* The district may therefore issue warrants in any one year to the amount of the tax levied and to be collected for the insuing year.'" (Emphasis added)

The opinion further stated:

"We are therefore of the opinion that your township trustees can issue warrants after the 1957 levy payable in 1958 dated at the time of issuance and stamped not paid for want of funds payable from anticipated taxes under such levy."

An attorney general's opinion, 64 O.A.G. 435, contains a similar holding.

Since a contract to pay a city for the furnishing of fire protection services is incurrence of a debt, it would appear that only limited anticipations of revenues may occur.

In answer to your fifth and sixth questions, a contract may be entered into between cities and towns on one hand, and township trustees on the other, which contracts may not anticipate revenues the levy for which has not already been made.

April 1, 1968

TAXATION OF REAL ESTATE TRANSFERS: Chapter 428A, §428.1, 26 USCA §4361. Assumption of mortgage by grantee. Whereby the terms of a deed, a grantee assumes a mortgage the amount of the mortgage should be excluded in determining the amount of tax due on the transfer. (Murray to Carstensen, Clinton County Attorney, 4/1/68) #68-4-4

Mr. L. D. Carstensen, Clinton County Attorney: We have your written request for our interpretation of Chapter 428A, Code of Iowa 1966 on the following question:

"Where a deed is given and the total consideration is $20,000.00 and the grantee pays the grantor $10,000.00 and the grantee, by the terms of the deed, assumes an existing mortgage in the amount of $10,000, should the revenue stamps affixed to the deed be $11.00 or $22.00?"

Chapter 428A.1 states as follows:

"There is hereby imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner. When there is no consideration or when the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, is one thousand dollars or less, there shall be no tax. When the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one thousand dollars, the tax shall be one dollar ten cents plus fifty-five cents for each five hundred dollars in excess of one thousand dollars."

Under the fact situation outlined in your letter, there is "an encumbrance remaining thereon at the time of the sale" and, therefore, this amount should be excluded before determining the applicable tax. The amount of the stamps affixed to the deed should be $11.00.

As you know this particular law was enacted by the 61st General Assembly, but only became effective January 1, 1968. It took the place of the federal tax on conveyances of real property which had been in existence for many years. Many interpretations of the federal law have been made over the years and the language in the Iowa statute is closely parallel to the words used in 26 USCA §4361. The following interpretation of the federal law, Rev. Rul. 54-197, 1954-1 CB 276, states as follows:

"Example (1): An owner of a residence on which he had a mortgage loan of $10,000, sold the property for $25,000, and purchaser assumed the $10,000 encumbrance on the property. The tax is based on $15,000, the gross consideration minus the existing mortgage, i.e., on the amount which A received for his equity in the property.

"The result would have been the same if the purchaser had not assumed the mortgage. In either event, the existing mortgage on the property is not removed by the sale. Furthermore, where realty is purchased subject to an existing mortgage, the mortgage is not removed by the sale of realty, even though the purchaser, by direct negotiation and agreement with the mortgagee, and independently of the contract of sale, pays off the mortgage at the time title to the property is conveyed to the purchaser. This is because the election to pay the mortgage is not a part of the contract of sale."

We believe that it is advisable to be guided by internal Revenue Service interpretations on this question so long as they do not conflict with the Iowa statute, and for the purpose of maintaining a related procedure accepted by those in charge of enforcement over the preceeding years.

April 2, 1968

CITIES AND TOWNS: Ordinances relating to liquor laws. §§124.34, 368.8, Code of Iowa, 1966. §124.34, Code of Iowa, 1966, empowers cities and towns, upon a finding that it is in the interest of the welfare and morals of the community, to require by ordinance that a permittee hire a policeman to maintain order in an establishment in which dancing is taking place. (Martin to Jansen, Johnson County Attorney, 4/2/68) #68-4-5

Mr. Robert W. Jansen, Johnson County Attorney: I have received your request for an opinion of the attorney general on the following issue: May a municipality require by ordinance, that those who operate a public establishment in which drinking and dancing occur, maintain a policeman on the premises at all hours during which dancing takes place.

Section 124.34, Code of Iowa, 1966, of the Iowa Liquor Laws, provides in pertinent part as follows:

". . . *Cities and towns are hereby empowered to adopt ordinances for the enforcement of this chapter, . . . City and town councils are empowered to adopt ordinances for the location of the premises* of class "B" permittees; *and are empowered to adopt ordinances, not in conflict with the provisions of this chapter* and that do not diminish the hours during which beer may be sold or consumed, *governing any other activities or matters which may affect* the sale and distribution of beer under class "B" permits *and the welfare and morals of the community involved.*" (emphasis added)

Section 368.8, Code of Iowa, 1966, provides in pertinent part as follows:

"They [municipalities] shall have power to limit the number of, regulate, license or prohibit:

"1. Public dance halls. Public dance halls, skating rinks, swimming pools, fortune tellers, palmists, and clairvoyants. Any place open to the public where dancing is allowed shall, under this section, be considered a public dance hall notwithstanding the fact that food is served and a restaurant license held under section 170.2."

Until Chapter 154, Acts of the 61st General Assembly, did away with the requirement, §124.39(2), Code of Iowa, 1962, required that class "B" permittees operating dance halls in conjunction with sale of beer, maintain a policeman to supervise these activities, at their own expense. The issue is thus presented, with a repeal of this requirement, are cities and towns precluded from establishing ordinances which require it.

It may not be cogently argued, that the legislature by repealing a statute, intends by so doing, to enact the converse thereof. Moreover, section 368.8(1), above set out, provides that cities and towns have specific authority to regulate dance halls. When this is coupled with the provisions of §124.34, above set out, it is clear that if there is no statutory direction to the contrary, a municipality may enact an ordinance requiring that a policeman be in attendance. Upon an examination of the Iowa liquor laws, we are unable to discover such a conflict.

It is therefore the opinion of this office that §124.34, Code of Iowa, 1966, empowers cities and towns, upon a finding that it is in the interest of the "welfare and morals of the community," to require by ordinance that a class "B" beer permittee hire a policeman to maintain order in an establishment in which dancing is taking place.

April 2, 1968

COUNTIES: Board of Supervisors. §39.18, Code of Iowa, 1966. Amendment to §39.18 provides for term of members of board of supervisors to be staggered so that the terms of no more than "a bare majority" of the board expire every two years. (Nolan to Synhorst, Sec. of State, 4/2/68) #68-4-6.

The Hon. Melvin D. Synhorst, Secretary of State: In your letter of March 13, 1968, transmitting an inquiry from the Pocahontas County Auditor there is a request for an opinion interpreting Senate File 297, Acts of the Sixty-second General Assembly. In Pocahontas County the board of supervisors appear to have been elected as follows:

1. Elected 1964, took office 1965, term expires January 2, 1969.
2. Elected 1966, took office 1967, term expires January 2, 1971.
3. Elected 1964, took office 1966, term expires January 2, 1970.
4. Elected 1966, took office 1967, term expires January 2, 1971.
5. Elected 1964, took office 1966, term expires January 2, 1970.

Applying the provisions of §39.18 of the Code of Iowa, as amended by Chapter 104 of the Acts of the 62nd General Assembly, which provide as follows:

"There shall be elected, biennially, in counties and townships, members of the board of supervisors and township trustees, respectively, for a term of four years to succeed those whose terms of office will expire on the second secular day of January following said election. The term of office of any supervisor or trustee, taking office for a four-year term one year later than the January next succeeding his election, shall, at the general election which next precedes by more than one year the expiration of his term, be refilled by a member elected to a three-year term or a five-year term, to be specified on the ballot as determined by the board, so that the terms of no more than a bare majority of the board will expire in the same year. Thereafter all succeeding members shall be elected to four-year terms."

From the above it appears that in the election in 1968 there should be elected a supervisor for District No. 1 for a four-year term commencing January 1969 and expiring January 1973. For Districts Nos. 3 and 5 there should be elected supervisors in 1968 whose terms shall commence on January 2, 1970, and be for three or five years expiring in 1973 or 1975 as determined by the board of supervisors. While both may be elected for a 3 year term and "no more than a bare majority of the board" would have terms expiring in the same year, that result would not be obtained if both were elected to 5 year terms. The "bare majority" provision for expiration of terms would also be met if one was elected for a 3 year term and the other for a 5 year term. Supervisors for Districts Nos. 2 and 4 should be elected in 1970 for four-year terms expiring in 1975.

April 2, 1968

COUNTIES: Board of Supervisors. §39.18. Chapter 104, Laws of the 62nd G. A. amending §39.18, Code of Iowa, 1966, is construed as a transitional method of staggering the terms of members of boards of supervisors and should be implemented as soon as reasonably possible. (Nolan to Knoke, Pottawattamie County Attorney, 4/2/68) #68-4-7

Mr. George Knoke, Pottawattamie County Attorney: This replies to your letter of February 6, 1968, in which you raised the question as to whether or not a county supervisor "who was elected in November, 1964 and took office in January 1966 and whose term expires in January, 1970, must stand for election in November, 1968 for a three or five year term or whether he would be elected in November, 1968 for a term from January, 1970 to January, 1974 and then be required to stand for election in November, 1970, for a three or five year term."

The problem as stated in your letter arises from the amendment to §39.18, Code of Iowa, 1966, which was enacted by the 62nd General Assembly and appears as Chapter 104 of the Laws of the 62nd General Assembly:

"Section 1. Section thirty-nine point eighteen (39.18), Code 1966, is amended by striking from lines seven (7) to thirteen (13), inclusive, the words '; there shall also be elected a member or members for a term of four years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office' and inserting in lieu thereof the words 'The term of office of any supervisor or trustee, taking office for a four-year term one year later than the January next succeeding his election, shall, at the general election which next precedes by more than one year the expiration of his term, be refilled by a member elected to a three-year term or a five-year term, to be specified on the

ballot as determined by the board, so that the terms of no more than a bare majority of the board will expire in the same year. Thereafter all succeeding members shall be elected to four-year terms."

It appears that Chapter 104 was enacted to provide a transitional method of staggering the terms for the board of supervisors and it is our opinion that it should be implemented as soon as reasonably possible. Therefore a supervisor whose term expires in January, 1970, should stand for election in November of 1968 for a three or five year term (expiring in January, 1973, or January, 1975). The resulting effect would be that the terms of some of the supervisors will expire every two years thereafter, and yet a carry-over will be maintained by the reestablishment of four-year terms for all members of the board of supervisors.

I find nothing in Chapter 104 to support a conclusion that a supervisor elected in 1968 for a term commencing January, 1970, should be permitted to stand for a four-year term and then at the election preceding the term commencing 1974 to run for a three or five year term. I believe that such a construction of Chapter 104 would be improper.

April 2, 1968

HIGHWAYS — limitations on wide loads — Chapter 285, Acts of the 62nd G. A. The actual load widths of over-width loads are subject to adjustment on account of road widths and traffic volumes in accordance with §§5 and 6 of Chapter 285, Acts of the 62nd G. A. for purposes of determining the maximum movement distances contained in §4 of such chapter. (Graham to Pelzer, Emmet County Attorney, 4/2/68) #68-4-16

Mr. Max O. Pelzer, Emmet County Attorney: References made to your letter of November 17, 1967, in which you request an opinion as to whether or not permits might be granted by the county under authority of Chapter 285 of the Acts of the 62nd General Assembly for vehicles that physically exceed 40 feet in width through the application of Section 6 of the Chapter.

Please refer to the attached copy of an opinion dated October 4, 1967, to Mr. George J. Knoke, Pottawattamie County Attorney. On page 4 of the October 4th Opinion in the last sentence of the first paragraph, it is stated:

". . . in this connection it is important to recognize that the actual width of the load is subject to adjustment on account of Sections 5 and 6 of Senate File 681 which as we have seen make changes in the load widths for application of the distance limitations of Section 4 on account of road surface, traffic volume, and width of the highway."

It is the opinion of this office that if an application of Section 6 of Chapter 285 would have the effect of reducing the effective load width to 40 feet, or below 40 feet, that a movement could be made consistent with the distance formula of Section 4 and with the requirements of Section 7.

April 3, 1968

MOTOR VEHICLES: Publication of rules—Motorcycle licenses; §§17A.1, 17A.5, Code of Iowa, 1966. Department of Public Safety not required to write rules restricting licenses for the operation of motorcycles when it is authorized to do so by statute. (Zeller to Elvers, State Senator, 4/3/68) #68-4-9.

The Hon. Adolph W. Elvers, State Senator: Your letter of March 23, 1968, has been received presenting the following question:

"Is the Iowa Department of Public Safety required to comply with Chapter 17A, 1966 Code of Iowa, as amended by the 62nd General Assembly?"

Our answer is that the Department is required to comply with Chapter 17A, Code of Iowa, 1966, unless there is statutory authority for its action.

The Secretary of the Rules Committee, however, states that your question relates to the recent restriction upon a renewal of license for operation of motor vehicles, which reads, "not valid for motorcycle." The operator may remove this restriction by passing a test and showing his ability to operate a motorcycle.

Authority for this restriction appears in §321.193, Code of Iowa, 1966, reading as follows:

"The department upon issuing an operator's * * * license shall have authority whenever good cause appears, to impose restrictions suitable to the licensee's driving ability with respect to the type of vehicle * * *."

The department does have good cause for this restriction, due to the large increase in accidents, in recent years, arising from the use and operation of motorcycles. Since the statute gives the necessary authority, it is not necessary to write a new rule to enlarge the authority, which already exists.

April 4, 1968

COUNTIES: Board of Supervisors. §§345.1 and 309.9, Code of Iowa, 1966. Although secondary road fund may be used for construction of garages and sheds, when the cost of such construction is in excess of $20,000.00 the Board of Supervisors has no authority to authorize the project without submitting the proposition to the voters. (Nolan to Myers, Marion County Attorney, 4/4/68) #68-4-8

Mr. Pat Myers, Marion County Attorney: This is in reply to your letter of December 27, 1967, in which you requested an opinion of this office on the following:

"In an Attorney General's opinion, dated April 28, 1949, page 41, the Attorney General came to the conclusion that Section 309.13, Code of 1946, as considered by each house of the 53rd General Assembly, evinced an intent that the secondary road funds may be used for the construction of garages and sheds for repairing and servicing of county equipment. The Attorney General also ruled that such funds may not be used for this purpose without submission of the matter first to the electors, pursuant to the provisions of Section 345.1, Code of 1946.

"My question is this, Does Section 345.1 of the 1966 Code of Iowa still limit the expenditures that can be made under Section 309.9(7) of the 1966 Code of Iowa in view of legislation since that time?"

Subsequently in a telephone conversation you stated that the estimated cost of the proposed construction will be approximately $21,000.00 which is in excess of the amount specified in §345.1, Code of Iowa, 1966. §345.1 provides:

"The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction

of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. Except, however, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed twenty thousand dollars."

It is our view that garages and sheds for the repairing and servicing of county equipment must be construed as "any other building" within the meaning of §345.1. Therefore although the secondary road fund may be used for such construction under §309.9 which provides:

"The secondary road fund is hereby pledged to and shall be used for any or all of the following purposes at the option of the board of supervisors:

* * *

"7. Secondary road equipment, materials, supplies and garages or sheds for the storage, repair and servicing thereof."

there is no authority for the construction of such garages and sheds costing in excess of $20,000.00 without submitting the proposition on such matter to the voters.

April 4, 1968

CITIES AND TOWNS: **Authority to charge for ambulance service** under Iowa Code §§368.2, 368.74 (1966) Cities not authorized to charge for ambulance service. A non-profit corporation may be organized to provide such services under Iowa Code Chapter 504A (1966). Such corporation and its agents will be liable for negligently rendered service. (Martin to Ramsay, Winnebago County Attorney, 4/4/68) #68-4-10

Mr. Richard C. Ramsay, Winnebago County Attorney: I have received your request for an attorney general's opinion on the following issues:

"1. Clearly the town can own and operate its own ambulance service under chapter 368.74, Iowa Code, but:

"A. Can the town charge town residents for such service?

"B. Can the town perform the service for non-residents and charge them for such service?

"2. Can a non-profit corporation be established, by donations, to own and operate the ambulance service on a voluntary basis and charge for such service? If yes, what would be the liability of the volunteer workers and of the corporation for non or misfeasance?"

In answer to parts A and B of question 1 the effect of §368.2, Code of Iowa, 1966, should be considered. That section states in part:

"Notwithstanding any of the provisions of this section, cities and towns shall not have power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute. . . ."

This section has been interpreted by this office to preclude a charge for services rendered by a municipally-owned ambulance service. Opin-

ions of the Attorney General (Zeller to Crotty — August 7, 1967, and Zeller to Schoenthaler — August 7, 1967)

Since there is no statute empowering municipalities to make such a charge and since §368.2, Code of Iowa, 1966, does not distinguish between residents and non-residents, it is the opinion of this office that a municipality may not charge a non-resident for ambulance service.

In answer to your second question, it is the opinion of this office that a non-profit corporation may be established to provide ambulance service under Iowa Code Chapter 504A (1966). Iowa Code Chapter 504 (1966) is not applicable due to the following provision of §504A.100(6), Code of Iowa, 1966:

". . . [T]his chapter shall apply to: All domestic corporations organized after the date on which this chapter became effective . . ."

It appears to be the intent of this subsection to channel the organization of non-profit corporations into Iowa Code Chapter 504A (1966).

I can find no authority which would preclude the corporation of the type contemplated from charging fees for services rendered.

The doctrine of charitable immunity no longer exists. In *Langheim v. Denison Fire Department Swimming Pool Association*, 237 Iowa 386, 21 N. W. 2d 295 (1946), the Iowa Supreme Court followed a recognized trend of limiting the doctrine of charitable immunity by holding that the defendant non-profit corporation was not a charity

The next case was *Haynes v. Presbyterian Hospital Assoc.*, 241 Iowa 1269, 45 N. W. 2d 151 (1950). That case purported to destroy, generally, the doctrine of charitable immunity. However, it was not until *Sullivan v. First Presbyterian Church*, ... Iowa....., 152 N. W. 2d 628 (1967) that the demise of the doctrine of charitable immunity was a certainty. In the Sullivan case the Court set forth the language of the Haynes case above referred to, which purported to destroy the doctrine of charitable immunity, and referring to it stated:

"This pronouncement was intended to abrogate the non-governmental charitable immunity in Iowa. . . . We so interpret the Haynes opinion now."

Thus, the last twenty years have seen the decline of the doctrine of charitable immunity to the point that it may not now be relied upon as a factor in deciding whether private non-profit corporate organization is preferable to a local governing body's furnishing the desired service.

The volunteer workers of such a corporation would not be relieved from liability for negligent acts because of employment by either a non-profit corporation or a charity. The doctrine of respondeat superior has never been extended to meet what might be argued is a policy of that doctrine, i.e., to allocate the cost of injuries inflicted by an industry, in a broad sense, to the industry, as a cost of doing business. The case of *Hough v. Illinois Cent. R. Co. et al*, 169 Iowa 224, 149 N. W. 885 (1914) states:

"As a rule it is no defense for one to show that his act or omission was while acting as an agent or servant for another."

In this case a negligent agent was made a party defendant as was his employer and a jury verdict was upheld against both of them. It would appear from the foregoing as well as the authorities cited in 57 C.J.S., "Master and Servant" §577, that respondeat superior is no defense for an employee, and this is true whether or not there is liability on the part of the non-profit corporation.

This office has been unable to discover the existence of any other doctrine which could be put forth as the basis for avoiding an agent's personal liability or that of the corporation, for negligent acts.

April 4, 1968

COUNTIES: Support of minor committed as mentally ill — §252.16 and §230.1, 1966 Code of Iowa. County from which minor was committed, and where minor had legal settlement remains liable even though parents moved to another county after minor was committed. (Seckington to Gray, Calhoun County Attorney, 4/4/68) #68-4-11

Mr. Dale E. Gray, Calhoun County Attorney: I am in receipt of your letter dated February 2, 1968, wherein you request an opinion on the following question:

Who is liable for the care and keep of the minor, John Harvey Spanyers, whose entry into the Cherokee Mental Health Institute was made while his parents had legal settlement in Webster County, but have since moved to Calhoun County?

Section 252.16, 1966 Code of Iowa, states in part as follows:

"A legal settlement in this state may be acquired as follows:

"1. Any person continuosly residing in any county in this state for a period of one year acquires a legal settlement in that county . . ."

* * *

"5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of their mother . . ."

I assume that the parents of the child in question did in fact have legal settlement in Webster County, Iowa, at the time of the child's admission to Cherokee, and that therefore the child, pursuant to §252.16, quoted above, also had legal settlement in Webster County.

The liability of counties and the state for persons admitted to Cherokee is found in §230.1, 1966 Code of Iowa, which states in part as follows:

"The necessary and legal costs and expenses attending the taking into custody, care, investigation, admission, commitment, and support of a mentally ill person admitted or committed to a hospital shall be paid:

"1. By the county in which such person has a legal settlement, . . ."

* * *

"The legal settlement of any person found mentally ill who is a patient of any state institution shall be that existing at the time of admission thereto."

There is no material difference in the liability of a county for the care of a voluntary or involuntary admission to a state institution.

It is therefore the opinion of this office, that since the child in question

was admitted to Cherokee from Webster County, that county was and is liable for the cost of said child's care and keep at Cherokee. The liability remains with the admitting county, whether or not the parents of the minor subsequently move to and gain settlement in another county.

April 8, 1968

STATE OFFICERS AND DEPARTMENTS — Executive Council Contingency Fund — Chapter 451, Acts of the 61st G. A.; chapter 47 and chapter 77, §5, Acts of the 62nd G. A.; §§19.18 and 19.29, Code of Iowa, 1966. The executive council may not allocate $75,000.00 from the contingency fund created by chapter 77, §5, Acts of the 62nd G. A. to pay the cost of erecting partitions in the new James W. Grimes office building nor may the unlimited standing appropriation created by §19.29 be utilized for this purpose. However, the reasonable cost of relocating certain department of revenue space could be paid under §19.18 or §19.29, Code of Iowa, 1966. (Turner to Executive Council, 4/8/68) #S68-4-2

The Executive Council of Iowa: You have requested my opinion as to the following:

"As a result of your personal appearance before the Executive Council at their meeting of April 2, 1968, and the conference held in your office with Secretary of State Synhorst, Auditor of State, Smith, State Comptroller Selden, and others, I am writing to you asking for your opinion as to the funding for the additional occupancy and miscellaneous expenses for the James W. Grimes Office Building.

"On March 18, 1968, the Executive Council met with the Budget and Financial Control Committee and adopted a resolution allocating $75,000 from the Contingency Fund as passed in House File 786.

"In view of the questions which you have raised in this meeting, I have been directed to obtain from you an opinion as to whether or not funds from the Performance of Duty account, as established by Section 19.29 of the 1966 Code of Iowa, may be used for this purpose.

"Similar to this problem is the request submitted by the Department of Revenue as a result of the relocation of their space in the Lucas State Office Building, a copy of their request is attached hereto. Since they do not have funds available for this purpose, may the Executive Council allocate funds from the Performance of Duty Account?"

I.

Construction of the new state office building, now known as the James W. Grimes Office Building, was authorized by the 61st General Assembly, which provided that the "total cost of said building shall not exceed the sum of three million dollars," which was specifically appropriated to the executive council for that purpose. See chapter 451, Acts of 61st G. A. (page 852).

As I now understand the facts, this new building, which is located on the capitol grounds, is in the final stages of completion and ready for occupancy; the original $3,000,000 appropriation and an additional $300,000 appropriation to the executive council by the 62nd General Assembly have both been nearly fully expended; that the executive council has assigned all of the space in said building to state agencies and departments which are ready to move in; and that the council has assigned office

space in the basement, including space for the printing board and its printing equipment, computers, etc., not originally contemplated for use for anything but storage. I also understand that the state department of public instruction has requested construction of interior partitions and other facilities and that as a consequence the executive council and the budget and financial control committee have found, as a fact, that the requested interior partitions and other improvements are not only desirable but necessary to the efficient use of the building and the conditions under which the employees will work.

Accordingly, I am informed that on March 18, 1968, at a joint meeting, the executive council and said committee adopted a resolution allocating $75,000 from the contingent fund (H.F. 786, now chapter 77, Sec. 5, page 110, Acts of 62nd G. A.), as the fair and reasonable cost of said partitions and improvements. In other words, it is proposed that $75,000 be expended in addition to the $3,000,000 appropriation of the 61st G. A. and the $300,000 appropriation of the 62nd G. A.

In my opinion, no part of said $75,000 can be legally expended from the contingent fund or any other fund for such purposes.

Chapter 47, 62nd G. A., provides, in part, as follows:

"Section 1. There is hereby appropriated from the general fund of the state of Iowa to the executive council the sum of three hundred thousand (300,000) dollars, or so much thereof as may be necessary, to be used for landscaping, seeding and sodding, sidewalks, driveways, *interior partitions, painting, and moving expenses* of the new state office building authorized by the Sixty-first General Assembly.

"Sec. 2. Before any of the fund appropriated by this Act shall be expended, it shall be determined by the state architect with the approval of the budget and financial control committee that the expenditures shall be for the best interest of the state. All contracts shall be let in accordance with chapter seventy-three (73) of the Code." (Emphasis added)

In O.A.G., February 19, 1968, it was our opinion that "moving expenses of the new state office building" were such as were involved in the improvements described in the aforesaid Act and did not authorize payment of "moving expenses for [the mere physical act of] moving the various governmental agencies into the new state office building." Incidentally, other funds were found to be available for that kind of moving of said agencies and no part of the $300,000 was encumbered thereby. Thus, it appears that the legislature considered the incidental costs of preparing the building for occupancy by the various agencies.

We have written six opinions in the last seven months with respect to the use of the general contingent fund and which, I think, adequately delineate the limitations on the expenditure thereof. See O.A.G. October 12, 1967, October 13, 1967, January 16, 1968, January 29, 1968, February 9, 1968 and February 12, 1968. The contingent fund may be expended only for contingencies. A contingency arises out of an event which must be to some degree unforseen. Whether a contingency has arisen is a question of fact within the discretion of the executive council to determine. O.A.G. January 29, 1968. While the council's powers in exercising its discretion are broad, the exercise of such discretion must be sound and the council cannot act arbitrarily and capriciously in abuse of that

discretion. It cannot, for example, by its own acts create a situation which might thereafter result in a shortage in an appropriation and then contend the shortage constitutes a contingency which may be satisfied from the contingent fund. In other words, the council cannot do indirectly what it could not do directly. See O.A.G. February 12, 1968. If it were otherwise, Article III, §24, Constitution of Iowa, which provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law" would mean little and the executive department of our government, through its executive council, could freely invade and exercise the exclusive prerogative expressly delegated and reserved to the legislative department with respect to expenditure of public funds, whenever an appropriation was exhausted, subject only to the balance remaining in the contingent fund. A $75,000 allocation therefrom could as well be several such or a single million dollar allocation and the fund would soon be exhausted for purposes other than the purpose of providing for a real contingency as intended by the legislature. Similarly, the legislature could make many inadequate appropriations to the state agencies without the usual struggle and debate, and the pressures from the public, usually and ordinarily attending this vitally important function, and abdicate its responsibility, adding this great power to that of the executive branch.

When, as here and in the case of the appropration for an airplane for the administrative flights of the governor, (O.A.G. October 12, 1967) the legislature appropriates a specific amount for a specific purpose, it is not within the power of any person or persons to increase that appropriation for that specific purpose. "Interior partitions" were specifically provided for in the $300,000 appropriation and if constructed at all must be paid for therefrom. This is true, also, of any other improvement to the building. Had there been no specific appropriation with respect to such matters, perhaps funds could be found therefor in some other general or standing appropriation which might be construed to be broad enough to cover the same. But this is not the case. Thus, §19.29, Code of Iowa, 1966, which provides for an apparently unlimited standing appropriation to cover the performance of the duties of the executive council, cannot be used for this purpose.

II.

While I am not fully conversant with the factual background, the executive council may find, as a matter of fact, that a different situation exists with reference to the relocation of space alloted to the department of revenue in the Lucas State Office Building. This building, which is also located on the capitol ground, has been in existence for many years and, as I under stand it, the tax commission, which is now the department of revenue, has been located therein for a long time. You have attached a letter from Director of Revenue, William H. Forst, indicating it has been found that it will be necessary to do considerable electrical work and desirable to install a door into the back of the freight elevator on the fifth floor, none of which the superintendent of public buildings and grounds and his staff can accomplish within his appropriation. The estimated cost of this work is $14,207. No specific appropriation has been made for either of these purposes although $200,000 has been appropri-

ated to the superintendent of public buildings and grounds for other specifically enumerated purposes. See chapter 46, 62nd G. A., page 81.

Accordingly, if the executive council finds that such improvements, installations and repairs, including the electrical installations and the freight elevator door, are necessary to the efficient use of the building and the working conditions of the employees to be located therein, they may authorize payment of the fair and reasonable value thereof under the provisions of §19.18, Code of Iowa, 1966, or from the standing appropriation contained in the performance of duty provisions of §19.29. See 1936 O.A.G. 694 and 1930 O.A.G. 101.

April 8, 1968

ELECTIONS: Voter registration oath. §48.11, Code of Iowa, 1966. The oath provisions of §48.11, Code of Iowa, 1966, are merely directory and not mandatory. Any deviation from the statutory oath while technically not lawful does not vitiate an election nor a voter's registration under such an oath. (Martin to Synhorst, Secretary of State, 4/8/68) #68-4-12

The Hon. Melvin D. Synhorst, Secretary of State: You have forwarded to this office for an opinion of the attorney general a letter from the city clerk of the city of Bettendorf, which raises a question concerning voter registration.

Section 48.11, Code of Iowa, 1966, provides in pertinent part as follows:

"Any qualified voter who applies for registration shall subscribe to the following oath or affidavit:

" 'You do solemnly swear or affirm that you will fully and truly answer such questions as shall be put to you, touching your qualifications as a voter, under the laws of this state?' "

We are informed by the city clerk of the city of Bettendorf that Bettendorf has the following oath:

"I, being duly sworn on oath, depose and say that the statements made by me as above, are true to the best of my knowledge and belief."

The question is thus presented: Are the voters of the city lawfully registered?

It appears settled that an election statute setting forth procedures will be construed as directory and not as mandatory unless a contrary intent appears from the statute itself. *Younker v. Susong,* 133 Iowa 663, 156 N. W. 24 (1916); *Chairman in Town of Worcester v. Boho,* 29 Wis. 2d 674, 139 N. W. 2d 557 (1966); 36 O.A.G. 641. Applying this concept to §48.11, there appears to be no direction in the statute that if the statute not be complied with the registrations or the votes cast by those so registered are vitiated.

It is likewise well settled that deviation from such directory provisions are mere irregularities and do not vitiate an election. *Younker v. Susong,* 133 Iowa 663, 156 N. W. 24 (1916); *Chairman in Town of Worcester v. Boho,* 29 Wis. 2d 674, 139 N. W. 2d 557 (1966); 1936 O.A.G. 641.

It is therefore the opinion of this office that even though the voter registration oath used by the city of Bettendorf is not that required by statute, no election was vitiated thereby, and no re-registration of the entire voting population of the city of Bettendorf is necessary.

April 8, 1968

COUNTIES AND COUNTY OFFICERS — Inspection and copying of public records — Senate File 537, Chapter 106, Acts of the 62nd G. A. The lawful custodian may not refuse to permit the use of public records for purely commercial purposes. News media representatives and abstracters have as much right to examine and copy public records as does anyone else. The lawful custodian may make a charge reasonably related to the actual cost thereof for furnishing a place for examining and copying records and for supervising such records while being examined and copied; but it is doubtful that the public records act was intended to be or should be used as a revenue producing measure. (Haesemeyer to Faches, Linn County Attorney, 4/8/68) #68-4-19

Mr. William G. Faches, Linn County Attorney: Reference is made to your letter of March 14, 1968, in which you pose the following questions with respect to the recently enacted public records act, Senate File 537, Chapter 106, Acts of the 62nd G. A.:

"1. Can the lawful custodian, in this case, the Linn County Clerk, of birth, death, marriage, etc., records, continue to refuse to permit the use of these records for purely commercial purposes?

"2. Are the news media employees and abstracters, for example, 'Commercial,' or are they included in the purview of Sections 2 or 3 of Senate File 537?

"3. If news media employees and abstracters are included in the purview of Sections 2 and 3 of Senate File 537, is the fee schedule for use of a room and record supervisor, set for them, to be charged to all citizens from the family tree researcher down to the individual attorney wishing to examine a court file?"

1. The lawful custodian may not refuse to permit the use of public records for purely commercial purposes. It is quite clear that the particular records you describe are "public records" as that term is defined in section 1 of Senate File 537. It is equally plain that they are not included within the specific types of public records which section 7 of the Act provides shall be kept confidential. As stated in a recent opinion of this office to Jack M. Fulton, Commissioner of Public Safety, dated January 23, 1968, relative to Senate File 537:

"Whether or not the data obtained from your records is to be used for commercial purposes is immaterial. The statute does not make any distinction as to the purpose for which public records may be used. Hence, there is no legal authority under which you could restrict the purposes for which the person copying your records could use the information contained therein to uses determined by your department to be in the public interest."

2. As pointed out in response to your first question the purpose for which a person examining and copying your records intends to use the information obtained is irrelevant. Hence, it is not necessary to make any determination as to whether or not news media employees and abstracters, for example, represent commercial as opposed to purely private interests. In our opinion they have as much right to examine and copy public records as does the private citizen making a casual inquiry.

3. Section 3 of Senate File 537 provides:

"Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules and regulations regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or his authorized deputy in supervising the records during such work."

In our opinion the statutory provision quoted above is calculated to insure that the lawful custodian of public records is, in making such records available for examination and copying, not to be obliged to incur unnecessary expense or to have the work of his office disrupted without being reimbursed for such expense or compensated for such disruption.

It is doubtful that Senate File 537 was intended as a revenue measure and presumably the necessary expenses of providing a place for one desiring to copy public records to work would be geared to the actual cost of providing such work place. By the same token the reasonable fee which the lawful custodian is authorized, but not required, to charge for his services or the services of his deputy in supervising the records while the work of copying is going on should be closely related to the actual cost of such supervision.

Within the framework of the foregoing guideline it is our opinion that the same fee schedule for use of a room and records supervisor should apply to news media employees, abstracters, family tree researcher and individual attorneys. I should point out, however, that section 3 of Senate File 537 does require the custodian to provide a suitable place for the work of examination and copying and that it is only when it is impracticable for such work to be carried on in the lawful custodian's office that a charge may be made for providing a place for such work to be carried on. Where records are being examined on a mass basis it would probably be necessary that a special place be set aside for such examination and that some supervision of the records would be required. In such a case it is only reasonable that the lawful custodian be made whole for the expenses incurred by his office.

In the situation where the copying and examination is of a more casual nature as, for example, where only one or a few records are sought to be examined or copied it is doubtful that a special work place would be required or that the cost of supervising the records would be other than negligible. Accordingly, in this latter case the custodian of the records would be justified in making only a modest charge for his services if, indeed, he charged anything at all.

April 8, 1968

COSTS AS INCLUDING ATTORNEYS' FEES. §663.44, Code of Iowa, 1966, Ch. 410, 62nd G. A. The attorneys' fees in habeas corpus proceedings initiated by a convicted person are not authorized under §663.44, Code of Iowa, 1966. Costs and fees under that section, as

amended by §410, 62nd G. A., include attorneys' fees for court appointed attorneys claimed after July 1, 1967. Strauss to Robinson, Sec., Executive Council, April 8, 1968) #68-4-21

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of January 5, 1968, in which you enclosed claims of *Jones County v. State of Iowa* dated December 29, 1967, with the costs of various criminal cases in the amounts of $2,386.30 and $1,791.61 for which you ask approval before the submission to the Council for payment.

Reference is further made to a letter of Mr. W. C. Wellman, Deputy Secretary, dated January 29, 1968, relative to a payment of unpaid fees and costs that cannot be collected from the person liable to pay the same in the amount of $5,143.03. Certification of the clerk of the district court of Jones County is attached to each of the foregoing designated files and concerns the costs including the attorney's fees of court appointed attorneys involved in habeas corpus actions of previously convicted prisoners confined in the reformatory at Anamosa. The claims are made under the provisions of §663.44, Code of Iowa, 1966, as amended by Chapter 410 of the 62nd General Assembly. Prior to such amendment §663.44 provided the following:

"If the plaintiff is discharged, the costs shall be taxed to the defendant, unless he is an officer holding the plaintiff in custody under a warrant of arrest or commitment, or under other legal process, in which case the costs shall be taxed to the county. If the plaintiff's application is refused, the costs shall be taxed against him, and, in the discretion of the court, against the person who filed the petition in his behalf.

"However, where the plaintiff is an inmate of any state institution, and is discharged in habeas corpus proceedings, or where the habeas corpus proceedings fail and costs and fees cannot be collected from the person liable to pay the same, such costs and fees shall be paid by the county in which such state institution is located. The facts of such payment and the proceedings on which it is based, with a statement of the amount of fees or costs incurred, with approval in writing by the presiding judge appended to such statement or indorsed thereon, shall then be certified by the clerk of the district court under his seal of office to the state executive council. The executive council shall then review the proceedings and authorize reimbursement for all such fees and costs or such part thereof as the executive council shall find justified, and shall notify the state comptroller to draw a warrant to such county treasurer on the state general fund for the amount authorized."

Under the statute in that form to a claim made for the payment of attorney's fees in a habeas corpus action on November 30, 1966, the Comptroller, Marvin R. Selden, was advised in an opinion that:

"In view of the fact that habeas corpus is held to be a civil action, attorney's fees for indigents in such matters are not allowable under Chapter 663, Code of 1966 and claim therefore should be denied."

This conclusion is fortified by opinion of the Supreme Court in the case of *Waldon v. District Court*, 256 Iowa 1311, 130 N. W. 2d 728, where an original proceeding in certiorari in the Supreme Court where the district court refused to appoint counsel to indigent state prisoner, the Court there stated:

"The real question is, must a state, to give equal protection of the laws, furnish counsel to indigents to prosecute post conviction remedies? No authority so holds."

In view of the foregoing I advise you that any claim for attorney's fees claimed under the provisions of §663.44, Code of Iowa, 1966, prior to the enactment of Chapter 410, Acts of the 62nd General Assembly, should be denied since no court had power to award attorney fees in habeas corpus cases prior thereto. See Opinion Turner to Lodwick, 2-27-67. Thus any such fee award operated, if it operated at all, only against the county and had no effect on the state's duty to reimburse therefor. Chapter 410 is not, nor does it purport to be, a legalizing act and it can have no retroactive application to legalize a claim against the state for fees which were not then allowable. Said Chapter amending §663.44, Code of Iowa, 1966, provided that the term costs and fees referred to in that section shall include any fees awarded to court appointed attorneys representing an indigent party bringing habeas corpus action. Such numbered chapter became effective on July 1, 1967 and is applicable only under such claims based on awards made after such date.

April 8, 1968

CRIMINAL LAW: **Psychopathic Hospital Expenses** — §§225.7, 225.8, 225.28, 1966 Code of Iowa; §4, Ch. 5, Acts of 62nd G. A. Expenses incurred by a criminal defendant examined at the Psychopathic Hospital by court order at the request of the state should be paid out of the appropriation made to said hospital by the 62nd G. A. and not by the county from whence he was sent. (Elderkin to Wehr, Scott County Attorney, 4/8/68) #68-4-22

Mr. Edward N. Wehr, Scott County Attorney: This is in answer to your recent letter requesting an opinion as to the following:

"This office is prosecuting a criminal case entitled State of Iowa vs. Clement Lee Bogan wherein the Defendant is charged with Murder In The First Degree.

"Prior to a scheduled preliminary hearing, the Defendant's attorney moved for a continuance for the purpose of having the Defendant submit to a psychiatric examination to determine whether he was mentally competent to stand trial at this time. This motion was granted, the Defendant examined, and a report rendered to the Court.

"Upon receipt of the results of the examination, it was the desire of the State to seek such an examination of its own. A Court Order was obtained ordering the Defendant to be examined at the Psychopathic Hospital at the University of Iowa in Iowa City. This examination was requested by the State and arrangements for admittance were made by this office directly with the Psychopathic Hospital in Iowa City.

"The Defendant has now been examined and returned to custody in Scott County, and Scott County is now in receipt of two statements for services rendered from the Psychopathic Hospital, one being in the sum of $845.00 and the other in the sum of $35.00. . . .

"The specific question which we desire to be answered is whether or not under the circumstances set forth above, it is proper for a state-owned institution to charge the State of Iowa through the Scott County Attorney's Office for the type of services as stated above."

Section 225.7 of the 1966 Code of Iowa is relevant and provides as follows:

"Patients admitted to the said state psychopathic hospital shall be divided into four classes:

"1. Voluntary private patients.
"2. Committed private patients.
"3. Voluntary public patients.
"4. Committed public patients."

Obviously, a criminal defendant examined by court order at the request of the State would fall into the fourth class of patients — i.e., committed public patients.

Section 225.8 of the 1966 Code of Iowa is also relevant and states:

"All voluntary private patients and committed private patients shall be kept and maintained without expense to the state, and the voluntary public patients and committed public patients shall be kept and maintained by the state."

Section 225.28 of the Code in the past provided the method of obtaining payment of the expenses incurred by public patients. The bills for said expenses were to be rendered monthly to the State Comptroller in accordance with rules agreed upon by the Comptroller and the State Board of Regents. However, the last legislature for the first time provided a special appropriation to the Psychopathic Hospital (§4 of Chapter 5, Acts of the 62nd G. A.), which reads as follows:

"For the psychopathic hospital for the purpose of chapter two hundred twenty-five (225), Code of Iowa, there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1967, and ending June 30, 1969, the following sum or so much thereof as necessary to be used in the following manner:

"For salaries, support, maintenance, equipment, miscellaneous; *and for the care, treatment and maintenance of committed and voluntary public patients therein;* and for repairs, replacements and alterations for the psychopathic hospital . . . $1,897,000.00 (Emphasis added)

Therefore it is my opinion that the Psychopathic Hospital should pay the expenses incurred in the instant situation out of the above-mentioned appropriation rather than bill the Scott County Attorney's Office.

April 8, 1968

COUNTY CONSERVATION BOARD: Rights and liabilities in proposed dike system — Ch. 455A, 1966 Code of Iowa. State and county may be liable as one permitting a nuisance if proposed dike system in fact becomes a nuisance. State and county would be liable if the project results in a "taking" of property. (Seckington to Blum, Franklin County Attorney, 4/8/68) #68-4-23

Mr. Lee B. Blum, Franklin County Attorney: Receipt of your letter of February 28, 1968, is hereby acknowledged. In that letter you ask for an opinion on the following question:

"Will the County, the State or any employees of either of them be legally liable to landowners west of the river or down river in the event their land should later be subject to more extensive flooding than it was before the dike was built?"

The question arises because the state and county own land adjoining a river in Franklin County, and private landowners wish to build a dike system which would extend on to the state and county land.

Before answering your question, it should be pointed out that Chapter 455A, 1966 Code of Iowa, requires any person desiring to do any work on or near a floodway or flood plain to first submit an application, together with the material facts, to the Iowa Natural Resources Council. That Council is a regulatory agency whose duty is to pass on the advisability and feasibility of all work done on or near a watercourse in this state. You should therefore comply with the requirements of the above cited chapter before proceeding with any work.

Assuming that the Iowa Natural Resources Council permits you to do some work near the river, what legal consequences may arise?

There is nothing in the statute which can be read to guaranty that once a permit is issued, the permitee is protected from suit if he in fact causes damage.

The permit is issued on the finding that the proposed work will not harm the public interest, the public interest being the wise use of our water resources, §455A.2, 1966 Code of Iowa. What is wise and reasonable in the public interest may in fact cause damage to a private landowner. There is nothing in the statute to prevent that person from bringing some type of action against the permitees for damages or mandatory injunction.

It is the general rule in Iowa, as well as in most jurisdictions, that a riparian owner does not have the right to construct a dike, embankment or other structures along the normal bank of a stream to protect his land from the waters of the stream, when those structures cause waters in times of ordinary floods to damage the lands of others. (*Keck v. Venghause*, 127 Iowa 529, 103 N. W. 773; *Walters v. Marshalltown*, 145 Iowa 457, 120 N. W. 1046; *Hunt v. Smith*, 238 Iowa 543, 28 N. W. 2d 213; *Allely v. Fickel*, 243 Iowa 105, 49 N. W. 2d 544, 23 ALR 2d 750)

A statute or ordinance will not be construed to authorize the creation or maintenance of a nuisance. (*Schlotfelt v. Vinton Farmers Supply Co.*, 252 Iowa 1102, 109 N. W. 2d 695 and *Dawson v. Laufersweiler*, 241 Iowa 850, 43 N. W. 2d 726)

It makes no difference that the county and/or state do not partake in the actual construction, but only permit private individuals to do the work on county and state property. If in fact the proposed work turns out to be a nuisance, the state and county will have permitted said nuisance to be maintained.

Any person, including governmental subdivisions, who permits a nuisance to be maintained on his property, may become liable for the abatement of that nuisance, or for damages incurred because of such nuisance. See *Reardon v. Borough of Wanaque*, 28 A 2d 54, 129 NJL 18; *Maynard v. Carey Const. Co.*, 19 N. E. 2d 304, 302 Mass. 530; *Hedrick v. City of St. Joseph*, 122 S. W. 375, 138 Mo. App. 396.

The Iowa cases of *Abbott v. City of Des Moines*, 230 Iowa 494, 298 N. W. 649, and *Smith v. Iowa City*, 213 Iowa 391, 239 N. W. 29, held that the cities were not liable for damages only because the thing under consideration was not a nuisance.

The case of *Newton v. City of Grundy Center*, 246 Iowa 916, 70 N W. 2d 162, indicates that a political subdivision would be liable if it creates a nuisance. As I stated earlier, one who permits a nuisance to be maintained on his property may become liable for the abatement of that nuisance, or for damages caused by that nuisance. However, there is no indication that personal liability would attach to any state or county employee.

I suggest that a written agreement be executed between the parties to the proposed project, which agreement would contain a "save harmless" clause to protect the county and state. You might also wish to require the private individuals to post a bond in sufficient amount to insure that you would be protected from any damage caused, court costs or costs of removing the dikes. This suggestion, however, will not have any effect on the matter which I consider next.

Iowa's Constitution provides in Article I, §18, as follows:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

The 1908 amendment to the above article is not pertinent to the question under consideration.

Article I, §18, of our Constitution, *supra*, was considered in the case of *Lage v. Pottawattamie County*, 232 Iowa 955, 5 N. W. 2d 161 (1942). Plaintiff in the above cited case was a landowner whose land was inundated because of work done by the county near a watercourse. The inundation resulted in a substantial decrease in the value of Plaintiff's land.

The court, at page 949, stated:

"When a public structure directly, naturally, and necessarily results in the flooding and overflowing of private property, there is a taking of property within the meaning of the Constitution."

Later, at pages 949-950, the court states:

"In *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wall (U. S.) 166, 177, 80 U. S. 166, 177, 20 L. Ed. 557, 560, the court said:

"'. . . It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use.'"

There seems to be a great similarity between the situation the court in Pumpelly, *supra*, describes, and the factual situation of the matter under consideration.

While the state and county will not pay for or do the actual work on this project, there is a definite public benefit and use resulting from the work.

As I stated earlier, a "save harmless" clause will not protect the state or county if in fact the proposed project results in a "taking," in the Constitutional sense, of property downstream.

April 9, 1968

CITIES AND TOWNS: City payment of Justice of the Peace fees. §§367.7, 601.128, 601.131, Code of Iowa, 1966. Upon transfer of ordinance violation cases from a mayor's court to a Justice of the Peace, the Justice of the Peace is entitled only to those fees which are set out by ordinance. A city council may by ordinance adopt the fee schedule set out in §601.128, Code of Iowa, 1966. If an ordinance prosecution fails, or the defendant cannot pay the costs of the action, §367.7, Code of Iowa, 1966, authorizes the city council to make such a payment. (Martin to Wegman, Chickasaw County Attorney, 4/9/68) #68-4-13.

Mr. William L. Wegman, Chickasaw County Attorney: I have received your recent request for an opinion of the attorney general on the following matters:

1. When ordinance violations are transferred from a mayor's court to a Justice of the Peace, under the provisions of §367.7, Code of Iowa, 1966, is a Justice of the Peace entitled only to those fees which are established by ordinance, or, may he collect fees in accordance with the schedule found in §601.128, Code of Iowa, 1966.

2. If, after having been transferred, an ordinance prosecution fails, or a defendant in an ordinance prosecution cannot pay the costs may the city or town from which the transfer was made pay the costs.

Section 367.7, Code of Iowa, 1966, provides as follows:

"When an information is filed before the mayor for the violation of an ordinance of the city or town, he may, upon his own motion only, at any time before trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and such justice of the peace shall have jurisdiction thereof to the same extent and with the same power as the mayor. *The fees taxable after the transfer of the case, fixed by ordinance, shall be paid by the city or town to such justice.*" (Emphasis added)

The issues which you have raised are answered in 44 O.A.G. 183, at 184. That opinion provides as follows:

"It must be perfectly clear that in matters of prosecution for offenses against the ordinances of the city the justice should keep a docket separate and distinct from the county docket. The titles of these cases are not the 'State of Iowa v. John Doe,' but the 'city of Council Bluffs vs. John Doe.' They are not state criminal cases. *The section above provides that the fees shall be fixed by the city ordinance, and may or may not be the same as the state fees. They are paid by the city or town to the justice.* It is our opinion that said fees must be considered as other fees received by the justice, for example the same as fees in civil cases, in an accounting by the justice of the peace to the county treasury as provided in code section 10639 [now appearing as §601.131, Code of Iowa, 1966]." (Emphasis added)

It is apparent from the above cited opinion that a Justice of the Peace is not by operation of law entitled to the fees set out in §601.128, Code of Iowa, 1966, in a municipal ordinance prosecution. However, the city

council may adopt an ordinance which sets fees at the same rate as is found in §601.128. Whatever the fees may be, they are a part of the statutory compensation found in §601.131, Code of Iowa, 1966. 54 O.A.G. 91, 44 O.A.G. 183.

The language from the above set out opinion also suggests the correct view with respect to your second question. If an ordinance prosecution fails or if the defendant cannot pay the costs, the city is authorized to pay them by the last sentence of §367.7, Code of Iowa, 1966.

April 9, 1968

COUNTIES: Treasurer. §§39.17, 69.11 and 69.12, Code of Iowa, 1966. A candidate seeking to fill a vacancy in the office of treasurer at the general election in 1968 would run for a short term of two years, that being the unexpired portion of the regular four year term. (Nolan to Crotty, Pocahontas County Attorney, 4/9/68) #68-4-14

Mr. J. D. Crotty, Pocahontas County Attorney: This is in reply to your letter of March 22, 1967, requesting an opinion on the following:

"The County Treasurer elected in the November, 1966 general election resigned December 31, 1966. The Board of Supervisors appointed an individual to fill the vacancy 'until the general election of 1968.'

"Query: Will a candidate file for the office in 1968 for a term from the 1968 general election to December 31, 1970 (which would be the remainder of the term of the County Treasurer originally elected) or would the candidate file for a term from the general election of 1970 and then in the general election of 1970 run for a short term (general election 1970 to December 31, 1970) and also for the full four year term from January 1, 1970 to December 31, 1974?"

The applicable section of the Code of Iowa is §39.17 which provides in pertinent part:

"There shall be elected in each county a treasurer and a recorder of deeds at the general election to be held in 1962 and each four years thereafter, such officers shall be elected and hold office for a term of four years."

Section 69.11 and section 69.12 are also applicable. Section 69.11 provides:

"An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. . . ."

Section 69.12 provides:

"Officers elected to fill vacancies — tenure. Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law."

Construing all of these statutes, it is my view that a candidate to fill the vacancy in the office of county treasurer would seek a term commencing on the date of the general election of 1968 and until that term expires. The next full term will commence in January, 1971. In other words, the candidate seeking to fill the vacancy by election in 1968 would run for a short term of two years and if he thereafter wished to run for a full term he would run again in the election of 1970.

April 9, 1968

STATE OFFICERS AND DEPARTMENTS — Board of engineering examiners — confidential records — Chapter 106, Acts of the 62nd G. A. Personal information contained in the personnel file maintained for each registered professional engineer may be kept confidential and not opened for public inspection. (Haesemeyer to Black, Board of Engineering Examiners, 4/9/68) #68-4-18

Mr. H. M. Black, Chairman, Board of Engineering Examiners: By your letter of March 5, 1968, you have requested an opinion of the attorney general with respect to the following:

"This Board maintains a file on each person who is a Registered Professional Engineer in Iowa, commencing with the first application that he files. As of the date he becomes a registered engineer, this file will contain as a minimum:

"1. A certified transcript of the academic record he attained in college.

"2. At least five references submitted by fellow engineers, each obtained on a 'confidential' basis, and each giving opinions as to the character and professional competence of the person involved.

"3. A record of the grades he received in two examinations.

"The file may contain other information, such as experience records, special information, etc. In the event that the subject registrant has been investigated or disciplined for infractions of the law or the code of ethics, these records will be in the file.

"It is our opinion that it would be possible for the registrant to suffer substantial and irreparable injury if these files were to be available for examination and copying without substantial reason or a court order. We note that the records of a student at an educational institution must be kept confidential; it would appear that some of our records are in the same category

"Please give us an opinion that may be used by this Board in support of a policy concerning the availability of our records."

Chapter 106, Acts of the 62nd General Assembly, enunciates a broad public policy in rather sweeping terms to the effect that every citizen of the state shall have the right to examine all records of the state and of its various departments and subdivisions. Nevertheless, the legislature in apparent recognition of the need to keep some records confidential provided in §§7 and 8 of chapter 106 certain limitations on the right of the people to examine all public records. Thus §7 provides in relevant part:

"Sec. 7. The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:

* * *

"11. Personal information in confidential personnel records of public bodies including but not limited to cities, towns, boards of supervisors and school districts."

§8 provides in part:

"Sec. 8. In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit

shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. . . ."

Webster's Third New International Dictionary of the English Language, Unabridged, G. & C. Merriam Company, 1967, contains, among others, the following definition of the word "personnel":

"persons of a particular (as professional or occupational) group . . ."

It is our opinion that the files of your professional group which you have described are personnel files and that the information they contain is of a personal nature. As such these files would fall within the exemption provided for by §7(11) of chapter 106.

Moreover, in the event you did decide to open the personnel file of a particular individual to public scrutiny, the probability would be substantial that a person likely to be damaged by such proposed disclosure could successfully avail himself of the remedy of injunction for which provision is made in §8 of chapter 106.

April 9, 1968

STATE OFFICERS AND DEPARTMENTS — Employment Security Commission, supplies — Chapter 19, Code of Iowa, 1966. The matter of purchasing suplies for the employment security commission is discretionary with the executive council and if such commission wishes to utilize federal procurement sources it should obtain executive council authorization to do so. (Haesemeyer to Maley, Iowa Employment Security Commission, 4/9/68) #68-4-20

Mr. Walter F. Maley, General Counsel, Iowa Employment Security Commission: By your letter of March 21, 1968, you requested an opinion of the attorney general with respect to the following:

"The Iowa Employment Security Commission is in receipt of a communication from the U. S. Department of Labor, Bureau of Employment Security, entitled Fiscal Letter No. 758, and dated March 1, 1968. A copy of this communication is submitted herewith for your examination and advice.

"In essence the Bureau of Employment Security is considered the feasibility of issuing a federal standard under which state Employment Security Commissions would be required to purchase supplies and equipment from federal stock items primarily rather than through state central purchasing systems or through current agency procurement methods. The proposed standard under consideration is set forth therein, and Robert C. Goodwin, Administrator, requests that an Attorney General's opinion should be submitted in the event that the Iowa Employment Security Commission would be unable to comply with this proposed federal standard.

"The Commission has requested that I solicit an opinion from your office in this regard, although the pertinent provisions of Chapter 96, 1966 Code of Iowa, do not expressly prohibit the Commission from complying with this proposed federal standard. We are also unaware of any regulation or state practice which would prohibit us from purchasing items in the manner described in the enclosed Fiscal Letter No. 758. However, the Commission would prefer to rely upon your advice in this matter before replying to the U. S. Department of Labor."

A copy of Fiscal Letter No. 758 referred to in your letter is attached hereto.

The purchase of supplies for the various departments and agencies of state government is centralized in the executive council and the secretary thereof. §§19.4, 19.5, 19.18, 19.20, 19.21, 19.24, 19.25, 19.27, 19.28, Code of Iowa, 1966. Thus §19.18, Code of Iowa, 1966, provides in relevant part:

"The executive council may contract for . . . all necessary furniture, fuel, stores, and supplies . . . for the various departments of the state government at the seat of government. * * *"

§19.20, Code of Iowa, 1966, provides:

"19.20 Advertisement for bids. The secretary of the executive council shall, from time to time, on the order of the council, advertise in two newspapers published at the seat of government, and in such other newspapers as the council may order, for sealed proposals for furnishing supplies (except government postage and other noncompetitive supplies) which advertisements shall state the kind, quality, quantity, and time and place of delivery, the time and place when such proposals will be opened, and when the same must be filed with such secretary, and other matters as the council may direct.

"On any item or items which shall exceed the purchase price of two hundred dollars the council shall in the purchase of supplies and equipment, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state.

"Jobbers or others desirous of selling supplies shall, by filing with the secretary of the executive council showing their address and business be afforded an opportunity to compete for the furnishing of supplies and equipment, under such rules as the council may prescribe."

A prior opinion of the attorney general, 40 OAG 73, took the position that the matter of purchasing supplies for the unemployment compensation commission and the state employment service is discretionary with the executive council. We see no reason to depart from this earlier opinion and would recommend that if your agency wishes to avail itself of federal procurement sources as outlined in Fiscal Letter No. 758 that you obtain an appropriate authorization from the executive council to do so.

April 11, 1968

MEMORIAL HOSPITALS. Ch. 37, Code of Iowa, 1966; Ch. 103, Acts of the 62nd G. A. There is no authority under the provisions of Ch. 37, Code of Iowa, 1966, as amended by Ch. 103, 62nd G. A., to sell or lease a portion of a site of a memorial hospital to private parties for a medical clinic to be used by medical practitioners or for private parties to make a gift of a building to the commission on such premises for such purposes. (Strauss to Henke, Floyd County Attorney, 4/11/68) #68-4-17

Mr. E. W. Henke, Floyd County Attorney: Reference is herein made to your letter of February 7, 1968, in which you submitted the following:

"The Floyd County Memorial Hospital is organized and existing under the provisions of Chapter 37 of the Code of Iowa entitled 'MEMORIAL HALLS AND MONUMENTS FOR SOLDIERS, SAILORS, AND MARINES.'

"Bonds were issued as provided by Section 37.6 for the acquisition of the necessary ground and for the construction of the hospital.

"The site purchased consists of twenty (20) acres of land. Part of said liberty memorial bonds are still issued and outstanding.

"Title to the real estate is in the Floyd County Memorial Hospital Commission and Section 37.9 provides, in part, that said Commission —

" '. . . shall have charge and supervision of the erection of said building or monument, and when erected, the management and control thereof.'

"Enclosed is a Plot Plan showing the location of the hospital on the site. Marked on the sketch in the southeast corner thereof is a site approximately one and one-half (1½) acres, that, in the opinion of the Commission, is not needed for hospital purposes for the foreseeable future, if ever. There is approximately ten (10) acres to the West of the hospital building for future expansion of hospital facilities as well as to the north and northwest.

"Does the Commission have the authority under said Chapter 37 to sell said southeast portion of real estate, or alternatively, to lease the same, to private persons, firm or corporation, on such terms and conditions as the Commission would prescribe for the purpose of said Lessee erecting on said site a medical clinic for the use of persons duly licensed to practice medicine under the laws of the State of Iowa?

"The Commission is of the opinion that such use, particularly leasing rather than sale, would best serve the uses and purposes of the hospital and the general public in Floyd County, Iowa, as providing hospital and medical services with the utmost of convenience to the general public.

"Chapter 103 of the Acts of the 62nd General Assembly amended Section 37.18 as follows:

" 'The term memorial hall or memorial building as in this chapter provided, shall also mean and include such parking grounds, ramps, buildings or facilities as the Commission may build, acquire by purchase or lease or gift to be used for purposes not inconsistent with the uses as set out in this section.'

"Does the said Commission have authority, under the provisions of Chapter 37, Code of Iowa, to sell a portion of said site, or lease the same, to a private person, firm or corporation for a medical clinic to be occupied and used by persons authorized to practice medicine under the laws of the State of Iowa?

"Does the Commission have the authority under Section 37.18, as amended by said Chapter 103 of the 62nd General Assembly, to authorize private persons, firm or corporation to build a building on said site as a gift to the Commission to be used for a medical clinic to be occupied and used by persons authorized to practice medicine under the laws of the State of Iowa?"

In reply thereto I would advise you that upon the authority of the following opinions of this department, to-wit: November 25, 1929, appearing in 1930 O.A.G. at page 231, May 7, 1936, appearing in 1936 O.A.G. at page 434, April 6, 1964, appearing in 1964 O.A.G. at page 87, and an informal opinion of October 24, 1967, copies of which are hereto attached and by this reference made a part hereof, the Floyd County Memorial Hospital Commission has no authority to sell or lease a portion of the site of the Floyd County Memorial Hospital. Nor is there authority in private persons, firms or corporations to build a building on the hospital site as a gift to the commission to be used for medical clinic purposes by persons authorized to practice medicine under the laws of Iowa.

April 11, 1968

COUNTY AND COUNTY OFFICERS: Courts—§§246.38, 791, 1966 Code; Chapter 422, 62nd G. A. Acts which allowed credit to convict confined to county jail or other correctional or mental institution prior to sentencing because of failure to furnish bail, may only be applied prospectively from July 1, 1967. (Claerhout to Gaudineer, State Senator, 4/11/68) #68-4-24

Hon. Lee H. Gaudineer, Jr., State Senator: This is in response to your letter of February 1, 1968, wherein you have requested an opinion of the Attorney General as follows:

"The 62nd G. A. provided in S.F. 81, (Chapter 422, Acts of the 62nd G. A.) that all time spent by a convict in a county jail because of failure to post bond pending trial, would count on his sentence if convicted and sentenced to the penitentiary. It was made the obligation of the court clerk to certify the number of days so spent in jail to the warden. Recently I have learned that some counties are certifying for time so spent only after July 1, 1967.

"The statute uses the past tense and not the present or future tense. It also appears to be a procedural statute and not one that affects substantial rights; or it is prospective in application and not merely perspective (sic).

"Accordingly, may I have your opinion as to whether or not Chapter 422, Acts of the 62nd G. A., applies to individuals who spent time in a county jail because of failure to post bail prior to July 1, 1967, as well as after that date, if such person is still incarcerated."

The abovementioned Act became law on July 1, 1967, according to the provisions of Article III, §26, Constitution of Iowa. Section 1 of S.F. 81 amended Chapter 791, Code of Iowa, 1966, by adding a new section which states:

"Whenever any person who has been confined to jail at any time prior to sentencing because of failure to furnish bail, is sentenced to the county jail, the court shall backdate the execution of judgment or mittimus a sufficient number of days to give such person credit upon any sentence imposed for the time already spent in jail."

Section 2 of S.F. 81 amended §246.38 of the 1966 Code of Iowa adding the following provisions:

"; provided, however, if a convict had been confined to a county jail or other correctional or mental institution at any time prior to sentencing, or after sentencing but prior to his case having been decided on appeal, because of failure to furnish bail or because of being charged with a nonbailable offense, he shall be given credit for such days already served in jail upon the term of his sentence. The clerk of the district court of the county from which the convict was sentenced, shall certify to the warden the number of days so served."

A study of Chapter 422 reveals no clear indication that the prospective-retroactive issue was considered by the legislature. Ordinarily, where such statutes have reached a review by the Iowa Supreme Court, retroactive application has been denied. That court succinctly stated its position in *Manilla Community School District v. Halverson*, 1960, 251 Iowa 496, 101 N. W. 2d 705, at page 501 of the Iowa Reports:

"The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent. Generally the courts have evolved a strict rule of construction against a retrospective operation, and in fact indulged in the presumption that the legislature intended statutes, or

amendments thereof, enacted by it to operate prospectively only, and not retroactively. Grant v. Norris, supra 249 Iowa 236, 245, 85 N. W. 2d 261, 266; 50 Am. Jur., Statutes section 478. We have subscribed to the rule that retroactive laws are not looked upon with favor, but with disfavor, and we have always been loath to give statutes that effect unless the General Assembly clearly signifies or expresses that intent. Especially where as here the right affected is substantive, we favor a prospective interpretation."

However, it should be noted that the above rule is not absolute. In *Hill v. Electronics Corp. of America*, 1962, 253 Iowa 581, 113 N. W. 2d 313, the court recognized that where the statute relates solely to remedies or procedure, the general rule is subject to exception. Therefore, the problem is whether Chapter 422, Acts of the 62nd G. A. is remedial or procedural as opposed to being substantative law. Black's Law Dictionary, 1598 (4th Ed. 1951), defines substantive law as:

"That part of law which creates, defines, and regulates rights as opposed to 'adjective or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion."

The Iowa Supreme Court has spoken on the exception to the general rule prohibiting retroactive application in the case of *Davis v. Jones*, 1956, 247 Iowa 1031, 1036, 78 N. W. 2d 6, where it is stated:

"The rule that statutes will be construed to be prospective only is subject to an exception in the case of a statute relating to remedies or procedure. This exception does not apply where there is no remedy whatever before the statute was enacted. This appears to be particularly true when the statute creates new rights. 82 C.J.S., Statutes, section 421, pages 996, 997. It must be considered the new statute created a new right which a party did not have prior to its enactment. Consequently it is our holding the exception to the general rule relative to remedial and procedural statutes is not applicable to the amendment under consideration in that a new right was created by the amendment."

The *Davis* decision from which the above quote was taken, received further support from the more recent opinion in *Schultz v. Gosselink*, 1967, ____Iowa____, 148 N. W. 2d 434. In that case, the court also relied on the definitions of "substantive law" and "procedural law" found in Black's Law Dictionary to support its holding that a statute which imposed a burden of pleading and proving contributory negligence affected both remedial and substantive rights. However, the statute was then interpreted so that the burden of proof in the statute was both prospective and retroactive but the quantum of proof was prospective only. There appears to be no opportunity to so divide S.F. 81. Obviously, S.F. 81 created a new right to have a certain amount of time credited to the sentence of those prisoners who were unable to obtain bail while awaiting trial. The Act provides neither a method for enforcing these newly created rights, nor obtaining redress for their invasion. Thus, S.F. 81 (Chapter 422, Acts of the 62nd G. A.) must be considered substantive law and not procedural.

It should also be noted that the Iowa Supreme Court has commented on S.F. 81 in the recent case of *State v. Sefcheck*, ____Iowa____, filed March 5, 1968. Although the majority recommended a time credit be granted to the prisoner on the particular facts of his case, there was no mention of any statutory authority. The two dissenting justices observed:

"Admittedly these amendments [S.F. 81] do not go directly to the factual situation presented in the instant case. On the other hand they do

demonstrate awareness on the part of the legislature of the problem here presented. Stated otherwise, it is now clear the declared public policy of the State of Iowa is to avoid the anathema of double punishment."

There can be little doubt that the public policy, as recognized above, is just. While the legislature's newly found awareness of the problem is commendable, there is nothing available in the words of the Act or rules of law to show that S.F. 81 was intended to be retroactively applied. Therefore, I am of the opinion that Chapter 422, Acts of the 62nd G. A. may only be prospectively applied from its effective date of July 1, 1967.

April 11, 1968

STATE OFFICERS AND DEPARTMENTS — Department of Public Safety, receipt and disbursement of funds — §§7.9, 80.8, 80.13, 80.21, Code of Iowa, 1966. The department of public safety is not authorized to receive and disburse funds from sources other than its legislative appropriation for the training of candidates for or members of such department. (Haesemeyer to Smith, State Auditor, 4/11/68) #68-4-25

The Hon. Lloyd R. Smith, Auditor of State: By your letter of April 9, 1968, you have requested an opinion of the attorney general with respect to the following:

"Chapter 80.13 provides, 'The commissioner is authorized to hold a training school for candidates for or members of the department of public safety, and may send to recognized training schools such members as the commissioner may deem advisable, for periods not to exceed one month in any calendar year. The expenses of such school of training shall be paid in the same manner as other expenses of the patrol.'

"Chapter 80.8 states . . . 'The salaries of all members and employees of the department shall be provided for by the legislative appropriation therefor. . . .'

"Chapter 80.21 states . . . 'All salaries herein provided for and all expenses incurred under the provisions of this chapter shall be allowed and audited in the same manner as in other state offices, and shall be payable out of moneys hereafter appropriated.'

"In view of the above sections of Chapter 80 is the Department of Public Safety authorized to receive and disburse without prior approval any funds from any source; state, federal, or private, other than the legislative appropriation for the training of candidates for or members of the department of public safety."

The language of chapter 80, Code of Iowa, 1966, which you quote in your letter would appear to be dispositive of the question you raise unless there is statutory authority to be found elsewhere in the code which would authorize the department of public safety to receive and disburse funds from sources other than its appropriation. We have been unable to find any such authority in the code and it is accordingly our opinion that the department of public safety is not authorized to receive and disburse funds from a source other than its legislative appropriation for the training of candidates for or members of such department of public safety.

The maxim *expressio unis est exclusio alterius* is applicable where, as here, the legislature has expressly provided a single source from which the expenses of the department of public safety are to be paid. We must conclude that in expressing this one source the legislature intended to

exclude all others. Support for this position may be drawn from the fact that the code is replete with numerous instances where the legislature has expressly authorized various other state agencies and departments to accept and use funds from outside sources. For example, §283.1 authorizes the state board of public instruction to accept and disburse federal funds; §283A.3 gives the superintendent of public instruction authority to accept and disburse federal school lunch program funds; §234.14 permits the acceptance of federal funds to support the activities of the social welfare department; §249B.7 authorizes the commission on aging to accept and use federal funds or any grants and gifts. It is apparent from these and other provisions of the code that when the legislature wished to authorize the acceptance of federal funds or gifts or grants it did so by express statutory authorization. We must conclude, therefore, that in failing to give the department of public safety such authority the legislature intended that they not have it.

The catch-all language of §7.9 would, on the surface, appear to authorize the governor to accept or designate an agency to accept federal funds in instances where a state agency has not been designated to do so. However, as we have previously stated, §7.9 merely authorizes the governor to accept and conserve federal funds in situations where no state agency has been designated. It does not authorize the creation of new agencies or the disbursement of funds accepted other than pursuant to an oppropriation by the legislature. OAG Turner to Representative Leroy S. Miller, June 10, 1967.

April 12, 1968

STATE OFFICERS AND DEPARTMENTS — Department of Public Safety, review of rules — §§17A.1, 321.186, 321.193, Code of Iowa, 1966. The department of public safety already has authority under existing law and rules to restrict motor vehicle operator's licenses as not valid for motorcycles. Hence it is not necessary for such department to make and promulgate a new rule subject to the review provisions of Chapter 17A. (Turner to Elvers, State Senator, 4/12/68) #S68-4-3

The Hon. Adolph W. Elvers, State Senator, Chm., Departmental Rules Review Comm.: Thank you for your letter of April 9, 1968, with respect to my opinion of March 7, 1968 signed by Assistant Attorney General Joseph W. Zeller, upholding the recent policy of the department of public safety in placing a "not valid for motorcycle" restriction on new and renewed motor vehicle operator's licenses when the operator fails to prove he is competent or qualified to operate a motorcycle.

You suggest that because the department of public safety has specifically enumerated rules governing restricted licenses, and which are published in 1966 Iowa Departmental Rules, pages 525 to 526, that the new policy regarding this particular restriction should be by departmental rule, subject to the requirements of chapter 17A, Code of Iowa, 1966, particularly because of §17A.1 as amended by chapter 92, §1, 62nd G. A.

Our opinion of March 7, 1968, said the department of public safety was authorized by statute (§§321.186 and 321.193, Code of Iowa, 1966) to impose the aforementioned limitation on the operation of motorcycles by restriction of the operator's license. No consideration was given by us to how the department would put the aforementioned new policy into effect,

although it was our opinion that operators holding current valid unrestricted licenses at the present time may continue to operate either cars or motorcycles without further examination until the date of expiration.

If the department's rules as reported on pages 525 to 526 had purported to be an all inclusive list of the specific instances in which restrictions would be imposed on licenses, it is possible that the point you make could be well taken. In that event, the doctrine "expressio unis est exclusio alterius" might apply, in absence of amendment to the rules, to exclude the power of the department to impose restrictions not listed. But I feel it is unnecessary to answer that question because the rules do not purport to list all cases in which restrictions may be imposed.

In the first place, the rules to which you have reference state that they are a "partial list of restrictions that may be imposed" and, in fact, the list is quite obviously merely illustrative and intended to cite situations by way of example. Second, these rules already provide that the department may restrict a license "to operation of taxicab or *passenger car.*" Certainly, it cannot be gainsaid that the greater restriction of a license to a passenger car would include the lesser restriction of a license to operate any motor vehicle for which a chauffeur's license is not required, by the motorcycle limitation. Thus, it appears that the rules already allow this restriction, as do the aforementioned sections of the statute.

The power to impose the foregoing restriction which we have said is contained in §321.193, was apparently made a part of the motor vehicle laws in 1937 (see ch. 134, §224, Acts 47th G. A.), and the pertinent parts of the rules here involved were apparently adopted in 1953. When the department did not exercise the power it had thereunder to put the new motorcycle limitation policy into affect until only a few weeks ago, those unfamiliar with, or who had forgotten, the fact the power existed could readily conclude that the department was undertaking to legislate. Indeed, such a situation gives rise to the question of whether the failure of the department to exercise its power in this area for so many years might somehow have abrogated it. This is particularly true where one or more legislators may have, in the interval, attempted without success to effectuate such a policy by a specific law. For example, Senate Files 227 and 798, Acts of the 62nd G. A., were bills specifically introduced for the purpose of prohibiting persons from operating a motorcycle without a valid motorcycle operator's license, but which were not enacted into law. We have said, before, that the failure to enact the bill cannot amend the existing law or effect construction or interpretation of existing law. Furthermore, while there is some authority that a penal statute may be abrogated by desuetude or non-enforcement (see 49 Iowa Law Review 389) we do not believe that rule is broad enough to invalidate this new policy or the unused power which the department has had for many years.

Accordingly, Mr. Zeller's opinions of March 7 and April 3, 1968, are hereby reconfirmed and it is our opinion that whether a new rule or amendment is advisable, such is not required in order to effectuate the new policy limitation on the operation of motorcycles.

April 12, 1968

MOTOR FUEL TAX: Price posting — §324.2(1), as amended by Chapter 288, §1(1), Acts of the 62nd General Assembly and §324.20, Code of Iowa, 1966. Price posting provisions of §324.20, Code of Iowa, 1966, do not apply to distributors prices on sales of special fuel in bulk for highway use. **Prior opinion, Martin to Fullmer, April 9, 1968, withdrawn.** (Martin to Fullmer, Dir., Motor Vehicle Fuel Tax Div., 4/12/68) #68-4-26

Mr. Wayne Fullmer, Director, Gas Tax Division, Treasurer of State's Office: On April 9, 1968, this office issued an opinion on the following question: Do the price posting provisions of §324.20, Code of Iowa, 1966, require that distributors prices on sales of special fuel to bulk users be posted? Under that opinion prices on such sales were required to be posted.

We withdraw that opinion.

§324.20, Code of Iowa, 1966, provides in pertinent part as follows:

"Every distributor and other person selling *motor fuel* in this state for resale to dealers in this state shall keep posted . . . a placard showing . . . the price per gallon of each grade of motor fuel offered for sale. . . ." (emphasis added)

§324.2(1), Code of Iowa, 1966, as amended by Chapter 288, §1(1), Acts of the 62nd General Assembly, specifically excludes from the definition of motor fuel, special fuel. In our opinion of April 9, 1968, we simply overlooked this definitional section.

It is therefore the opinion of this office that the price posting provisions of §324.20, Code of Iowa, 1966, *do not* require that distributors prices on sales of special fuel to bulk users for highway use, be posted.

April 15, 1968

BOARD OF SUPERVISORS. §332.3(6), Code of Iowa, 1966. The Board of Supervisors under the general powers conferred upon it by §332.3(6) may contract as lessee for equipment designed to record for the county for taxation purposes data from city and county assessors and the board further has the authority to enter into a contract with the bank to process such tax data on the computer of such bank. (Strauss to Atwell, Supervisor of County Audits, 4/15/68) #68-4-27.

Mr. Herman E. Atwell, Supervisor of County Audits, Office of Auditor of State: Reference is herein made to your letter of April 7, 1968, in which you submitted the following:

"The Board of Supervisors are desirous of computerizing part of the operation of the County Assessor, Auditor and Treasurer with respect to data processing of real estate taxes. Two questions arise; 1). Does the Board have the authority to enter into an agreement to rent the necessary equipment for recording on magnetic tape the necessary data from the City and County Assessor's Offices? The county will furnish the necessary operation and the work will be done in the Court House. The estimated cost of this portion of the work will be $1,000.00 per month for the first year.

"2). Does the Board have the authority to enter into an agreement with the Council Bluffs Savings Bank to process the magnetic tape on the

computor owned by the bank. The estimated cost of this operation is unknown at the present time."

In reply thereto I advise:

1. On the authority of an opinion of this department appearing in the Report for 1962 at page 153, a copy of which is hereto attached and by this reference made a part hereof, the answer to both of your questions is in the affirmative and the board may enter into agreements of the character described.

2. The form and content of such agreements, including costs of the foregoing operations and the length of the term of the contract, are within the sound discretion of the board.

April 23, 1968

WELFARE: Transfer of Funds — from "Fund for Aid to Dependent Children" provided in §239.12 cannot be transferred to a fund from which wages can be paid pursuant to "Work Incentive Program" under the Work Incentive Program of the Amendment to the Social Security Act, 42 USC, Section 602ff. Public Law 90-248, January 2, 1968 by 90th Congress, H.R. 12080. (Williams to Downing, Chm., State Board of Social Welfare, 4/23/68) #68-4-30

Mr. A. Downing, Chairman, State Board of Social Welfare: You have requested an informal opinion in a letter to the Attorney General dated March 7, 1968, in which you state:

"It is our under standing that a new Work Incentive Program is to be operated by the Department of Labor. Under Priority III of the Work Incentive Program, a transfer of certain funds is required from the Department of Welfare to the Department of Labor.

"It is our understanding that some question has been raised as to whether or not a transfer of such funds from the Department of Welfare to the Department of Labor can be made without appropriate legislation."

Public Law 90-248, 90th Congress, enacted January 2, 1968, H.R. 12080, Social Security Act, was amended to provide a Work Incentive Program for recipients under a state plan which requires the State Department of Social Welfare to transfer Aid to Dependent Children assistance funds to the Employment Security Commission of the State of Iowa to be used to pay wages to recipients of Aid to Dependent Children assistance who are participating in the Work Incentive Program.

Section 239.13, 1966 Code of Iowa reads as follows:

"239.13 Assistance not assignable. Assistance granted under this chapter shall not be transferable or assignable at law or in equity, and none of the money paid or payable under this chapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

It is clear from reading the Iowa statute that there is no contemplation the money available for payments under this chapter can be transferred to another state department for the purpose of having wages paid therewith to those who may be eligible or receiving Aid to Dependent Children assistance. It also appears that because of the provision in Section 239.13 any ADC funds paid by counties to the State Department and money appropriated by the Legislature to the State Department to

create the fund cannot be used in the form of payment of wages for services performed which would subject the payment to garnishment contrary to Section 239.13.

Therefore there should be some specific enabling Legislation by the State Legislature to permit participation in Part C entitled "Work Incentive Program For Recipients of Aid Under State Plan Approved Under Part A" pursuant to Title IV of the Social Security Act as amended by Public Law 90-248, passed January 2, 1968 by the 90th Congress.

April 24, 1968

MERIT SYSTEM—Mandatory Retirement—Ch. 95, 62nd G. A., §§97B.45 and 97B.46, 1966 Code of Iowa. Highway Commission may not establish personnel rules of policies that conflict with merit system rules or with mandatory retirement rules of §97B.45 and 46. (Ivie to Coupal, Dir. of Highways, 4/24/68) #68-4-28.

J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: You have asked an opinion on the following matter:

"Does the Highway Commission have the authority to adopt a personnel policy that provides for mandatory retirement at age 65 years for all persons employed by the Highway Commission?"

Prior to enactment of Chapter 95, 62nd General Assembly, rules for personnel administration by state departments were established by the personnel director with the approval of the Executive Council. As you know, generally such rules were proposed by a department of government and submitted through the personnel director for approval by the Executive Council.

Chapter 95, 62nd General Assembly, repealed the Division of Personnel (§8.5(6), 1966 Code of Iowa) and transferred all functions of the director thereof to the Iowa Merit Employment Department. All rules and regulations with regard to personnel administration are now the responsibility of that department, subject to approval of the Executive Council and the provisions of Chapter 17A, 1966 Code of Iowa.

The Highway Commission may adopt no personnel administrative rules, regulations or policies that conflict with Chapter 95, 62nd General Assembly and rules and regulations adopted thereunder.

There is, however, a more compelling reason for answering your question in the negative. Sections 97B.45 and .46, 1966 Code of Iowa, as amended by Chapter 121, 62nd General Assembly, clearly establishes mandatory retirement age for all members of Iowa Public Employment Retirement System. All personnel of the Highway Commission are members of IPERS and therefore subject to the statutory retirement set out therein.

April 24, 1968

MERIT SYSTEM — Mandatory Retirement Regulations — I.P.E.R.S. — Chapter 95, 62nd G. A.; §8.5(6), Code of Iowa, 1966; §§97B.45 and 97B.46, Code of Iowa, 1966 and chapter 121, 62nd G A. Mandatory retirement provisions of §97B.45 and 97B.46 govern all I.P.E.R.S. mem-

bers whether covered by merit system or not. Executive Council regulations conflict with merit system policy and §97B.45 and §97B.46. (Ivie to Robinson, Sec., Executive Council 4/24/68) #68-4-29

Stephen C. Robinson, Secretary, State Executive Council: You have requested an opinion as to whether there are inconsistencies between mandatory retirement regulations adopted by the council on August 24, 1965, and the policy outlined in Chapter 95, Laws of the 62nd General Assembly, (H.F. 572).

While you do not so express, it is clear that your question is directed to the provisions of §18, Chapter 95 which reads as follows:

"No person shall be appointed or promoted to, or demoted or discharged from, any position in the merit system, or in any way favored or discriminated against, with respect to employment in the merit system because of his political or religious opinions or affiliations or race or national origin or sex, or *age*." (emphasis supplied)

Phrased in another manner, your question appears to be, "Does a mandatory retirement from a merit system position conflict with the policy outlined in Chapter 95, 62nd General Assembly?"

Chapter 95, 62nd General Assembly makes no direct mention of mandatory or compulsory retirement of any employee of state government, unless such a retirement could be considered a "discharge" as such word is used in the Act. Such an interpretation is justified to great extent by the wording of §14 of this chapter which reads in part as follows:

"Any employee who is *discharged* . . . may appeal. . . . If the commission finds that the action complained of was taken by the appointing authority for any . . . *age* or non-merit reasons, the employee shall be reinstated. . . ." (emphasis supplied)

An examination of similar merit or civil service systems of other states and the United States discloses that, in most cases, other acts are specific as to the authority for or against compulsory retirement. Examples of these are:

1. *Minnesota* (§43.05(2)2, where the rules shall provide for compulsory retirement at a fixed age.)

2. *Missouri* (§36.180, where the board is authorized to determine the eligibility of candidates subject to such limitations as to age as may be determined to be for the best interests of the service.)

3. *Illinois* (§63b108b.4, where the director is authorized to prepare rules for rejection of eligibles who fail to comply with reasonable, previously specified job requirements of the directory with regard to such factors as age.)

4. *Wisconsin* (§16.29, where retirement from service based on incapacity, including age, is directed to be a last resort.)

5. *United States* (USCA, Tit. 5, §3301, which authorizes the President to "ascertain the fitness of applicants as to age . . . for the employment sought.")

None of the statutes from other jurisdictions examined contained prohibition against discrimination based on age, as does the Iowa statute, except the Wisconsin statute. While the setting of retirement age is

most properly a part of personnel administration, where the General Assembly has enacted a specific statute with reference to compulsory retirement, no administrative group, commission or agency may adopt a contrary policy based on a general statute.

In this regard, reference must be had to §§11 and 12 of Chapter 121, 62nd General Assembly, amending §97B.45 and .46, 1966 Code of Iowa, with relation to this entire question. In these sections the 62nd General Assembly did establish a compulsory retirement age, with some modifications, which is contrary to the provisions of the regulations adopted by the Executive Council on August 24, 1965. While the applicability of these sections is limited to employees who are members of the Iowa Public Employees Retirement System, I find that, while there are members of I.P.E.R.S. exempted from the coverage of Chapter 95, 62nd General Assembly, I do not find employees covered by Chapter 95 who are not also members of I.P.E.R.S.

In *Smith v. Newell*, 245 Iowa 496, 117 N. W. 2d 883, 887, the court, in discussing §97B.45 and 97B.46, 1966 Code of Iowa, stated:

"In the instant case they withheld approval on the one ground of age. This reason, as far as the board was concerned, had no basis in the statute. The board used only §97B.45, and refused to give attention to §97B.46. Section 97B.46 is as much a part of legislative enactment as the previous section. When some employer, and head of a department, has an employee who is past seventy years of age, and still healthy and fully capable of performing his duties, the legislature, in its wisdom, provided a method to retain the usually very valuable services of such employees."

It is to be noted that Chapter 95, 62nd General Assembly was passed by the General Assembly on May 25, 1967 while Chapter 121, 62nd General Assembly, was passed on June 30, 1967. The import of these dates is that the General Assembly amended the specific compulsory retirement provisions of the Code some time after adopting the general personnel matters dealt with in the Merit System Act.

I therefore answer you as follows:

(1) The retirement regulations of August 25, 1965, do conflict with the policy and mandate of Chapter 95, 62nd General Assembly.

(2) The retirement provisions of §97B.45 and §97B.46, 1966 Code of Iowa as amended by §11 and §12 of Chapter 121, 62nd General Assembly, apply to all I.P.E.R.S. members, whether those members are covered by Chapter 95, 62nd General Assembly, or not.

May 3, 1968

COURTS — Membership of judges in judicial retirement system or IPERS — §§63.6, 63.12, 97B.45, 97B.46, 97B.69(4), 605.24, 605A.3. A judge who withdraws from the judicial retirement system is entitled to resume membership in IPERS but may not be compelled to do so. A judge retained at a judicial election who has theretofore withdrawn from the judicial retirement system may if he wishes to do so take an oath of office upon such election and within one year of the taking of such oath and upon appropriate payment and notice be readmitted to membership in the judicial retirement system. (Haesemeyer to Selden, State Comptroller, 5/3/68) #68-5-1

Mr. Marvin R. Selden, Jr., Comptroller: By your letter of April 8, 1968, you have requested an opinion of the attorney general with respect to

certain additional questions which have arisen because of our opinion of April 1, 1968, pertaining to refunds from the judicial retirement system. In your letter you state:

"We are in receipt of your opinion, requested by us on August 28, 1967, pertaining to refunds from the Judicial Retirement System, in which you have stated, 'I am of the opinion that any active judge (1) may withdraw from the system and receive back his contributions thereto without interest upon the execution of an acquittance that he will not at any time hereafter claim from the State of Iowa any benefit or annuity under the provisions of Chapter 605A of the Code (1966), nor any future benefit under any subsequent law which is supplemented, derived or provided wholly or in part by funds now on deposit with the State credited to the judicial retirement fund, except by repayment of the funds withdrawn with interest of their equivalent. (2) The foregoing applies to active judges both before and after completion of six years of service.'

"Section 97B.69, Code 1966, reads as follows:

'1. Every person who is a member of the Judicial Retirement System on July 4, 1959, or who thereafter becomes a member shall have his membership terminated in the Iowa Public Employees' Retirement System.'

"With respect to your opinion and the above cited section of the Code, we respectfully request your opinion as to the following:

"Should a judge who has voluntarily withdrawn from the Judicial Retirement System be required to contribute to the Iowa Public Employees Retirement System?

"Section 63.12, Code 1966, reads as follows: 'When the incumbent of an office is re-elected, he shall qualify as above directed, but a judge retained at a judicial election need not requalify.'

"In your opinion you state that a judge, 'may withdraw from the system,' but that he may claim future benefits from the system, 'by repayment of the funds withdrawn with interest or their equivalent.'

"Since a judge must file his notice of intention within one year after he takes oath of office, and since he is not required to again qualify after being retained at a judicial election, we respectfully request your opinion as to how he can again qualify for benefits within the provisions of Section 605A.3 of the Code."

1. §97B.69(4) provides:

"Any employee whose membership in the judicial retirement fund is subsequently terminated shall be *entitled* to resume membership in the Iowa public employees' retirement system." (Emphasis added)

The use of the word "entitled" in the foregoing statutory provision clearly connotes an element of choice or option. If the legislature had intended that a judge who terminated his membership in the judicial retirement fund was to be compelled to resume membership in IPERS it is reasonable to conclude that it would have used words having a mandatory meaning such as e.g., "shall," "must" or "shall be required" instead of the expression "shall be entitled." While we have been unable to find any Iowa cases construing these words, decisions from other jurisdictions make it clear that the words "shall be entitled to" carry with them an implication of choice. Thus in *Dasher v. Bruno*, 5 Ill. App. 2d 500, 126 N. E. 2d 404, 406 (1955) it is stated:

". . . [the] words 'shall be entitled to' were words not of limitation or imposition, but were words of right, privilege, and power implying a choice. . . ."

It is clear from the foregoing that whether or not a judge who has voluntarily withdrawn from the judicial retirement system should resume membership in IPERS is a matter which is optional with the judge.

A further reason for reaching the conclusion we have on this question may be found in the differing mandatory retirement age for judges as opposed to members of IPERS. §605.24 provides:

"605.24 Mandatory retirement. All judges of the supreme court or district court who shall have reached the mandatory retirement age, shall cease to hold office. The mandatory retirement age shall be seventy-five years for all judges of the supreme court or district court holding office on July 1, 1965. The mandatory retirement age shall be seventy-two years for all judges of the supreme court or district court appointed to office after July 1, 1965."

On the other hand for members of IPERS §§97B.45 and 97B.46 respectively establish normal and mandatory retirement ages of 65 and 70. While it is not necessary at this time to decide which of these two apparently conflicting statutory retirement provisions would prevail in the case of a judge who voluntarily withdrew from the judicial retirement system and thereafter resumed membership in IPERS, we are satisfied that a judge should not be compelled to rejoin IPERS and thereby place himself in peril of being obliged to accept retirement at an earlier age than other judges, especially in view of the legislative use of the permissive words "shall be entitled to" in §97B.69(4).

2. §§63.6 and 63.12 provide:

"63.6 Judges. All judges of courts of record shall qualify before taking office following appointment by taking and subscribing an oath to the effect that they will support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will, to the best of their knowledge and ability, administer justice according to the law, equally to the rich and the poor.

* * *

"63.12 Re-elected incumbent. When the incumbent of an office is re-elected, he shall qualify as above directed, but a judge retained at a judicial election need not requalify."

§605A.3 provides:

"605A.3 Notice by judge in writing. This chapter shall not apply to any judge of the municipal, superior, district or supreme court until he gives notice in writing, while serving as a judge, to the state comptroller and treasurer of state, of his purpose to come within its purview. Judges of the municipal and superior courts shall at the same time give a copy of such notice to the city treasurer and county auditor within the district of such court. Such notice shall be given within one year after the effective date hereof or within one year after any date on which he takes oath of office as such judge."

The second question you have asked points to an apparent inconsistency between two statutory provisions. Thus, while §605A.3 permits a judge to resume membership in the judicial retirement system by appropriate payment and notice given within one year after any date on which he took an oath of office as a judge, §63.12 provides that a judge who has been retained at a judicial election need not requalify or in other words, that he need not file an oath in the form provided in §63.6. However,

§63.12 does not say that a judge who has been retained at a judicial election may not requalify or that he shall not requalify. It merely says that such a judge "need not requalify." We read these words as permissive rather than mandatory. Thus, a judge who wished to do so could bring himself within the judicial retirement system by filing an oath in the form and manner prescribed in §63.6.

May 6, 1968

CHILD LABOR LAW: §§92.1, 91.15, 92.4(3) and 92.11, Code of Iowa, 1966. (1) A school as an institution does not come within prohibited establishments enumerated in §92.1. (2) Training school for girls qualifies for exception, stated in §92.4(3). (3) Whether girl under 16 years of age is prohibited from working in school laundry is a fact question. (Zeller to Parkins, Commissioner of Labor, 5/6/68) #68-5-4

Mr. Dale Parkins, Commissioner of Labor, Bureau of Labor: Reference is made to your recent letter of April 12, 1968, in which you write in pertinent part as follows:

"Chapter 92.1 is as follows: No person under fourteen years of age shall be employed with or without compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, ...

"Does this apply to various institutions in Iowa? The problem arises out of a situation at the Mitchellville Training School for Girls. At this institution the girls are required to run various machinery in a laundry. Are these institutions exempt from this section of the law just because they are an institution, ...

"Also in light of the above if these machines are considered dangerous, does 92.4(3) prohibit these institutions from permitting children under 16 years of age from operating or assisting in the operation of these machines? In other words does 92.4(3) apply to institutions in Iowa, or does a place such as Mitchellville Training School for Girls qualify for the exception in 92.4(3)?"

In addition to §92.1, Code of Iowa, 1966, the principal provision of which is cited in your letter, the question relates to §92.11, Code of Iowa, 1966, and to §92.4(3). Section 92.4(3) reads as follows:

"The following acts shall be unlawful:

* * *

"3. Permitting any boy or girl under sixteen years of age to operate or assist in operating dangerous machinery; but this provision shall not apply to pupils working under an instructor in manual training departments in public schools of the state or under an instructor in a school, shop, or industrial plant, in a course of vocational education approved by the state board for vocational education."

Section 92.11 reads as follows:

"No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, or morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or other like explosive is required, or in or about any mine during the school term, or in or about any hotel, cafe, restaurant, bowling alley, pool or billiard room, cigar store, barber shop, or in any occupation dangerous to life or limb.

"No female under twenty-one years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing."

Webster's Third International Dictionary defines "school" as an "institution for the teaching of children."

The work described falls into the class of school services.

In view of the above, it is my opinion that a school as an institution does not come within the coverage of §92.1, 1966 Code of Iowa, and is not included in the prohibited establishments included therein.

It is my opinion that a training school for girls does not come within the prohibitions referred to in the statute. However, a distinction should be drawn between an independent undertaking within the school operating solely for revenue purposes as distinguished from school purposes deemed to be assistance for the operation of the school. The latter class of services would seem to be exempt from the statute.

Further, the definition of a work shop as defined in §91.15 is restricted to Chapter 91 and has no application to Chapter 92, Code of Iowa, 1966.

As to your second question dealing with the provisions of §92.4(3) there are two questions of fact, (a) whether this is dangerous machinery, (b) whether the girls under sixteen years of age are prohibited from assisting in the operation of laundry machines, as they are working under an instructor.

I am of the opinion that the girls in the Mitchellville Training School do qualify for the exception provided for in §92.4(3) as they are working under an instructor in their manual training department for various operations including laundry service and are not working in commercial laundries.

Under §92.11, above cited, employment of a person under sixteen years of age is prohibited if such employment by reason of its nature or place results in injury to health or depraves the morals or in any occupation dangerous to life or limb.

This question propounded is largely one of fact and we cannot answer it as the facts are not before us upon which to base a determination.

I enclose herewith copies of a letter to Don Lowe, Bureau of Labor from Carl H. Pesch, dated October 24, 1958, which reaches a similar conclusion when applied to child labor in hospitals.

May 6, 1968

MOTOR VEHICLES: Suspension of license does not bar driving on road not open to public. §§321A.32, 321.1(48), 321.228, Code of Iowa, 1966. Suspension of license applies only on roads open to the use of the public as a matter of right. (Zeller to Rolfs, Butler County Attorney, 5/6/68) #68-5-2

Mr. Craig Rolfs, Butler County Attorney: Reference is made to your recent letter of March 28, 1968. Your letter in pertinent part reads as follows:

"I am requesting an Attorney General's opinion upon the following

question: Is it a violation of Section 321A.32(1) for a person whose operator's license is suspended under the provisions of the Motor Vehicle Financial Responsibility Act to operate a motor vehicle upon a newly constructed highway and the land upon which the new highway was constructed had never been previously used for highway purposes?

"The facts of the case in question are that the defendant was observed driving upon a portion of U. S. highway #3 which had been rerouted around the town of Shell Rock, Iowa. This was an entirely new segment of highway and although the paving was such that automobiles could travel on it the highway had not been declared open for public use by the State Highway Commission at the time the defendant was observed driving upon it."

Section 321A.32 in pertinent part reads as follows:

"Any person whose license * * * has been suspended or revoked * * * drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this chapter, shall be fined not more than five hundred dollars or imprisoned not exceeding six months, or both."

Section 321.1(48), defines "street" or "highway" as follows:

" 'Street' or 'highway' means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

There are two decisions which aid us in the interpretation of this section, which are as follows:

Sills v. Forbes, Dist. Ct. of App., Calif. 91 P. 2d 246, 248 (1939), which held that the road was not open to the use of the public, and therefore, was not a highway.

Arch Dam Constructors v. State Tax Comm. of Utah, 12 Utah 2d 96, 363 P. 2d 80, Sup. Ct. of Utah (1961)

The question above decided in the Arch Dam Constructors case was whether trucks using a road only with the permission of the United States were subject to registration and license fees. The Utah Supreme Court held that the access road being open to the public only by the permission of the United States was not a "highway" for the purpose of subjecting vehicles to registration and license fees, by the State Tax Commission. Likewise, in your letter, you have said that the roadway was not open for the use of the public.

Accordingly, we are of the opinion that since the road referred to was not open for public use, that the road is not a highway for the purpose of requiring drivers to be licensed to drive thereon under the provisions of the above statute, §321A.32, Code of Iowa, 1966, which is not affected by the provisions of §321.228. Cf. *State v. Valeu,* 1965, 257 Iowa 867, 134 N. W. 2d 911.

May 6, 1968

STATE DEPARTMENTS: TREASURER. The provisions of §12 of Chapter 391, Acts of the 62nd G. A. do not require that a separate notice for each person appearing to be the owner of unclaimed property be published by the treasurer. Names may be grouped for publication. (Nolan to Jon P. Sexton, Deputy Treasurer of State, 5/6/68) #68-5-12.

Mr. Jon P. Sexton, Deputy Treasurer of State: In your letter of March

26, 1968, you asked to be advised by this office whether you are required to publish the names of persons who appear to be owners of abandoned property and whose names were furnished in delinquent reports after publication of the list pursuant to §12 of Chapter 391, Acts of the 62nd General Assembly. Section 12 provides:

"1. Within one hundred twenty (120) days from the final date for filing of the report required by section eleven (11) of this Act, the state treasurer shall cause notice to be published at least once each week for two (2) successive weeks in an English language newspaper of general circulation in the county in this state in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside this state, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within this state."

Specifically you ask:

"Are we now required to publish the names of these additional people whose names were provided well after the filing date and after the date our general publication was made? Are we also to publish the names of every person appearing to be the owner of Unclaimed Property as they are provided to us?"

It is our view that the first question must be answered affirmatively. We construe the final date for the filing of the report required by section 11 of the Act to be that set out in section 11, subsection 4, which permits the state treasurer to postpone the reporting date upon the written request of any person required to file a report.

We do not construe the Act to require that a separate notice of the names of each person appearing to be the owner of unclaimed property be published by the treasurer as such names may be provided to him, because section 12 allows 120 days from the filing of the report within which time any number of names may be grouped together for publication.

May 6, 1968

CITIES AND TOWNS: Sewer rentals — §§393.1, 393.7, 393.8, Code of Iowa, 1966. The "Sewer Rentals Fund" may not be used to provide funds to construct a storm sewer. (Martin to Renda, State Representative, 5/6/68) #68-5-10

The Hon. Thomas A. Renda, State Representative: You have asked for an Attorney General's Opinion on the following issue:

"Is a 'storm sewer' that is used for the purpose of controlling and carrying off of surface water a 'sanitary utility' as defined by Section 393.1, so as to enable a municipal corporation to expend sewer rental funds for the construction of a 'storm sewer'?"

Section 393.1, Code of Iowa, 1966, to which you refer, provides as follows:

"The city or town council of any city or town which has installed or is installing *sewerage, a system of sewerage, sewage pumping stations, or sewage treatment or purification works or is contracting with an adjoining or nearby municipality for the use of all or part of the sanitary sewer system of said other municipality, any and all of which are hereinafter termed sanitary utilities,* for public use, and which has by ordinance established one or more sewer districts in compliance with section

391.11, may by ordinance establish just and equitable rates or charges or rentals to be paid to such city or town for the use of such sanitary utilities by every person, firm or corporation whose premises are served by a connection to such sanitary utilities directly or indirectly." (Emphasis added)

Section 393.8, Code of Iowa, 1966, provides that all sewer rental fees collected under the provisions of Chapter 393 be deposited with the city treasurer to be kept by him in a part of the Sanitation Fund denominated "Sewer Rentals Fund." This section further provides that disbursements may be made from the "Sewer Rentals Fund" only for the purposes set forth in the Chapter.

Section 393.7, Code of Iowa, 1966, in pertinent part provides as follows:

"Said sewer rentals, charges or rates may supplant or replace, in whole or in part, any millage levy taxes which may be, or have been, authorized by resolution of the council of the municipality for any of the following purposes:

* * *

"2. To pay any costs of the construction, maintenance or repair of such sanitary facilities or utilities, ..."

The statutory rubric provided by all of the above cited sections authorizes municipalities to establish rates and make charges for providing "sanitary utilities," and further authorizes a municipality to expend the funds thus collected for construction, maintenance, or repair of such "sanitary utilities."

Although there is authority which holds that "sewerage" includes a storm sewer, the title of Chapter 393, which was originally enacted by Chapter 157, Acts of the 44th G. A. provides as follows:

"An Act to provide for the financing in any city or town of the management, construction, maintenance, and operation of main *sanitary* sewers, intercepting *sanitary* sewers, outfall or outlet *sanitary* sewers, *sanitary* pumping stations, and *sanitary* sewage treatment of purifying works by a system of sewer rentals." (emphasis added)

You will note that before every noun referring to the system involved the adjective "sanitary" appears. While it may be argued that the word "sewerage," when taken alone includes a storm sewer, when viewed in light of the title of the act the intent that storm sewers not be included is manifest.

Moreover, the statute as a whole, was not designed as a general revenue producing measure. Opinion of the Attorney General, Turner to Selden, July 19, 1967.

It is therefore the opinion of this office that the Sewer Rentals Fund may not be used for the purpose of construction of storm sewers.

May 6, 1968

COUNTIES AND COUNTY OFFICERS: Reserve Deputy Sheriffs, covered by Workman's Compensation Law, Tort Liability of Governmental Subdivisions Law, and their "twenty-four hour responsibilities" are prescribed by the appointing sheriff. (Cullison to Tapscott, State Representative, 5/6/68) #68-5-5

Hon. John Tapscott, State Representative: This letter is in reply to your request for an opinion of the Attorney General concerning the status of reserve deputy sheriffs, who serve without compensation but are deputized in the same manner as other deputy sheriffs. Specifically you requested our opinion as to whether reserve deputy sheriffs are entitled to protection such as workman's compensation. You also requested our opinion as to whether reserve deputy sheriffs have the same twenty-four hour responsibilities as other peace officers.

Sheriffs are authorized to appoint deputies by §341.1, Code of Iowa 1966, which states:

"Each . . . sheriff . . . may, with the approval of the board of supervisors, appoint one or more deputies . . . not holding a county office, for whose acts he shall be responsible. The number of deputies . . . shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

The duties of the deputies are set forth in §341.6, Code of Iowa 1966, as follows:

"Each deputy . . . shall perform such duties as may be assigned to him or her by the officer making the appointment. . . ."

From the foregoing it is our opinion that the so-called "twenty-four hour responsibilities" of reserve deputy sheriffs is a matter to be determined by the sheriff who appointed them.

It is also our opinion that reserve deputy sheriffs are covered by both the Iowa Workman's Compensation Law and Chapter 405, Laws of the 62nd General Assembly, relating to tort liability of governmental subdivisions.

Section 85.62, Code of Iowa 1966, relating to coverage of the Iowa Workman's Compensation Law states:

"Any . . . sheriff . . . and all of their deputies and any and all other legally appointed or elected law-enforcing officers, who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, become temporarily or permanently physically disabled or if said injury results in death shall be entitled to compensation for all such injuries or disability together with statutory medical, nursing, hospital, surgery and funeral expenses. . . ."

Section 2 of Chapter 405, Laws of the 62nd General Assembly, an act relating to the tort liability of governmental subdivisions, states:

"Except as otherwise provided in this act, every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."

"Municipality" is defined in subsection 1 of §1 as:

"A city, town, county, township, school district, and any other unit of local government."

Since the office of the sheriff is a county office and "reserve deputy

sheriffs" who have been regularly appointed are "officers, employees, and agents" of the "municipality," their acts are within the scope of Chapter 405.

May 6, 1968

COURTS: Clerks of the District Courts must, in the absence of a rule of the court, accept for filing separate petitions from the parties to what is essentially the same matrimonial dispute. (Cullison to Wehr, Scott County Attorney, 5/6/68) #68-5-11

Mr. Edward N. Wehr, Scott County Attorney: You requested our opinion as to whether or not the Clerk of the District Court is required to accept separate petitions in what is essentially one matrimonial dispute. Specifically you asked whether or not a petition for divorce or separate maintenance may be filed in a new proceeding by the defendant-spouse in a similar proceeding already pending in the same county.

It is our opinion, in the absence of a rule of the court, that the clerk must accept for filing such a petition.

Section 606.1, Code of Iowa 1966, states:

"The clerk of the district court shall . . . keep the records . . . and record the proceedings of the court as hereinafter directed, under the direction of the judge."

The clerk's functions are ministerial and the propriety of the actions, which are commenced is a legal question to be determined by the court.

May 6, 1968

CITIES AND TOWNS: Ordinances — Chapter 366, Code of Iowa, 1966. A so-called procedural ordinance is just as binding upon succeeding councils as a substantive ordinance. Both require compliance with a statutory procedure for repeal of ordinances before a repeal may be effected. (Martin to Yarham, Cass County Attorney, 5/6/68) #68-5-3

Mr. Ray Yarham, Cass County Attorney: This will acknowledge your letter of April 1, 1968, in which you say that a councilman of the city of Atlantic has requested that you obtain an opinion of this office on the following question: Are procedural ordinances such as rules of order binding on succeeding councils?

Although we have examined the authorities, we can find no legal support for such a theory. Procedural ordinances are binding on succeeding councils until duly repealed. We have found no authority which would relegate a procedural type ordinance to a status less than that of any other kind of ordinance. An ordinance is an ordinance, though it may be merely procedural.

It is therefore the opinion of this office that a procedural ordinance is entitled to all the permanence to which an ordinance is commonly entitled. It may be repealed only by following the statutory procedure for repealing ordinances.

May 6, 1968

POLICE JUDGE. §367.13, Code of Iowa, 1966. Where the city council has provided by ordinance a salary for the police judge in lieu of all fees, such fees to be paid into the city treasury, a city ordinance in

conflict therewith is invalid. (Strauss to Atwell, Supervisor of County Audits, State Auditor's office, 5/6/68) #68-5-13

Mr. Herman E. Atwell, Supervisor of County Audits, Office of Auditor of State: Reference is herein made to your letter of April 7, 1968, in which you submitted the following:

"Below, I wish to quote a city ordinance which refers to a police judge as to salary paid and how fees received should be handled.

"1-16-2: 'SALARY: He shall receive a salary in such amount as may from time to time be fixed by the Council. In addition to said salary, he shall be entitled to keep and retain all fees and costs in connection with the handling of cases for Cerro Gordo County and the State of Iowa; provided, however, that the salary shall be in lieu of all fees and costs in cases involving the violation of any provisions of this Code.'

"The salary paid to the police judge is $150.00 per month. The police judge is paying all of the fees from city cases to the City Treasurer, but is keeping personally, all the fees from state cases. How should the police judge, under the above ordinance, handle the fees on state cases?

"Is the above city ordinance in conflict with Section 367.13 of the 1966 Code?"

According to 37 Am. Jur., §165, page 787:

"It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and state-wide application is universally held to be invalid."

For the rule in Iowa see *Seager v. Foster*, 185 Iowa 32, 169 N. W. 681, 8 A.L.R. 690; *City of Des Moines v. Reiter*, 251 Iowa 1206, 102 N. W. 2d 363; *City of Vinton v. Engledow*, 140 N. W. 2d 852.

According to §367.13, Code of Iowa, 1966, the fees of the police court are payable in the following manner:

"Police judges in criminal cases under ordinances or state laws shall receive the same fees as justices of the peace receive in similar cases. In criminal cases under ordinance, said fees shall be payable from the municipal treasury, and in criminal cases under state law, said fees shall be payable from the county treasury. The council may by ordinance provide a salary in lieu of all fees, and thereafter all fees collected shall be paid into the municipal treasury."

This statute was interpreted by an opinion issued by this department on July 20, 1964, to Mr. Robert B. Dickey, the Lee County Attorney, which opinion is hereby confirmed, and which opinion provides:

"'Approximately two years ago the city of Fort Madison created a Police Court in accordance with Chapter 367 Code of Iowa. The Police Court has been handling cases in which the defendant is charged under the Iowa court. In handling these matters he has been turning the costs into the County Treasurer. The question has now arisen as to whether or not these criminal costs should perhaps have been paid to the City Clerk of Fort Madison rather than the Lee County Treasurer.

"'After reading this section (367.13), I am inclined to think that the Lee County Treasurer should reimburse the City of Fort Madison for the fees collected, however, before doing so I would like a confirmation of this from your office.'

"Section 367.13, 1962 Code of Iowa, provides:

" 'Police judges in criminal cases under ordinances or state laws shall receive the same fees as justices of the peace receive in similar cases. In criminal cases under ordinance, said fees shall be payable from the municipal treasury, and in criminal cases under state law, said fees shall be payable from the county treasury. The council may by ordinance provide a salary in lieu of all fees, and thereafter all fees collected shall be paid into the municipal treasury.'

"Section 367.13 does not distinguish between those fees received from criminal cases under ordinance and those under state law. Since we are not authorized to make any such distinction it is our opinion that when a city council has by ordinance provided a salary in lieu of all fees for a police judge, *all* fees collected thereafter should be paid into the municipal treasury. See 1928 O.A.G. 445. It therefore follows that the city of Fort Madison should be reimbursed by Lee County for any such fees which have been paid to the county treasurer."

As so interpreted plainly the ordinance exhibited in your letter is in conflict with the terms of §367.13. The city council, having provided by ordinance for a salary for the police judge in lieu of all fees, which shall be in lieu of fees and costs involving violations of any provisions of the Code and is silent as to the disposition of fees involved in violations of city ordinances, and in practice the police judge is paying all of the fees from city cases to the city treasurer, but is not accounting for state cases, conflict with §367.13, Code of Iowa, 1966, exists, and the method provided by such numbered section prevails.

May 6, 1968

TAXATION: **Homestead Tax Credit; Disabled Veterans.** Property acquired by a veteran through the use of proceeds from the sale of property acquired under Sections 801 and 802, Chapter 21, Title 38, U.S.C. does not qualify for the tax credit contained in Chapter 350, Laws of the 62nd G. A. (McLaughlin to Akers, Assist. Dir., Property Tax Division, 5/6/68) #68-5-7.

Mr. Otto B. Akers, Assistant Director, Property Tax Division, Iowa Department of Revenue: You have requested an opinion of the Attorney General on the following:

Is a disabled veteran who uses the proceeds from the sale of homestead property to acquire other residential property which he and his family occupy as a home entitled to claim the real property tax credit for disabled veterans on the acquired property?

You have advised that a disabled veteran acquired homestead property under §§801 and 802 of Chapter 21, Title 38, U.S.C., that after occupying this property as a homestead he sold it and used the proceeds from the sale to acquire other residential property which he and his family presently occupy as a home.

Chapter 350 of the Laws of the Sixty-Second General Assembly made the following addition to Chapter 425, Code of Iowa (1966):

"SECTION 1. Chapter four hundred twenty-five (425), Code 1966, is amended by adding the following new section:

" 'In the event the owner of the homestead, allowed a credit under this chapter, is a veteran of any of the military forces of the United States who acquired the homestead under the provisions of the United States Code, title thirty-eight (38), chapter twenty-one (21), sections eight hundred one (801) and eight hundred two (802), the credit allowed on said homestead from the homestead credit fund herein provided shall be the entire amount of the tax levied on said homestead. The credit herein allowed shall be continued to the estate of such veteran who is deceased

or the surviving spouse and children who are the beneficiaries thereof so long as the surviving spouse remains unmarried and until any surviving unmarried children reach the age of twenty-one years. The provisions of this section shall not be applicable to the holder of title to any such homestead whose annual income, together with that of his spouse, if any, for the last preceding twelve (12) month income tax accounting period exceeds five thousand dollars. For the purpose of this section "income" means taxable income for federal income tax purposes plus income from securities of state and other political subdivisions exempt from federal income tax. Any veteran or his beneficiary who elects to secure the credit provided in this section shall not be eligible for any other real property tax exemption provided by law for veterans of military service.' "

Under Federal law (Section 802, Chapter 21, Title 38, U.S.C.) the acquisition of property by a qualifying disabled veteran is a one-shot proposition; that is, the assistance provided the veteran by Chapter 21 is available to him only once. Accordingly, under Federal law, assistance in acquiring the second property is not available to this veteran. Nor, in our opinion, is the homestead tax credit provided under Chapter 350, Laws of the 62nd G. A., available to the veteran. Chapter 350, quoted supra, provides that the homestead tax credit is available to the veteran who acquired his homestead property under Federal law — that is, with Federal assistance. In this instance, the veteran acquired his new homestead residence through the use of the proceeds from the sale of property originally acquired under Title 38, Chapter 21, Sections 801 and 802, U.S.C. but not directly under that section and such property does not qualify for the credit.

May 6, 1968

DEPARTMENT OF SOCIAL SERVICES: Responsibilities of superintendent and business manager of state institution. Sections 218.8 and 218.9, 1966 Code of Iowa, as amended by Chapter 209, Acts of the 62nd G. A.

The business manager, not the superintendent, is fully responsible for the financial affairs of an institution. (Seckington to Brown, Dept. of Social Services, 5/6/68) #68-5-6

Mr. M. J. Brown, Administrative Assistant, Department of Social Services: Receipt of your request for opinion dated April 23, 1968, is hereby acknowledged.

In that letter you ask the following question:

". . . Can the superintendent at an institution . . . be held fully responsible for the financial affairs of the institution?"

Chapter 218, 1966 Code of Iowa, as amended by Chapter 209, Acts of the 62nd General Assembly, outlines the duties and responsibilities of the superintendent of state institutions under the control of the Department of Social Services.

Section 218.9, 1966 Code of Iowa, provides in part as follows:

"The superintendent, warden, or other executive officer shall have the immediate custody and control, . . . of all property used in connection with the institution *except as provided in this chapter.*" (emphasis added)

Section 218.8, 1966 Code of Iowa, as amended, reads in part as follows:

"Subject to the orders and directions of the division director in control of his particular institution and to the written request of the auditor of state made to such division director, such business manager shall have the following powers, duties and responsibilities:

"1. He shall be the general business manager of the institution to which he has been appointed and shall have complete charge and supervision over all business matters and financial affairs relating to such institution, including the general institution, farms and gardens and all industries engaged in at such institution.

* * *

"4. He shall have complete control and be charged with the full accountability of all property and moneys of the institution to which he has been appointed."

It is the opinion of this office that the business manager is the one who is held fully responsible for the financial affairs of the institution and not the superintendent. The statute is clear on that point, and only by legislation can the responsibility be shifted to another person.

May 6, 1968

EXECUTIVE COUNCIL — §§18.2(4), 695.7 and 695.9, Code of Iowa, 1966. There is no authority in the executive council to require capitol police to possess and use pistols and other firearms. Such police as peace officers may be possessed of such firearms under authority granted the sheriff in §695.7 or authority of the commissioner of public safety granted in §695.9. (Strauss to Robinson, Sec., Exec. Council, 5/6/68) #68-5-8

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to your letter of April 16, 1968, in which you stated:

"The Executive Council, in their meeting held April 15, 1968, directed that I obtain from you an opinion as to whether or not the Council has authority to authorize the Capitol Police Security Patrol to carry, and upon the proper instruction, use side arm weapons, such as pistols, in the performance of their duty on the Capitol Grounds."

In reply thereto I advise as follows:

There is no authority in the executive council to require the capitol police to possess and use pistols and other firearms. However as peace officers, see §18.2(4), Code of Iowa, 1966, they could be so armed by the sheriff of Polk County under the provisions of §695.7, Code of Iowa, 1966, providing as follows:

"It shall be the duty of the sheriff to issue a permit to go armed with a revolver, pistol, or pocket billy to all peace officers and such other persons who are residents of his county, and who, in the judgment of said official, should be permitted to go so armed."

And as officers and employees of the state they could be so provided by the commissioner of public safety under the provisions of §695.9, Code of Iowa, 1966, providing as follows:

"The commissioner of public safety may, in his discretion, issue a permit to carry concealed a revolver, pistol, pocket billy or other weapon to any officer or employee of the state. Such a permit may also be issued by the commissioner to a nonresident of the state who is engaged in law-enforcing work in this state. The provisions of this chapter relative to permits to carry concealed weapons shall apply insofar as applicable, and the commissioner of public safety shall keep a record of permits issued the same as is required of sheriffs."

May 6, 1968

JUSTICE OF THE PEACE — Change of venue to mayor's court — §§367.5, 601.34, 601.35, 761.2, 761.3, 1966 Code of Iowa. Except for preliminary examination, there is no statutory authority for a change of venue from a justice of the peace court to a mayor's court. (D. B. Hendrickson to Murray, State Senator, 5/6/68) #68-5-9

Senator Donald W. Murray: Your letter of April 5, 1968 is hereby acknowledged wherein you ask an opinion on the following question, to wit:

". . . whether a change of venue could be made from a justice of the peace court to a mayor's court."

Chapter 367.5, 1966 Code of Iowa, provides that the mayor shall have in criminal matters the jurisdiction of a justice of the peace, coextensive with the county, and in civil cases, the jurisdiction within the city or town that a justice of the peace has within the township.

Despite the fact that in these matters the mayor has coextensive jurisdiction, there is no statutory authority for allowing a venue change from a justice of the peace court to a mayor's court.

Chapter 601.34 and 601.35, 1966 Code of Iowa, provide for a change of venue from a justice of the peace court but only to the next nearest justice in the township if there be any, if not, then to the next nearest justice in the county.

The Iowa court in *State v. Jamison*, 100 Iowa 342, 69 N. W. 529 (1896) stated:

"He (justice of the peace) is required to send the case to the next nearest justice in the township, and may, upon the contingency provided in the statute transfer it to another justice in the county. No provision is made for sending it to the next nearest mayor of a city or town. The word 'justice' is not a general term, applicable alike to all courts having jurisdiction of minor offenses. It is used throughout the statute as applicable to justices of the peace and not to mayors or judges of police courts or other officers."

The above cited language appears to be as relevant today as it was in 1896 for no significant changes in the applicable statutes have been made since the early Iowa decision.

It should be noted, however, that the provisions for a preliminary examination found in Chapter 761 of the 1966 Code of Iowa provides as follows:

"761.2. Before any evidence is heard, the defendant may have a change of venue, upon filing an affidavit that the magistrate is prejudiced against him, or is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes.

"761.3. On filing such an affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers, and a transcript of the entire record in the case, to the nearest magistrate in the township, if there be one; if not, to the nearest magistrate in the county, who shall proceed with said examination as hereinafter provided; but one such change shall be allowed."

Chapter 748.1(2) defines "magistrates" so as to include both justices of the peace, mayors and judges of the police court.

Therefore, if a defendant appearing for a preliminary examination before a justice of the peace acting as a magistrate, and makes a proper motion for a change of venue, a change of venue may be made to a mayor's court since both are magistrates and no distinction is made for the purposes of a preliminary examination.

In conclusion, it is our opinion that except where a defendant appears for a preliminary examination pursuant to Chapter 761, 1966 Code of Iowa, there is no statutory authority for a change of venue from a justice of the peace court to a mayor's court.

May 7, 1968

CITIES AND TOWNS. MUNICIPAL HOSPITAL. §§435.5 and 380.6, Code of Iowa, 1966. Except under conditions set out in §§435.5 and 380.6 funds of municipal hospital must be deposited in banks located in town where the hospital is located. (Nolan to Robert W. Sackett, 5/7/68) #68-5-16

Mr. Robert W. Sackett, Clay County Attorney: Several weeks ago you requested a formal opinion on the question of whether the Board of Directors of the Spencer Municipal Hospital may invest hospital funds in banks located outside the City of Spencer. Your letter states that the Spencer Hospital, while a municipal hospital, services a wide area and has grown to be "a fine, expanded and well equipped facility, mainly as beneficiary of many large gifts and bequests from this area." You also state that the area banks have been very instrumental in guiding large gifts and bequests to the hospital's benefit and it appears that it will be detrimental if it is ruled that the board of trustees cannot support these loyal institutions.

With your letter was enclosed an opinion prepared by Mr. J. I. Hossack, City Attorney of Spencer, Iowa, which concludes that the depository for the operating funds of the hospital must be located in a bank in the City of Spencer pursuant to §453.1, Code of Iowa, 1966, as amended by Chapters 301 and 359, Acts of the 62nd G. A., which provides in pertinent part as follows:

"The treasurer of . . . city . . . shall deposit all funds in their hands in such banks as are first approved by the . . . city or town council, board of hospital trustees, . . . respectively; provided, however, that the treasurer of state and the treasurer of each political subdivision shall invest all funds not needed for current operating expenses in time certificates of deposit in banks listed as approved depositories pursuant to this chapter or in investment permitted by section four hundred fifty-two point ten (452.10) of the Code. . . ."

§453.4 requires that deposits by the city or town treasurer shall be in banks located in the city or town. §453.5 is also cited and provides in pertinent part:

"If none of the duly approved banks will accept said deposits under the conditions herein prescribed or authorized, said funds may be deposited in any approved bank or banks conveniently located within the state."

Hospital trustees have no authority other than that given by statute. The city or town council is clothed with authority to transact the business of the city or town in all cases where such authority is not expressly delegated to some other board, officer or agency. 1936 O.A.G. 331. Section 380.6 of the Code, as amended by Chapter 317, Acts of the 62nd G. A., provides in part:

"Said board of trustees shall be vested with authority to provide for the management, control, and government of such city or town hospital . . . and shall provide all needed rules and regulations for the economic conduct thereof. . . .

"As a part of said board of trustees authority they may accept property by gift, devise, bequest or otherwise; and, if said board deems it advisable, may, at public sale, sell or exchange any property so accepted upon a concurring vote of a majority of all members of the board of trustees, and apply the proceeds thereof, or property received in exchange therefor, to any legitimate hospital, nursing home, or custodial home purposes.

"The said trustees may in their discretion establish a fund for depreciation as a separate fund. Said funds may be invested in United States government bonds and when so invested the accumulation of interest on the bonds so purchased shall be used for the purposes of said depreciation fund; such investment when so made shall remain in said United States government bonds until such time as in the judgment of the board of trustees it is deemed advisable to use said funds for hospital, nursing home, or custodial home purposes."

Except under the conditions set out in §453.5 and the last paragraph of §380.6 set out above, there appears to be no authority at the present time for the deposit of municipal hospital funds other than in banks located in the town where the hospital is located. We must conclude therefore that the city attorney was correct in his interpretation of the law with respect to this matter.

May 7, 1968

CONSTITUTIONAL LAW: Reapportionment of general assembly — Chapter 105, §3, Acts, 62nd G. A.; S.J.R. 8, Chapter 463, Acts, 62nd G. A. In the absence of legislative or court action the terms of senators composing the 63rd G. A. are as follows: (a) Those elected in 1968 will serve until Dec. 31, 1972, (b) Those elected in 1966 will serve until Dec. 31, 1970. If the constitutional amendment contained in S.J.R. 8 is adopted by the people in 1968 the 63rd G. A. will have to reduce the size of both houses of the general assembly and reapportion in 1969, again reapportion in 1971 and every ten years thereafter, provided that if the constitutional amendment requiring annual sessions of the legislature is also approved by the people the first reduction in size and reapportionment could occur in 1970 rather than 1969. (Turner to Lucken, State Senator, 5/7/68) #S68-5-1

The Hon. J. Henry Lucken, State Senator: Your letter of March 16, 1968, to the Secretary of State, has been referred to me for answer. Your letter stated in part:

"There appears to be some confusion about the situation on the Reapportionment Resolution to be voted on at the coming general election and present Court decision requirements on legislative districting for the 1970 election even though the Resolution calls for this to take effect after the 1970 census.

* * *

"To be more specific, my question is: Barring any further court actions, as things stand now, would you say that the legislative districts as they are set up for the 1968 election will still be in effect in the 1970 election. If this were the case then no Senate four year terms would be terminated or shortened to two years until the 1971 legislative session."

I.

As far as the four year term for senators elected in the year 1968 is concerned, §3 of chapter 105, Acts, 62nd G. A., provides in part as follows, (p. 174):

"The following single-member senatorial districts or single-member senatorial subdistricts in the year 1968 shall each elect one (1) senator for a four-year term:

Second senatorial district
Third senatorial district
Fourth senatorial district
Fifth senatorial district
Tenth senatorial district
Eleventh senatorial district
Twelfth senatorial district
Thirteenth senatorial district, subdistrict two (2)
Fifteenth senatorial district, subdistrict one (1)
Seventeenth senatorial district
Twentieth senatorial district, subdistrict one (1)
Twentieth senatorial district, subdistrict four (4)
Twenty-first senatorial district
Twenty-fourth senatorial district, subdistrict one (1)
Twenty-sixth senatorial district
Twenty-eighth senatorial district
Thirty-first senatorial district
Thirty-second senatorial district, subdistrict three (3)
Thirty-fifth senatorial district
Thirty-seventh senatorial district, subdistrict one (1)
Thirty-eighth senatorial district
Thirty-ninth senatorial district
Forty-first senatorial district
Forty-second senatorial district
Forty-third senatorial district
Forty-fourth senatorial district
Forty-fifth senatorial district
Forty-sixth senatorial district
Forty-seventh senatorial district
Forty-eighth senatorial district
Forty-ninth senatorial district. . . ."

Thus there is no existing statutory shortening of the four-year terms of senators elected at the 1968 election and senators so elected shall serve four years until and unless their terms may be terminated or shortened by subsequent legislation. (See Division II, below.)

As far as senators elected in the 1966 election from *single member* senatorial districts are concerned their terms for four years shall con-

tinue and such senators will serve until December 31, 1970, unless shortened by subsequent legislation, a very unlikely and remote possibility. Such districts are set out in chapter 105, §3, as follows, (at page 174):

"First senatorial district
Sixth senatorial district
Seventh senatorial district
Eighth senatorial district
Ninth senatorial district
Fourteenth senatorial district
Sixteenth senatorial district
Eighteenth senatorial district
Nineteenth senatorial district
Twenty-second senatorial district
Twenty-third senatorial district
Twenty-fifth senatorial district
Twenty-seventh senatorial district
Twenty-ninth senatorial district
Thirty-third senatorial district
Thirty-fourth senatorial district
Thirty-sixth senatorial district
Fortieth senatorial district"

And insofar as senators elected in 1966 for terms of four years from senatorial districts electing more than one senator are concerned, such senators shall continue to serve until December 31, 1970, unless shortened by subsequent legislation, an unlikely and remote possibility. Such subdistricts are described in §3 (page 175) as follows:

"Thirteenth senatorial district, subdistrict one (1)
Fifteenth senatorial district, subdistrict two (2)
Twentieth senatorial district, subdistrict two (2)
Twentieth senatorial district, subdistrict three (3)
Twentieth senatorial district, subdistrict five (5)
Twenty-fourth senatorial district, subdistrict two (2)
Twenty-fourth senatorial district, subdistrict three (3)
Thirtieth senatorial district, subdistrict one (1)
Thirtieth senatorial district, subdistrict two (2)
Thirty-second senatorial district, subdistrict one (1)
Thirty-second senatorial district, subdistrict two (2)
Thirty-seventh senatorial district, subdistrict two (2)"

Therefore I advise that in absence of legislative or court action, the terms of senators composing the senate of the 63rd G. A. are as follows:

(a) Those elected in the 1968 election will serve for four years or until December 31, 1972.

(b) Those elected at the 1966 election will serve until December 31, 1970.

II.

From my personal visit with you the other day, I know that the real nub of your question is what effect Senate Joint Resolution 8 (now Chap-

ter 463, Acts, 62nd G. A.), the constitutional amendment on composition of the general assembly, will have upon the above senatorial terms, as to whether they must be shortened during the 63rd General Assembly for the 1970 election, if it is adopted by the people.

Chapter 463 provides, in parts, as follows:

"Section 34. The senate shall be composed of not more than fifty (50) and the house of representatives of not more than one hundred (100) members. *Senators and representatives shall be elected from districts established by law.* Each district so established shall be of compact and contiguous territory. The state shall be apportioned into senatorial and representative districts on the basis of population. The general assembly may provide by law for factors in addition to population, not in conflict with the constitution of the United States, which may be considered in the apportioning of senatorial districts. No law so adopted shall permit the establishment of senatorial districts whereby a majority of the members of the senate shall represent less than forty (40) percent of the population of the state as shown by the most recent United States decennial census. (Emphasis added)

"Section 35. *The general assembly shall in 1971 and in each year immediately following the United States decennial census determine the number of senators and representatives to be elected to the general assembly and establish senatorial and representative districts.* The general assembly shall complete the apportionment prior to September 1 of the year so required. If the apportionment fails to become law prior to September 15 of such year, the supreme court shall cause the state to be apportioned into senatorial and representative districts to comply with the requirements of the constitution prior to December 31 of such year. The reapportioning authority shall, where necessary in establishing senatorial districts, shorten the term of any senator prior to completion of the term. Any senator whose term is so terminated shall not be compensated for the uncompleted part of the term. (Emphasis added)

"Section 36. Upon verified application by any qualified elector, the supreme court shall review an apportionment plan adopted by the general assembly which has been enacted into law. Should the supreme court dedermine such plan does not comply with the requirements of the constitution, the court shall within ninety (90) days adopt or cause to be adopted an apportionment plan which shall so comply. The supreme court shall have original jurisdiction of all litigation questioning the apportionment of the general assembly or any apportionment plan adopted by the general assembly."

What you apparently really want to know is when do the provisions of §34 go into effect if the people adopt this amendment. Does §35 mean that the general assembly does not act upon the provisions of §34 until the 64th General Assembly in 1971? Or does §34 go into effect independent of §35?

Of course, if this proposed amendment is ratified by the people in 1968, it becomes effective immediately and at such times thereafter as provided therein. The underscored words of §34 which say "Senators and representatives shall be elected from districts established by law" clearly require the legislature to reduce its size and there could be no self executing reduction before the legislature meets. But dos §35 mean that the legislature can or must wait until 1971 before taking such action? I don't think so. While it is not entirely clear, it is my opinion that §35 is independent and separable from §34 and that the 63rd General Assembly, rather than the one meeting in 1971, would be the general assembly re-

quired by the mandate of the people to establish senatorial and representative districts by law and to reduce the senate to not more than fifty (50) and the house of representatives to not more than one hundred (100) members, effective for the session following the next general election.* Section 35, then, would require that thereafter the general assembly reapportion itself in each year immediately following the decennial census, the first of which will be in 1970. Section 35 does not mean that the legislature shall wait until 1971 before apportioning itself in accordance with the provisions of §34.

* Caveat. If the people also vote for *annual sessions* in 1968 (by adopting Senate Joint Resolution 4, now Chapter 461, Acts, 62nd G. A.), there will be a regular session of the general assembly in 1970. Since no general election intervenes between the 1969 and 1970 sessions, the legislature elected to serve in 1969 will also serve in 1970. In that event, the reapportionment law required under the mandate of Chapter 463 (62nd G. A.) could either be deferred until the session in 1970 or, if not so deferred, such law could be amended or a new act substituted by the 1970 session. The reapportionment required by Chapter 463 cannot be effectuated without an election and, in absence of an intervening election, it makes no difference whether reapportionment is accomplished by the 63rd or the 64th General Assembly.

May 7, 1968

STATE OFFICERS AND DEPARTMENTS: Compatibility of officers of deputy industrial commissioner and member of city plan and zoning commission — §§86.2, 86.3, 86.8, chapter 373 and §414.6, Code of Iowa, 1966. There is neither incompatibility nor a conflict of interest involved in the same person holding both the offices of deputy industrial commissioner and member of a city plan and zoning commission. (Haesemeyer to Dahl, Industrial Commissioner, 5/7/68) #68-5-15

Mr. Harry W. Dahl, Industrial Commissioner: In your letter of March 11, 1968, you state:

"I would like to request an opinion from your office concerning the statutory limitations on the outside activities of the Industrial Commissioner and his Deputy Commissioners.

"Specifically, a Deputy Commissioner is being considered for appointment to the City Plan and Zoning Commission. As you know, Section 86.4 sets forth:

" 'It shall be unlawful for the commissioner, or any appointee of the commissioner while in office, to espouse the election or appointment of any candidate to any political office, contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, . . .'

"Further, Section 86.7 states:

" 'It shall be unlawful for the commissioner to be financially interested in any business enterprise coming under or affected by this chapter during his term of office, . . .'

"Our questions then become:

"(1) Can the Industrial Commissioner or a Deputy Industrial Commissioner stand for election to public office or for appointment to a public office or board?

"(2) Is it unlawful for the Commissioner or a Deputy Commissioner to be a member of a city plan and zoning commission, serving without pay, on an advisory board to a city council?

"(3) Would not the new Iowa State Merit Employment Law and the civil rights of the Industrial Commissioner or a Deputy Industrial Commissioner permit them to stand for election to public office or appointment to an advisory board such as a city plan and zoning commission?"

On April 8, 1968, I discussed this matter with deputy industrial commissioner Frank T. Harrison and pointed out that the opinion request was very broad in scope and appeared to go beyond the actual fact situation which prompted the request. I mentioned that it is not our practice to answer moot or academic questions and we accordingly agreed that our reply would be limited to the specific question of whether or not a deputy industrial commissioner could lawfully accept an appointment and serve without pay as a member of the city plan and zoning commission which is an advisory board to a city council.

Authority for the appointment of deputy industrial commissioners and the duties of the same are found in §§86.2, 86.3 and 86.8, Code of Iowa, 1966, which provide:

"86.2 Appointment of deputies. The commissioner may appoint four deputy industrial commissioners for whose acts he shall be responsible and who shall serve during the pleasure of the commissioner

"86.3 Duties of deputies. In the absence or disability of the industrial commissioner, or when acting under the directions of the commissioner, the deputies shall have all of the powers and perform all of the duties of the industrial commissioner pertaining to his office.

"86.8 Duties. It shall be the duty of the commissioner:

"1. To establish and enforce all necessary rules and regulations not in conflict with the provisions of this chapter and chapters 85 and 87 for carrying out the purposes thereof.

"2. To prepare and distribute the necessary blanks relating to computation, adjustment, and settlement of compensation arising thereunder.

"3. To preside as chairman of boards of arbitration for the settlement of controversies.

"4. To keep records of all proceedings and decisions of such boards, issue subpoenas for witnesses, administer oaths, examine books and records of parties subject to such provisions.

"5. In general to do all things not inconsistent with law in carrying out said provisions according to their true intent and purpose."

Statutory provisions relative to the appointment, duties and powers of members of a city plan and zoning commission are found in chapter 373 and §414.6, Code of Iowa, 1966.

It is to be observed that members of such commissions serve without pay. I am further informed that meetings of the particular commission in question would be held in the evening or at such other times as would not interfere with the deputy industrial commissioner's other duties.

There have been a great many opinions of the attorney general issued relative to compatibility of offices and some 94 such opinions are summa-

rized in an appendix to an opinion of this office, Strauss to Allen, dated August 8, 1967.

Generally speaking a public officer, other than a legislator, may hold an additional public office or employment so long as there is no incompatibility between the two offices held. See e.g. §368A.22, Code of Iowa, 1966, which permits a municipal officer or employee to hold two or more compatible positions. Where two offices are found to be conflicting the result may be somewhat harsh. As pointed out by the Iowa Supreme Court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965):

"If a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N. W. 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

After noting that the application of the common law rule quoted above may result in the first of two incompatible offices becoming vacant, the court in *State v. White*, supra, offered certain guidelines for testing whether two offices or employments are incompatible:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constituted incompatibility of offices, and the concensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 An. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

Applying the foregoing tests or criteria to the situation here presented it is our opinion that there is neither incompatibility nor a conflict of interest involved in the same person holding both the office of deputy industrial commissioner and member of a city plan and zoning commission.

May 10, 1968

STATE OFFICERS AND DEPARTMENTS: Executive Council bidding procedures — §19.20, Code of Iowa, 1966. The executive council may take invitations to bid on office furniture on the basis of a percentage discount from catalog prices rather than on an item by item basis. Where a bidder submits a bid of a percentage discount it is not necessary that he also submit the list prices to which such discount applies provided such list prices are a matter of record and can be readily verified. (Haesemeyer to Robinson, Sec., Executive Council, 5/10/68) #68-5-17

Mr. Stephen C. Robinson, Secretary, Executive Council: By your letter of April 22, 1968, you have requested an opinion of the attorney general with respect to the following:

"It has been the policy of the Council to authorize the taking of bids for the purchase of supplies and furniture articles for the various State agencies. Instead of doing this on an item by item basis, we submitted invitations to bid on a discount from catalog prices for office furniture so that whenever the Council grants authorization for the purchase of these items, it will not be necessary to take separate bids.

"Is such a practice in conformity with Section 19.20 of the Code of Iowa, 1966, a copy of the invitation to bid is hereby attached.

"Some of the Vendors, in answering said invitation, quoted their percentage discount or their percentage mark up from the manufactures list without including the said list with the bid. If the dealers list price or the manufacturers list price of April 1, 1968 is a matter of record and can be verified to me, would I have the authority to award a contract to a bidder who did not submit the list price with his bid."

§19.20, Code of Iowa, 1966, provides:

"19.20 Advertisement for bids. The secretary of the executive council shall, from time to time, on the order of the council, advertise in two newspapers published at the seat of government, and in such other newspapers as the council may order, for sealed proposals for furnishing supplies (except government postage and other noncompetitive supplies) which advertisements shall state the kind, quality, quantity, and time and place of delivery, the time and place when such proposals will be opened, and when the same must be filed with such secretary, and other matters as the council may direct.

"On any item or items which shall exceed the purchase price of two hundred dollars the council shall, in the purchase of supplies and equipment, afford all reasonable opportunity for competition, and shall give preference to local dealers and Iowa producers when such can be done without loss to the state.

"Jobbers or others desirous of selling supplies shall, by filing with the secretary of the executive council showing their address and business, be afforded an opportunity to compete for the furnishing of supplies and equipment, under such rules as the council may prescribe."

In our opinion there is nothing in such §19.20 which would prevent the executive council from putting the procedure you describe into effect. Moreover, you would have the authority to award a contract to a bidder who quoted a percentage discount or markup from list price but did not actually furnish the list price with his bid provided you are able to determine with certainty as of a specific date what the applicable list price is. This does not mean however, that a bidder in a particular case could by omitting the dealer's or manufacturer's list price from his bid, oblige the state to pay a price which would fluctuate with changes in the list price. Any percentage discount or markup would have to be applied to a single price fixed as of a specific date.

May 20, 1968

BOARD OF CONTROL: Department of Social Services — §218.94, Code of Iowa, 1966, §106, Ch. 209, Acts, 62nd G. A. §218.94 was amended by S.F. 739, now §106, Ch. 209, 62nd G. A. by substitution for the words "board of control" the words "Commissioner of the department of social services" and became effective August 15, 1967, and the power to sell real estate was vested on such date in the commissioner of the department of social services. (Strauss to Robinson, Sec., Executive Council, 5/20/68) #68-5-21

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to your letter of May 7, 1968, in which you presented the following for determination:

"The Executive Council, in their meeting held May 6, 1968, authorized the Board of Control to accept the bid submitted by Mr. Hubert DeSchamp, for an 80-acre tract of land located at the State Juvenile Home, Toledo, Iowa, said sale being held by auction, subject, however, to the determination by you as to whether or not the Board of Control has the authority to make said sale and also, whether or not the Executive Council should approve same."

Section 218.94, Code of Iowa, 1966, grants full power to acquire and sell real estate for the proper uses of certain institutions, including the State Juvenile Home, to the board of control, subject to the approval of the executive council. This section was amended by Senate File 739, now Section 106, Chapter 209, Laws of the 62nd General Assembly, by substituting for the words "board of control" the words "commissioner of the department of social services" and "commissioner" for the word "board," so that §218.94, as so amended, provides the following:

"The commissioner of the department of social services shall have full power, subject to the approval of the executive council to secure options to purchase real estate and to acquire and sell real estate for the proper uses of said institutions. Real estate shall be acquired and sold upon such terms and conditions as the commission may recommend subject to the approval of the executive council. Upon sale of such real estate, the proceeds thereof shall be deposited with the treasurer of state and credited to the general fund of the state. There is hereby appropriated from the general fund of the state a sum equal to the proceeds so deposited and credited to the general fund of the state to the department of social services which with the prior approval of the executive council may be used to purchase other real estate or for capital improvements upon property under such commissioner's control.

"The costs incident to securing of options, acquisitions and sale of real estate including, but not limited to, appraisals, invitations for offers, abstracts, and other necessary costs, may be paid from moneys appropriated for support and maintenance to the institution at which such real estate is located. Such fund shall be reimbursed from the proceeds of the sale."

Senate File 739 passed the House on June 13, 1967, passed the Senate on June 15, 1967, and was signed by the Governor on July 10, 1967. From this record and upon the authority of an opinion Turner to Faupel, 11-2-67, such bill became effective on August 15, 1967.

I return this request unapproved. I am of the opinion that this sale should be properly made by the commissioner of the department of social services.

May 20, 1968

COUNTIES: County Officers — §§39.17, 69.11, 12 and 13. At the November 1968 election where an auditor is to be elected to fill the remaining portion of a four-year term, the voters should choose an auditor for the short term and also elect a candidate for the term commencing January, 1969. (Nolan to Landess, Deputy Secretary of State, 5/20/68) #68-5-20

Mr. Robert C. Landess, Deputy Secretary of State: In your letter of April 16, 1968, you presented the following for an opinion by this office.

"If a County Auditor was appointed to fill the unexpired term in a vacancy created in that office, and the office stands for election of a new Auditor at the November 5, 1968 election, is the term of office for which the candidates for County Auditor are running, from January, 1969 to

January 1973, or from the date of election and qualification in November of 1968, through January, 1973. In the event that the term of office is from January, 1969 through January, 1973, must there be an election for the short term from November 5, 1968 to January, 1969?"

The statutes which are applicable to this situation are as follows:

"39.17 *County officers.* There shall be elected in each county at the general election to be held in the year 1960 and every four years thereafter, a clerk of the district court, an auditor and a sheriff who shall hold office for a term of four years. . . ."

"69.11 *Tenure of vacancy appointee.* An officer filling a vacancy in an office which is filled by election of the people shall continue to hold until the next regular election at which such vacancy can be filled, and until a successor is elected and qualified. Appointments to all other offices, made under this chapter, shall continue for the remainder of the term of each office, and until a successor is appointed and qualified."

"69.12 *Officers elected to fill vacancies — tenure.* Officers elected to fill vacancies, either at a special or general election, shall hold for the unexpired portion of the term, and until a successor is elected and qualified, unless otherwise provided by law."

"69.13 *Vacancies—when filled.* If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifty days, or any other office sixty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election."

The foregoing statutes have been construed by this office from time to time to require that the voters be able to elect a county officer for a short term from the time of qualification after the general election in November until the expiration of the remaining portion of the regular term the following January. Consequently, your second question is answered affirmatively.

At the November, 1968 election a county auditor should also be elected for the regular four year term commencing January, 1969.

I am enclosing herewith copies of opinions previously issued by this office.

May 20, 1968

CITIES AND TOWNS: **Bid specifications** — §§332.1 and 368.2, Code of Iowa, 1966. In purchasing road construction and maintenance equipment neither a municipality nor a county is required to obtain bids. It is not unreasonable, capricious, arbitrary or fraudulent for such a governmental body to require bids that contain (1) a guaranteed maximum repair cost and (2) a guaranteed minimum repurchase price if, the governmental body is not bound to repair or to sell, and further, if the bid specifications contain a limitation as to the period of time covered under the guarantees, which time, must be the same for all bidders. Martin to McNamara, State Representative, 5/20/68) #68-5-28.

The Hon. Walter McNamara, State Representative: I have received your recent request for an opinion of the Attorney General on the following issues:

"Is it proper under the statutes of the State of Iowa [for municipalities and counties] to include in the specifications for bidding [for construction equipment]:

"1. Guaraneed maximum repair costs for a specified period of time or hours of operation?

"2. A guaranteed minimum repurchase price for a specified length of time or hours of operation?"

We assume, for the purposes of this opinion, that the guarantees above mentioned operate in favor of the county or city and against the bidder, and are not binding on the political subdivision making the purchase. For example, if this system were to be used a county would be free at the end of the specified length of time, to sell road maintenance equipment to a purchaser in the open market, if, the resale value as determined in the general market place, would be higher.

You enclose with your request a copy of a Minnesota Attorney General's Opinion Head to Randall, June 12, 1967. In this opinion the Minnesota Attorney General in essence states that inasmuch as there was no limitation on either of the guarantees in terms of time, a political subdivision would not be comparing the same item when examining these bids and thus the procedure was invalid.

I enclose herewith a copy of a subsequent opinion of the Minnesota Attorney General Head to Arko, January 9, 1968. In that opinion the question was stated in such a manner as to limit the guaranteed maximum repair costs to a specified period of time, and limit the guaranteed minimum repurchase price to a specified length of time of operation. In that opinion the Minnesota Attorney General upholds the proposed bidding procedure.

Upon examining the authority in this state, we find that it is not necessary for political subdivisions, such as counties or cities and towns, to utilize competitive bidding in purchasing road building and maintenance equipment. Opinion of the Attorney General, Nolan to Vanderbur, January 24, 1968.

This is not to say, however, that there are no limitations placed upon political subdivisions in making such purchases. Whether competitive bidding is used or not, purchasing procedures must not be calculated or designed to be capricious, arbitrary, unreasonable, or fraudulent. *See Weiss v. Incorporated Town of Woodbine*, 228 Iowa 1, 289 N. W. 469 (1940); *Miller v. City of Des Moines*, 143 Iowa 409, 122 N. W. 226 (1909)

We find the proposed bidding system to be neither calculated nor designed to be capricious, arbitrary, unreasonable, or fraudulent.

The purpose of utilizing a guaranteed maximum repair cost in a bid, is to more accurately calculate the cost investment which a municipality or county must make in purchasing equipment of this type.

If through the purchase of an inexpensive piece of property a county finds itself forced to expend large sums for its repair and maintenance, it is obvious that the public has not received the best value for its tax dollars.

"The value of a guaranteed maximum repair cost is real even though the terms of the guarantee may never be used. If the actual cost of repair work proves less than the guaranteed maximum repair cost, the purchaser does not utilize the provisions of the guarantee; but he has

received value in that he has been able to rely on it. The quantum of this insurance value will depend on a variety of factors included, but not limited to, prior service cost experience with similar equipment, and it must and can be determined by the board so as to assure the taxpayers the best overall value for the money.

". . . A comparison of bids submitted on the differing calls is inappropriate. However, to the extent that a call for bids requires a potential seller to provide both the desired unit, as well as an insurance policy against repair costs for a specified period, it is our opinion that such a bidding procedure is permissible. . . . The call in this case, which requires both unit price and guaranteed maximum repair cost for a specified period of five years, passes the tests for competitive bidding which require that the specifications be reasonably designed to give all contractors an equal opportunity to bid and that they reasonably assure the taxpayers the best bargain for the least money." Opinion of the Minnesota Attorney General, Head to Arko, January 9, 1968. *See also*, Opinion of the Florida Attorney General, Faircloth to Ward, November 28, 1966; Opinion of the Nebraska Attorney General, Meyer to Ellwood, September 27, 1967; Opinion of the Attorney General of South Dakota, Farrar to Zeiser, October 25, 1965; Opinion of the Texas Attorney General, Carr to David, December 9, 1966, Opinion No. C-788.

It is likewise to be observed that a municipality is not realizing the full value of its tax funds if its total investment, when adjusted to reflect a guaranteed repurchase price, is not the lowest that can be had, all other things being equal.

"It is a generally recognized principle that the initial cost of equipment is only part of the potential overall cost of said equipment. The actual overall cost can only be determined at the terminal use of such equipment. Further, it is generally recognized that salvage value as well as repair cost has a relationship to the value and quality of equipment and is, therefore, properly considered by a purchaser. Guaranteed repurchase price bidding is a procedure whereby a reasonable attempt is made, prior to entering into a contract for the purchase of a specific piece of equipment, to predetermine and fix salvage costs, thereby giving the purchaser a better opportunity to determine the 'lowest responsible bidder' at the time the contract is awarded." Minnesota Attorney General, Head to Arko, January 9, 1968. *See also* Opinion of the Florida Attorney General, Faircloth to Ward, November 28, 1966; Opinion of the Nebraska Attorney General, Meyer to Ellwood, September 27, 1967; Opinion of the Attorney General of South Dakota, Farrar to Zeiser, October 25, 1965; Opinion of the Texas Attorney General, Carr to David, December 9, 1966, Opinion No. C-788.

The opinion of this office, Nolan to Vanderbur, January 24, 1968, while involving this question, is distinguishable. In that opinion the question was, may a county enter into a contract for the purchase of road building and maintenance equipment with a provision which *binds a future board of supervisors to resell* said equipment at a predetermined price at the expiration of five years. It is one thing to obtain a guarantee from a bidder that he will repurchase at a certain predetermined time, and quite another to promise to sell to that bidder.

It is therefore the opinion of this office that the proposed bidding system may be utilized by municipalities and counties in the purchase of road maintenance and construction equipment.

May 20, 1968

STATE OFFICERS AND DEPARTMENTS — §158.4, Code of Iowa, 1966. Examination for barbering license; applicant who has served appren-

ticeship in another state may be entitled to take examination for barbering license in Iowa. (Cullison to Kenyon, Iowa Dept. of Health, 5/20/68) #68-5-19

Mr. Clyde L. Kenyon, Managing Secretary, Barber Division, Iowa Department of Health: You requested our opinion as follows:

"Is an individual entitled to take the examination for a license to practice barbering in this state when he has obtained an apprentice certificate from the State of Iowa, but has served his apprenticeship for eighteen (18) months in another state?"

In our opinion such a candidate for examination is qualified if his apprenticeship was served under the supervision of a licensed practitioner of barbering in another state having license requirements comparable to Iowa's.

Section 158.4, Code of Iowa, 1966, states that a person who has completed a nine (9) month's course of theory and practice in a school of barbering approved by the barber examiner's board and has been certified a barber's apprentice and thereafter pursues "a clinic or practice course under the direct supervision and tutelage of a licensed practitioner of barbering for a period of eighteen (18) months from the date of issuance thereof . . ." shall be permitted to take the regular examination for a license to practice barbering.

We note that there is no requirement in §158.4 that the period of apprenticeship be served in the State of Iowa. We, therefore, conclude that such apprenticeship is satisfied if it is served under conditions which would be similar to Iowa's.

May 21, 1968

COUNTY SCHOOLS — Board of Education — §273.12, Code of Iowa, 1966. The county board of education is an agency of specific powers and the holding of a school of instruction for members of school boards of the county is not such a power. (Strauss to Atwell, Sup'r., County Audits, State Auditor's Office, 5/21/68) #68-5-27

Mr. Herman E. Atwell, Supervisor of County Audits, Office of Auditor of State: Reference is herein made to your letter of May 14, 1968, in which you request an opinion as to whether the county board of education may call all the members of all the school boards of a county together for a school of instruction and pay for the dinners which amounted to $80.00 from the board of education funds.

In reply thereto I advise that the county board possesses such express powers as are specifically assigned to it by law, §273.12, and implied or incidental powers to implement its express powers. Insofar as holding a school of instruction is concerned I find the board has neither express nor implied power. In the absence of a pertinent statute I am of the opinion that the county board has no authority to conduct such school of instruction or to use money from its own fund for such purposes.

May 21, 1968

TAXATION: Real Property Tax Assessment. Comparison of cultivated level farm land with cultivated rolling farm land. §441.37(1), Code of Iowa, 1966. Whether a taxpayer, protesting his property tax assessment to the local board of review, can compare all cultivated farm lands as "like property," where all such land is both level and rolling, to show

inequity in his assessment is a factual determination to be made by the local board of review based on the condition of the specific tracts of land to be compared. (Griger to Camp, State Representative, Clinton County, 5/21/68) #68-5-25

Hon. John Camp, State Representative: You have requested an opinion of the Attorney General with reference to §441.37(1), Code of Iowa, 1966, as follows:

"What the term 'like property' means in land assessments. Can you compare *all* cultivated farm land as like property, whether it is level or rolling?" (Emphasis yours)

§441.37(1) Code of Iowa, 1966, provides a ground for the taxpayer who is dissatisfied with his property tax assessment as determined by the Assessor to protest the same to the local board of review as follows:

"441.37 Protest of assessment — grounds. Any property owner or aggrieved taxpayer who is dissatisfied with his assessment may file a protest against such assessment with the board of review on or after May 1, to and including May 20, of the year of the assessment. In any county which has been declared to be a disaster area by proper federal authorities after March 1 and prior to May 20 of said year of assessment, the time for filing a protest shall be extended to and include the period from June 10 to June 20 of such year. Said protest shall be in writing and signed by the one protesting or by his duly authorized agent. Taxpayer may have an oral hearing thereon if request therefor in writing is made at the time of filing the protest. Said protest must be confined to one or more of the following grounds:

"1. That said assessment is not equitable as compared with assessments of other like property in the taxing district. When this ground is relied upon as the basis of a protest the legal description and assessments of a representative number of comparable properties, as described by the aggrieved taxpayer shall be listed on the protest, otherwise said protest shall not be considered on this ground."

As you will note, when a taxpayer protests his assessment under the provisions of §441.37(1), he must show that his assessment is inequitable as compared with assessments of *other like property* in the taxing district. Your question concerns the meaning of "like property" as used in this statute and whether a taxpayer can compare level cultivated farm land with rolling farm land as a basis of showing inequity in his assessment. Although you have presented a factual question, we call your attention to the following cases which, we think, are useful in illustrating "like" and "unlike" property comparisons.

In *Rosenbaum & Sons, Inc. vs. Coulson,* 246 Iowa 848, 69 N. W. 2d 403 (1955), the Iowa Supreme Court stated at 246 Iowa 848:

". . . in appeals by a taxpayer who alleges that the tax against his property is inequitable or out of proportion to the tax on other property, the other property must be of a *character, class,* or *kind* similar to his property. In this appeal the property which plaintiff alleges is inequitably and disproportionately assessed consists of two vacant business lots, and in determining that inequity his assessment must be compared to the assessments on property of a similar kind. Testimony as to assessments of improved business and residential property, personal property, or the property of public utilities is irrelevant and immaterial." (Emphasis supplied)

In *Daniels vs. Board of Review of Monona County,* 243 Iowa 405, 52 N. W. 2d 1 (1952), the Court noted at 243 Iowa 413-14:

"We do not mean to hold that inequality of assessment must be established by evidence of assessment of exactly similar property. *But, there must be some substantial similarity before a basis for comparison is presented.* Here we need go no further than the taxpayer's statements on this appeal to show no such substantial similarity is present. They admit the comparison here is between bottom farm land that is wet, subject to overflow, and heavy, comprising ninety-five percent of the farm land in the county and high land, with the finest soil and without drainage problems, comprising five percent of the farm land in the county." (Emphasis supplied)

Furthermore, in considering whether an assessment is disproportionate and discriminatory, comparison with but one other property is insufficient, since manifestly, an assessment is not discriminatory unless it stands out above the general level, and there is no such thing as absolute equality in the assessment of property for taxing purposes. *Crary vs. Board of Review,* 226 Iowa 1197, 286 N. W. 428 (1939).

Is the comparison of level and rolling cultivated farm land similar to the attempted comparison of wet bottom farm land and high land without drainage problems in *Daniels vs. Board of Review of Monona County,* supra? If so, then the taxpayer, as a basis for his protest to the Board of Review, cannot compare cultivated level farm land with cultivated rolling farm land.

Consultations with assessing authority have pointed out the practical problems involved in comparing farm lands. For example, one authority is of the opinion that level and gently rolling land could possibly be compared as like property, but that level land and steep phase land should not be compared as "like property." Consequently, we are of the opinion that whether a taxpayer, protesting to the local board of review, can compare *all* cultivated farm land as "like property," where all such land is both level and rolling, to show inequity in his assessment is a factual determination to be made by the local board of review based on the condition of the specific tracts of land to be compared. We have not viewed the land in question referred to in your letter and, consequently, we cannot make such determination.

May 21, 1968

COUNTY OFFICERS — Leave of Absence — There is no power in an elected county officer to take a leave of absence from his office, nor is there power in the board of supervisors to permit or authorize such leave. A deputy to the public officer may perform ministerial but not discretionary duties of the elected county officer. (Strauss to McKinley, Mitchell County Attorney, 5/21/68) #68-5-24

Mr. Keith A. McKinley, Mitchell County Attorney: I have your letter of May 7, 1968 in which you submitted the following questions:

"Can an elected county officer take a leave of absence from his position with the permission of the Board of Supervisors of the County without there being created a vacancy in the office? If so, can the Deputy in that office assume the duties during the absence of the county officer?"

In reply thereto I advise:

1. That the board of supervisors and elected county officers have only such powers as are specifically covered by statute and those incidental thereto. There is no power in the elected county officer to take a leave of obsence from officer nor is there power in the board of supervisors to

permit or to grant such leave. The general rule concerning the performance of duties by an elected public officer is stated in 42 Am. Jur., §138, Title Public Officers, at page 980, as follows:

". . . The law contemplates that an incumbent of a public office shall devote his personal attention to the duties of the office to which he is elected or appointed, but does not contemplate that such officer shall lose his title to the office or that it shall become vacant because he may be absent for a period of time and for that reason, or for some other cause, does not personally give his time and attention to the performance of his duties. While such failure of duty may furnish grounds for removal, it does not ipso facto create a vacancy."

Section 66.1, Code of Iowa, 1966, provides that the following is one of the reasons for removal of a public officer:

"1. For willful or habitual neglect or refusal to perform the duties of his office."

2. In answer to your question as to the authority of a deputy to a county officer in the absence of such officer, I would advise that such a deputy in the absence of the principal may perform ministerial duties, but may not act for the principal in matters involving judgment or discretion.

"Where an act to be done involves judgment or discretion it cannot be delegated to an agent." See *Thede v. Thornburg*, 207 Iowa 639, 645.

May 21, 1968

CONSERVATION: County Conservation Boards — Ch. 111A, §111.18, 1966 Code of Iowa. Jurisdiction and control over the improvement of state-owned meandered lakes is vested in the State Conservation Commission. County conservation boards have jurisdiction over only such lands as they may acquire for recreation and conservation purposes. (Turner to Skiver, Osceola County Attorney, 5/21/68) #68-5-29

Mr. Donald E. Skiver, Osceola County Attorney: You have asked for an opinion of this office regarding the following question which has been posed by the Osceola County Conservation Board:

"Iowa Lake lies partially in Osceola County and partly in Jackson County, Minnesota. The lake drains to the north into Minnesota. The Osceola County Conservation Board desires to raise the water level in this lake by construction of a dam across the out-let in Jackson County, Minnesota. Jackson County has agreed to furnish necessary easements to provide the site for the dam construction, but will not contribute to the cost of the dam.

"In your opinion, can the Osceola County Conservation Board expend funds levied on property in Osceola County, Iowa, to construct a dam in Jackson County, Minnesota, but which would raise the water level in the lake, and thereby improve the recreational capabilities of the Iowa portion of the lake?"

Chapter 111A of the 1966 Code of Iowa provides for the creation of county conservation boards. Section 111A.4 entitled "Powers and Duties" states that the county conservation boards shall have the custody, control and management of all real and personal property heretofore or hereafter acquired by the county for certain specified public uses related to conservation and recreation.

The language of this statute clearly indicates that the county conserva-

tion boards are to exercise jurisdiction and control only over property acquired by the county for conservation and recreation purposes enumer ated by statute.

Iowa Lake is a state-owned meandered lake and the Legislature has expressly granted jurisdiction over all meandered lakes to the State Conservation Commission (see §111.18, 1966 Code of Iowa). The answer to your question must be in the negative.

The jurisdiction of the Osceola County Conservation Board is limited to the custody, control and management of only such lands as it may acquire and since the Board has no jurisdiction over Iowa Lake, it may not expend funds for the construction and maintenance of the proposed dam, regardless of whether such dam be located in Iowa or Minnesota.

May 21, 1968

COUNTIES — Advertising — §§332.2(6), 333.2 & Ch. 364, Code of Iowa, 1966. The expenditure of public funds by Lee County Auditor for travel brochures is unauthorized and improper. (Nolan to Smith, State Auditor, 5/21/68) #68-5-26

The Hon. Lloyd R. Smith, Auditor of State: In your letter of February 12, 1968, you requested an opinion on the legality of the expenditure of public funds by a county for advertising in the form of tour guide brochures. Enclosed with your letter was a photostat of an agreement between Lee County, Fort Madison, Iowa, and the Great River Road Association, Post Office Box 420, Columbia, Missouri.

We note that while the application for advertising names Lee County, Iowa, as the purchaser and specifies the authorized signature of the county auditor, there is no indication that the board of supervisors has authorized any expenditure of funds for such purpose. There appears to be no authority under which the auditor might issue a warrant for the payment of such advertising without such authorization. §333.2, Code of Iowa, 1966.

The board of supervisors is given large discretion to make orders concerning the corporate property of the county as it may deem expedient and not inconsistent with law. *Sorenson v. Andrews,* 221 Iowa 44, 264 N. W. 562. There is no specific provision in the Code for the board of supervisors to appropriate money for the purposes of advertising the advantages of the county. §332.3(6) empowers the board of supervisors to "represent its county and have the care and management of the property and business thereof in all cases where no other provision is made." However, county boards of supervisors have only such powers as are expressly conferred by statute or necessarily implied from the power so conferred. *Mandicino v. Kelly,* .....Iowa....., 1968.

The legislature has indicated a public policy against such expenditures for advertising the advantages of a community in Chapter 364, which prohibits the expenditure of money derived from general taxation or special taxes by a city department of publicity, development and general welfare. It is our view that the expenditure of public funds by a county for the purpose set out in your letter is not proper.

May 21, 1968

CONSTITUTIONAL LAW: Incompatibility of offices of director of the Iowa state fair board and state senator — Article III, §22, Constitution of Iowa. A director of the Iowa state fair board holds a public office and he would have to relinquish such office before he could be permitted to take an oath of office as a state senator. (Haesemeyer to Kleve, Director, Iowa State Fair Board, 5/21/68) #68-5-30

Mr. Jean M. Kleve: Reference is made to your letter of May 7, 1968, in which you request an opinion of the attorney general with respect to the following

"I am considering taking out nomination papers for State Senator from Humboldt and Kossuth Counties on the Republican Ticket.

"At the present time, I am a Director of the Iowa State Fair. I would like your opinion as to whether it would be possible to keep my Director position with the Iowa State Fair if elected.

"According to Iowa State Code, any person holding a lucrative office under State shall [not] be eligible to Hold a seat in General Assembly.

"Last year my Per Diem, mileage and meals expense was $640.00, would this be considered a Lucrative job? If it would, when would my office with Iowa State Fair Board Terminate? I would appreciate your opinion as soon as possible."

Article III, §22 of the Constitution of Iowa provides as follows:

"No person holding any lucrative office under the United States, or this State, or any other power, shall be eligible to hold a seat in the General Assembly: but offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative."

The foregoing provision of the constitution does not bar a member of the general assembly from all public employment but only prohibits the simultaneous holding of a seat in the legislature and a lucrative public office. Public office has been judicially defined in *Hutton v. State*, 235 Iowa 52, 16 N. W. 2d 18 (1947) wherein the court states:

"One definition approved by various courts is that to make a public employment a public office, five elements are indispensable:

(1) It must be created by the constitution or legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) the office must have some permanency and continuity, and not be only temporary and occasional."

See also *Eller v. Iowa Employment Security Commission*, 251 Iowa 288, 100 N. W. 2d 417, 418 (1960); *Francis v. Iowa Employment Security Commission*, 250 Iowa 1300, 98 N. W. 2d 733, 734 (1959); *State v. Spaulding*, 102 Iowa 639, 72 N. W. 288 (1897)

Where there is no public office there can be no public officer, 42 Am. Jur. 880, Public Officers. However, it seems quite clear that a director

of the Iowa State Fair is a public officer within the meaning of the definition of such term hereinbefore quoted from *Hutton v. State*, supra. It is an office having a constitutional or statutory basis for its existence. §173.1, Code of Iowa, 1966. It is an office possessing a delegation of a portion of the sovereign power of government and the duties and powers of such office are defined directly through legislative authority. §173.14, Code of Iowa, 1966. Moreover, an examination of chapter 173 makes it clear that the duties of state fair directors are to be performed independently and without control of a superior power other than the law. Finally, the office has a degree of permanency and continuity and it is not only temporary or occasional. §173.6, Code of Iowa, 1966. In addition the office of director of the state fair is a lucrative one. §173.8, Code of Iowa, 1966. The fact that the amount you receive by way of per diem and expenses under §173.8 is relatively minor in amount does not alter the fact that a director of the state fair board is the holder of a lucrative office.

Accordingly, it is our opinion that the situation you describe would fall squarely within the prohibition of Article III, §22, of the Constitution of Iowa, and in the event that you were elected state senator you would have to resign your office as a director of the Iowa State Fair before you could be permitted to take the oath of office as a state senator.

May 21, 1968

TAXATION OF TRANSFERS OF REAL PROPERTY — Transfers in partition actions. §§428A.1, 428A.4, RCP 387(b). Where the interests conveyed in a partition action is without consideration no tax is due, however, if the value of the property is in excess of $1,000 and some of the parties take shares greater in value than their undivided interests a tax is due computed at the rate set out in §428A.1. (Murray to Mather, Sac County Attorney, 5/21/68) #68-5-23

Mr. Charles Mather, Sac County Attorney: Pursuant to our telephone conversation and your letter of March 4th, you have requested an opinion concerning the need for revenue stamps on a deed in partition between the owners of real estate, and if stamps are required, how does the recorder determine the value of the transaction.

The tax referred to is the subject matter of Chapter 428A, Code of Iowa 1966, and as you know the effective date of the statute was January 1, 1968. The action for partition of real property is covered by the Iowa Rules of Civil Procedure, Rules 270-298.

Section 428A.1 states as follows:

"There is hereby imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred, or otherwise conveyed, a tax determined in the following manner. When there is no consideration or when the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, is one thousand dollars or less, there shall be no tax. When the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one thousand dollars, the tax shall be one dollar ten cents plus fifty-five cents for each five hundred dollars in excess of one thousand dollars."

If as a result of the partition action, the decree entered merely sets off specific property in kind to the interested party and the conveyances

are made to the determined grantees without the payment of money, there is, of course, no consideration and according to the terms of the above cited statute no tax would attach.

Under the provisions of Rule 287(b), if the decree involves real estate, the Clerk of the Court must file a certified transcript of so much of the decree as shows the book and page where it is recorded, the confirmation of the shares and interests in the property portioned, the names of the parties found entitled to share therein, and an accurate description of each parcel allotted to each several owner with the recorder. You will note that this transcript must be presented to the County Auditor for transfer, and recorded in the deed records, and indexed as a conveyance of each parcel, with the name of the allottee as grantee and names of all other parties as grantors.

It is also to be noted that §428A.4 states as follows:

"The county recorder shall refuse to record any deed, instrument, or writing, taxable under the provisions of section 428A.1 on which documentary stamps in the amount stated thereon have not been affixed or without a statement on said deed, instrument, or writing that the same is exempt. * * *"

The certified transcript by the clerk should qualify as a sufficient statement of the fact that the conveyance is exempt.

You have mentioned the fact that under a similar federal statute, the federal government by regulation exempted a partition deed unless one party takes a share greater in value than his share of the property. The federal regulation to which you refer states as follows:

"Conveyances not subject to tax.

* * *

"(7) Partition deeds, unless, for consideration, some of the parties take shares greater in value than their undivided interests, in which event a tax attaches to each deed conveying such greater share computed upon the consideration for the excess."

The same result should be reached under the Iowa statute if the share taken by one party is greater in value than his shore of the property and it exceeds the one thousand dollar ($1,000) exclusion stated in §428A.1. It is apparent that there would be consideration involved in such a transaction.

Since the amount of the tax is fixed by §428A.1, it remains for the recorder to inquire of the person filing the instrument the amount of the consideration paid if it does not contain a documentary stamp. When said amount is determined the recorder must require that documentary stamps be purchased in an amount sufficient to meet the requirements of §428A.1, or the recorder may refuse to record the instrument if sufficient stamps are not affixed thereto under the provisions of §428A.4.

May 21, 1968

STATE OFFICERS AND DEPARTMENTS: Disposition of unclaimed property — Chapter 391, Acts, 62nd G. A. Where a claim is made against property shown as unclaimed on a report filed with the treasurer of state but which property has not yet been paid over to the

state any determination of the validity of the claim must be made solely by the holder. (Haesemeyer to Logsdon, Unclaimed Prop. Div., Treasurer of State, 5/21/68) #68-5-31

Mr. George J. Logsdon, Unclaimed Property Division, Office of Treasurer of State: By your letter of April 26, 1968, you have requested an opinion of this office with respect to a certain abandoned bank account reported to the treasurer of state pursuant to §11 of the Disposition of Unclaimed Property Act, chapter 391, Acts, 62nd G. A., (hereinafter referred to as "the Act").

The facts which have prompted your request may be briefly summarized as follows. On October 31, 1967, in accordance with §11 of the Act mentioned above the Williams Savings Bank, Willianms, Iowa, filed a report of unclaimed property held by it as of June 30, 1967, showing among other things, the following item:

"

Description of Property	Name and Last Known Address of Owner, Beneficiary, or Annuitant	Date of Last Transaction	Amount Due Owner
Checking Account	Farmers Savings Bank (Depositors Acct.) Blairsburg, Iowa	1-26-40	284.59

It appears from your letter and the correspondence attached thereto that one M. J. Isebrands has laid claim to this account in the hands of the Williams Savings Bank on the grounds that he is the sole surviving stockholder of the Farmers Savings Bank, Blairsburg, Iowa. It further appears that Mr. Isebrands has offered to make his affidavit to the effect that he is such sole surviving stockholder and has agreed to hold the Williams Savings Bank harmless from and against any and all other claims which might be asserted against the account in the event such Williams Savings Bank saw fit to pay such account over to him.

It appears that your request for our opinion stems from a request for advice from the Williams Savings Bank as a result of Mr. Isebrands' demand that the account in question be paid over to him. Strictly speaking the Williams Savings Bank, upon the advice of its own counsel, if necessary, should make any determination of Mr. Isebrands' entitlement to the funds in question prior to such account being delivered to the treasurer of state. Thus §13 of the Act provides in part as follows:

". . . if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section twelve (12) of this Act, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the state treasurer, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment."

As a practical matter, however, any holder who had filed a report under the Act would be ill-advised to pay over any amount listed in such report

to anyone claiming the same unless he was absolutely convinced of the claimant's entitlement thereto. This is so because of the language of §14 of the Act which provides:

"Sec. 14. Relief from Liability by Payment or Delivery. Upon the payment or delivery of abandoned property to the state treasurer, the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who pays or delivers abandoned property to the state treasurer under this Act is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. Any holder who has paid moneys to the state treasurer pursuant to this Act may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the state treasurer shall forthwith reimburse the holder for the payment."

Thus, a holder who pays or delivers abandoned property to the state treasurer is thereafter relieved of any liability with respect thereto, but if such holder pays or delivers such property to a claimant he must then prove to the treasurer that the claimant-payee was entitled to the amount paid.

In light of the foregoing and in view of the fact that the Williams Savings Bank is about to pay over the account to the treasurer of state, it is our view that any opinion that we would give you at this time as to the merits of Mr. Isebrands' claim would be premature.

Once the account has been delivered over to the state treasurer Mr. Isebrands may file a claim against the same under §19 of the Act which provides:

"Sec. 19. Claim for Abandoned Property Paid or Delivered. Any person claiming an interest in any property delivered to the state under this Act may file a claim thereto or to the proceeds from the sale thereof on the form prescribed by the state treasurer."

Thereafter, it is the duty of the state treasurer to consider the claim and make a decision with respect thereto. Thus, §20 of the Act provides:

"Sec. 20. Determination of Claims.

1. The state treasurer shall consider any claim filed under this Act and may hold a hearing and receive evidence concerning it. If a hearing is held, he shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard by him and the reasons for his decision. The decision shall be a public record.

2. If the claim is allowed, the state treasurer shall make payment forthwith. The claim shall be paid without deduction for costs of notices or sale or for service charges."

After the account in question has been delivered to your office, if a claim is filed with you pursuant to §20 of the Act and if you request our advice, we will render an opinion as to the legal merits of Mr. Isebrands' claim. However, prior to such time as the account is actually paid over and delivered to the state treasurer any determination of Mr. Isebrands' entitlement thereto will have to be made solely by the Williams Savings Bank.

May 21, 1968

STATE OFFICERS AND DEPARTMENTS: National guard, discrimina-

tion in employment on account of membership in — §§29A.28, 29A.43, Code of Iowa, 1966. The state and its subdivisions are prohibited from discharging any person from employment on account of membership in the military forces of the state or preventing or hindering him from performing any military service he may be called upon to perform by proper authority. (Haesemeyer to May, Deputy Adj. Gen., 5/21/68) #68-5-18.

Joseph G. May, B. G., Deputy Adjutant General: You have requested an opinion of the attorney general as to whether or not the state and subdivisions thereof are "employers" within the meaning of §29A.43, Code of Iowa, 1966. §29A.43 provides:

"29A.43 Discrimination prohibited — leave of absence. No person, firm, or corporation, shall discriminate against any officer or enlisted man of the national guard or organized reserves of the armed forces of the United States because of his membership therein. No employer, or agent of any employer, shall discharge any person from employment because of being an officer or enlisted man of the military forces of the state, or hinder or prevent him from performing any military service he may be called upon to perform by proper authority. Any member of the national guard or organized reserves of the armed forces of the United States ordered to temporary active duty for the purpose of military training or ordered on active state service, shall be entitled to a leave of absence during the period of such duty or service from his private employment, other than employment of a temporary nature, and upon completion of such duty or service the employer shall restore such person to the position held prior to such leave of absence, or employ such person in a similar position, provided, however, that such person shall give evidence to the employer of satisfactory completion of such training or duty, and further provided that such person is still qualified to perform the duties of such position. Such period of absence shall be construed as an absence with leave, and shall in no way affect the employee's rights to vacation, sick leave, bonus, or other employment benefits relating to his particular employment. Any person violating any of the provisions of this section shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for a period of not to exceed thirty days."

It is to be observed that the foregoing statute deals with essentially two subjects. First, it prohibits *any* employer from discharging an employee on account of his membership in the military forces of the state or hindering or preventing him from performing his military duties. Second, it requires *private* employers to grant leaves of absence for the entire period of any such absences to employees who are ordered to temporary active duty for training or who are ordered on active state service. The limitation of the leaves of absence provision of §29A.43 to private employment presumably is designed to avoid conflict with §29A.28 which provides:

"29A.28 Leave of absence of civil employees. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

It should be noted, however, that the fact that §29A.43 contains a leave of absence provision affecting only private employers does not mean that the prohibition against discharging an employee on account of guard membership or hindering or preventing him from performing guard service is similarly limited. On the contrary, we must conclude that the legislature when it used the expression "no employer" in the second sentence of §29A.43 meant precisely that. If the members of the general assembly meant to include only private employers they could have done so by saying "no private employer" instead of "no employer." From the fact that the expression "private employment" is found in the third sentence of §29A.43, we must conclude that the omission of the word "private" in the second sentence of such section was intentional and was calculated to give the prohibition against discharge and hindrance broader application than the provision for leaves of absence and restoration of employment.

Accordingly, it is our opinion that §29A.43 prohibits the state and its political subdivisions as well as private employers from discharging any person from employment on account of such person's membership in the military forces of the state, or hindering or preventing him from performing any military service he may be called upon to perform by proper authority.

May 21, 1968

TOWNSHIPS: Fire equipment levy. §§359.42, 359.43, 359.44, Code of Iowa, 1966. Township trustees may authorize ballot for fire equipment tax levy without petition therefor. (Zeller to Millhone, Page County Attorney, 5/21/68) #68-5-22

Mr. James Millhone, Page County Attorney: Reference is made to your letter dated March 22, 1968, reading in pertinent part as follows:

"The Township Trustees of two of the townships of this county have contacted me with respect to the acquisition of fire equipment and the furnishing of services for the extinguishing of fires within their territorial limits. The question has been raised as to whether it is necessary for the proposition to be presented upon petitions filed by 25% of the qualified electors of said township or whether the township trustees may place the issue upon the ballot by their own action and without the filing of petitions with them."

Section 359.44, Code of Iowa, 1966, reads as follows:

"Such proposal to levy the tax provided for . . . *may* be submitted by the township trustees . . . and such township trustees shall submit the proposition when petitioned therefor by 25% of the qualified electors. . . ." (emphasis added)

The word "may," which I have underlined provides sufficient authority to the trustees, in their discretion to act immediately, and accordingly, it is not necessary for the proposition to be presented upon petitions, by 25% of the electors. However, when a petition is submitted by 25% of the qualified electors, the trustees have no discretion and must submit the proposition to a ballot by the qualified electors.

May 22, 1968

COUNTIES: Board of Supervisors — §39.19, Code of Iowa, 1966. Exceptions to law that no person shall be elected to board who is a resident of the same township as a holdover member do not apply to Balckhawk County. Until law is changed pursuant to *Mandicino v. Kelly* no candi-

date from a township where a holdover member resides can be elected. (Nolan to Peterson, Blackhawk County Attorney, 5/22/68) #68-5-34.

Mr. Roger F. Peterson, Blackhawk County Attorney: This replies to your letter of April 17, 1968, in which you state the following:

"Section 39.19 of the Code of Iowa pertains to the qualifications for members of the Board of Supervisors. Paragraph 2 of that Section indicates that counties having five or seven supervisors, two members may be residents of a township which embraces a city of 35,000 population.

"We have a five member board and three members are up for election this year. The City of Waterloo is located in Waterloo Township and East Waterloo Township. Both townships have a population in excess of 35,000 people. Further, East Waterloo Township has two other cities located in it other than that portion of the City of Waterloo, they being Elk Run Heights and Evansdale. Both of these cities have a population of less than 35,000.

"Would you please advise the extent of the qualifications in Section 35.19, Sub-section 2, with respect to Black Hawk County. That is, may we have two members of the Board from East Waterloo Township which embraces a portion of the City of Waterloo and two members from Waterloo Township which embraces a portion of the City of Waterloo, or does this qualification not apply inasmuch as the City of Waterloo is not embraced in one township only, or may we have only two members of the Board from the corporate limits of the City of Waterloo only."

Subsection 2 of §39.19, Code of Iowa, 1966, provides an exception to the rule that no person shall be elected a member of the board of supervisors who is a resident of the same township with any other of the members holding over.

* * *

"2. In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population."

In Volume 14 of Words and Phrases at page 430 the word "embraced" is determined to be a synonym of the word "included":

". . . the word 'embraced' is a synonym of 'included.' As defined by lexicographers and as commonly used, it has, among others, the two meanings ascribed to the word 'include,' the first of which accords with its etymology from 'claudere.' To 'shut' is 'to confine within; to shut up; to hold, as the shell of a nut "includes" the kernal; a pearl is "included" in a shell.' Webst. Dict. The second and derivative meaning is to 'comprehend, as a genus the species; the whole a part.' Webster defines the word 'embraced' thus: 'To encircle; to encompass; to surround or inclose; to include, as parts of a whole, or as subordinate divisions of a part; to comprehend; as, natural philosophy "embraces" many sciences.' "

It is our view that neither East Waterloo Township nor Waterloo Township embraces the city of Waterloo, consequently the exception provided by subparagraph 2 of §39.19 does not apply in Black Hawk County. Therefore, no more than one candidate for supervisor should be a resident of each of these townships, and no candidate can be elected from a township where a holdover member resides.

In the case of *Mandicino v. Kelly* decided May 7, 1968, by the Iowa Supreme Court §39.19 is held to be violative of Amendment XIV of the Federal Constitution and Article I of the Iowa Constitution because it

forbids the election of more than two residents of Sioux City Township to the Woodbury County Board of Supervisors. The opinion in this case, written by Justice Mason, then states:

"The conclusions . . . of this opinion relative to classification of boards of supervisors as legislative bodies and being subject to the principle of one man, one vote in the election of its members is not limited to Woodbury County.

* * *

"The legislature has the duty to establish a system of county government meeting constitutional standards and this Court approaches this problem as it did the apportionment of the state legislature in Kruidenier v. McCulloch, supra, where, in finding the apportionment of the existing law invalid, deferred the effect of the invalidity until the legislature had a reasonable time to act. It cannot be said that the legislature is unaware of the problem or has failed to act. Elections to the board will be held in 1968 before the legislature would ordinarily convene.

"Orderly operation of government requires that the county boards heretofore elected under section 39.19 and to be elected thereunder in 1968 be permitted to function for a reasonable period sufficient for the enactment of new legislation and that the validity of the acts of the board so elected should not be challenged upon the basis of this decision. . . .

* * *

"Plaintiffs have suggested that should we find the instant apportionment unconstitutional, we might allow the Woodbury County board to exercise its authority under Code section 359.1 to divide Sioux City Township in such a manner that it might conceivably elect the supervisors under the present statute.

"We prefer, however, that the Iowa legislature be afforded an opportunity to enact corrective legislation to provide Woodbury County residents constitutional apportionment for its board of supervisors.

* * *

"Consequently, the declaration contained in Division IV, supra, of this opinion shall be prospective in effect. We retain jurisdiction and, if for any reason corrective legislation with any implementation required is not enacted by June 1, 1969, providing Woodbury County residents a system of county government in accordance with constitutional standards, we will entertain application of interested parties for further and appropriate relief."

May 22, 1968

ELECTIONS: One man, one vote — §§39.19, 331.8, 331.11 and 359.1, Code of Iowa, 1966. Recent decisions affecting representation by board of supervisors are prospective, although courts retain jurisdiction to provide a system of county government in accordance with constitutional standards if corrective legislation is not enacted. (Nolan to Pelzer, Emmet County Attorney, 5/22/68) #68-5-33.

Mr. Max O. Pelzer, Emmet County Attorney: This will acknowledge receipt of your April 3, 1968, letter questioning the extension of the "one-man vote" to the election of supervisors for Emmet County. In your letter you stated that Emmet County elects five supervisors from five districts. According to the statistics presented in your letter it appears that there is a difference in population of 7,653 between District 1, the most heavily populated (8,863), and District 2, the least populated (1,210), as of the last official census. I am unable to determine from your

letter, however, whether the supervisor districts were established following petition (see §331.8) or pursuant to the authority for redistricting contained in §331.11, Code of Iowa, 1966. If the former is the case you will note that districts cannot be abolished except by petition of one-tenth of the qualified electors of said county and submission of the question to the qualified electors of the county at the next general election. This would be material to the answer to the first of the two questions which you presented as follows:

"The question that he [Auditor] would like to have answered is whether or not the primary election and general election ballots would require the Emmet County Board of Supervisors to run at large or if there was any other method that could be used to carry out the "one-man vote" principle.

"Section 331.8 of the 1966 Code prohibits more than one supervisor to a township. What is the effect of this in the event supervisors must run at large or in the event there must be a subdistrict of Emmet County, Iowa? If there is to be a subdistrict, can it run across township lines?

"At this time the Board of Supervisors is elected whereby the terms are staggered. I believe that the only problem in regard to the 'one-man vote' principle is in regard to the two supervisors coming up for election. Or, is it possible that all would again have to run if it was determined that the supervisors must run at large?"

Recently, the Supreme Court of the United States has held that the "one-man, one-vote" principle applies to the boards of supervisors in counties in Texas. *Hank Avery v. Midland County, Texas, et al,* decided April 1, 1968, Supreme Court Opinions, The United States Law Week, Vol. 36, No. 38. Since the code of Iowa provides in §331.8 that the supervisors shall divide the county by townships into supervisor districts at "its regular meeting in January" and in §331.11 provides that a county may be redistricted *"once in every two years, and not oftener"* and since the decision of the United States Supreme Court was rendered subsequent to the January meeting it is our view that it would not be held to apply either to the primary election or general election ballots in Emmet County this year. This assumes however that the supervisors do not maintain a continuing January meeting and that the supervisors will comply with the provisions for redistricting at the next regular meeting in January pursuant to §331.8 if the county was not redistricted within the preceeding two years.

In answer to your second question, §39.19 provides that no person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over with two exceptions, one being that a member elect may be a resident of the same township as the member he is elected to succeed.

In the case of *Mandicino v. Kelly* decided May 7, 1968, by the Supreme Court of Iowa §39.19 is held to be violative of Amendment XIV of the Federal Constitution and Article I of the Iowa Constitution because it forbids the election of more than two residents of Sioux City Township to the Woodbury County Board of Supervisors. The opinion in this case, written by Justice Mason, then states:

"The conclusions . . . of this opinion relative to classification of boards

of supervisors as legislative bodies and being subject to the principle of one man, one vote in the election of its members is not limited to Woodbury County.

* * *

"The legislature has the duty to establish a system of county government meeting constitutional standards and this Court approaches this problem as it did the apportionment of the state legislature in *Kruidenier v. McCulloch*, supra, where, in finding the apportionment of the existing law invalid, deferred the effect of the invalidity until the legislature had a reasonable time to act. It cannot be said that the legislature is unaware of the problem or has failed to act. Elections to the board will be held in 1968 before the legislature would ordinarily convene.

"Orderly operation of government requires that the county boards heretofore elected under §39.19 and to be elected thereunder in 1968 be permitted to function for a reasonable period sufficient for the enactment of new legislation and that the validity of the acts of the board so elected should not be challenged upon the basis of this decision. . . .

* * *

"Plaintiffs have suggested that should we find the instant apportionment unconstitutional, we might allow the Woodbury County board to exercise its authority under Code section 359.1 to divide Sioux City Township in such a manner that it might conceivably elect the supervisors under the present statute.

"We prefer, however, that the Iowa legislature be afforded an opportunity to enact corrective legislation to provide Woodbury County residents constitutional apportionment for its board of supervisors.

* * *

"Consequently, the declaration contained in Division IV, supra, of this opinion shall be prospective in effect. We retain jurisdiction and, if for any reason corrective legislation with any implementation required is not enacted by June 1, 1969, providing Woodbury County residents a system of county government in accordance with constitutional standards, we will entertain application of interested parties for further and appropriate relief."

The Mandicino case involved a county where the supervisors were elected at large. However the language quoted therein from Avery v. Midland County, Texas, supra, appears to be directly in point:

". . . when the state delegates law making power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversized districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. . . ."

Since §331.8 provides that the district shall be obtained by dividing the county "by to vnships into a number of supervisor districts corresponding to the number of supervisors in such county" it appears that at the present time a township may not be placed in more than one supervisor district by the creation of township subdistricts.

We agree with your conclusion that only the terms of the supervisors which expire in 1969 or 1970 are to be filled at the next election. From the information you have presented we find no reason to conclude that all of the supervisors must run at large at the next election.

May 22, 1968

TAXATION: "Service" tax on purchases made by County and used for public purposes. §422.45(5), Code of Iowa, 1966, as amended by the 62nd General Assembly exempts purchases of services made by a county and used for public purposes. (Opinion from McLaughlin to McKinley, dated May 7, 1968, is withdrawn) (McLaughlin to McKinley, Mitchell County Attorney, 5/22/68) #68-5-32.

Mr. Keith A. McKinley, Mitchell County Attorney: You have requested an opinion of the Attorney General on whether the new tax on services applies to contract labor performed for a county.

Section 422.45(5), after amendment by §22, Chapter 348, Laws of the 62nd General Assembly provides as follows:

"422.45 Exemptions. There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:

* * *

"5. The gross receipts *or from services rendered, furnished, or performed and* of all sales of goods, wares or merchandise used for public purposes to any tax-certifying or tax-levying body of the state of Iowa or governmental subdivision thereof, including the state board of regents, board of control of state institutions, state highway commission and all divisions, boards commission, agencies or instrumentalities of state, federal, county or municipal government which derive disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes, except sales of goods, wares or merchandise *or from services rendered, furnished, or performed and* used by or in connection with the operation of any municipally-owned public utility engaged in selling gas, electricity or heat to the general public.

"The exemption provided by this subsection shall also apply to all such sales of goods, wares or merchandise *or from services rendered, furnished, or performed* and subject to use tax under the provisions of Chapter 423." (Italicized material added by 62nd General Assembly)

The statute admits of only one construction, which is that services rendered, furnished or performed to a tax-levying body (of which the county is one) and used for public purposes are exempt from the tax imposed upon services.

The opinion issued to you on May 7, 1968, in answer to your request of April 4, 1968, is hereby withdrawn.

May 22, 1968

ELECTIONS: Reapportionment — Ch. 105, Laws of the 62nd G. A. Residence of persons living in part of a town annexed after 1960 is determined for purposes of the reapportionment act by the provisions of such act. (Nolan to Redfern, State Representative, 5/22/68) #68-5-37.

The Hon. Carroll I. Redfern, State Representative: We have your letter of March 30, 1968, requesting an opinion on the following:

"H.F. 736 passed by the 62nd G. A. subdivided Lee County into two-sub-districts for the election of State Representatives in the elections to be held this fall.

"The incorporated Town of Donnellson, the major part of which is in Franklin Township and is a part of a voting precinct including the West half of Franklin Township, is in District One, and also includes land

from Charleston Township which is in District Two. Also the City of Fort Madison, a part of District One, has since 1960 annexed a part of Jefferson Township, and Jefferson Township is a part of District Two.

"In which District would a resident of the Town of Donnellson living in the Charleston Township part of Donnellson or the Jefferson Township part of the City of Fort Madison be considered a possible candidate or voter for such office?"

Subsection 23 of section 4, Chapter 105, Laws of the 62nd General Assembly, provides:

"The county of Lee shall constitute one (1) representative district and shall be subdivided into the two (2) following representative subdistricts and each subdistrict shall elect one (1) representative:

"a. Subdistrict one (1) shall constitute the following portions of Lee county which include the townships of Cedar, Marion, Pleasant Ridge, Denmark, Harrison, Franklin, West Point, Washington, Green Bay, and Madison as the townships existed in 1960.

"b. Subdistrict two (2) shall constitute the following portions of Lee county which include the townships of Van Buren, Charleston, Jefferson, Des Moines, Montrose, Jackson, and Keokuk as the townships existed in 1960."

In answer to your request it would appear that a person who is a resident of the town of Donnellson, living in the Charleston Township part of Donnellson, or a resident of that part of Jefferson Township annexed to Fort Madison after 1960, would be in subdistrict two (2) since no other provision appears in Chapter 105.

May 22, 1968

ELECTIONS: County Board of Supervisors — §§39.19 and 331.7, Code of Iowa, 1966. If a supervisor has been elected from one township and later moves to another the place of his latter residence is controlling in subsequent elections, but he does not vacate his office by moving from one place to another within the county. (Nolan to Wehr, Scott County Attorney, 5/22/68) #68-5-38

Mr. Edward N. Wehr, Scott County Attorney: This is in answer to your letter dated March 28, 1968, in which the following questions relating to the election of supervisors were presented:

"Scott County qualifies as a 'county having a Special Charter City of over 75,000 population' as provided in that section. [Section 331.7]

"1. If a supervisor has been elected from one township, but during his term has moved to a different township and has a legal residence in the latter township, is this supervisor considered as being elected from the latter or former township in a subsequent election where said supervisor is a hold-over and not a candidate because his term does not expire for two more years?

"2. Assuming again that an elected supervisor during his term of office moves to another township; what is the result then if the township that the supervisor moves to already has an elected supervisor from this latter township?

"3. If a township has an elected supervisor holding over, may another resident from said township be a candidate for supervisor? Assuming the same facts, could such a newly elected supervisor be sworn in and serve? This last question is presented because there appears to be some rulings that it is only the residence 'at the time of being sworn in' that controls

so that it is permissible for more than one supervisor to be elected from the same township as long as the split-residency requirements pertain at the time of taking office.

"4. May a resident of a township outside of a Special Charter City of over 75,000 population be a candidate for the office of supervisor if a hold-over supervisor is presently a resident of the same township? This question is quite similar to the previous one, but we would like to have a specific answer in regard to this special situation."

In answer to your first question we advise that §39.19, Code of Iowa, 1966, applies. This section provides that:

"No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:

"1. A member-elect may be a resident of the same township as a member he is elected to succeed."

If a supervisor has been elected from one township, but during his term moved to a different township the place of his latter residence is controlling in a subsequent election. If he has moved to a township where other supervisors reside, he may be precluded by §39.19 from seeking re-election himself. See 1960 O.A.G. 8, a copy of which is enclosed herewith.

In the case of *Mandicino v. Kelly* decided May 7, 1968, by the Iowa Supreme Court §39.19 is held to be violative of Amendment XIV of the Federal Constitution and Article I of the Iowa Constitution because it forbids the election of more than two residents of Sioux City Township to the Woodbury County Board of Supervisors. The opinion in this case, written by Justice Mason, then states:

"The conclusions . . . of this opinion relative to classification of boards of supervisors as legislative bodies and being subject to the principle of one man, one vote in the election of its members is not limited to Woodbury County.

* * *

"The legislature has the duty to establish a system of county government meeting constitutional standards and this Court approaches this problem as it did the apportionment of the state legislature in Kruidenier v. McCulloch, supra, where, in finding the apportionment of the existing law invalid, deferred the effect of the invalidity until the legislature had a reasonable time to act. It cannot be said that the legislature is unaware of the problem or has failed to act. Elections to the board will be held in 1968 before the legislature would ordinarily convene.

"Orderly operation of government requires that the county boards heretofore elected under section 39.19 and to be elected thereunder in 1968 be permitted to function for a reasonable period sufficient for the enactment of new legislation and that the validity of the acts of board so elected should not be challenged upon the basis of this decision. . . .

* * *

"Plaintiffs have suggested that should we find the instant apportionment unconstitutional, we might allow the Woodbury County board to exercise its authority under Code section 359.1 to divide Sioux City Township in such a manner that it might conceivably elect the supervisors under the present statute.

"We prefer, however, that the Iowa legislature be afforded an oppor-

tunity to enact corrective legislation to provide Woodbury County residents constitutional apportionment for its board of supervisors.

* * *

"Consequently, the declaration contained in Division IV, supra, of this opinion shall be prospective in effect. We retain jurisdiction and, if for any reason corrective legislation with any implementation required is not enacted by June 1, 1969, providing Woodbury County residents a system of county government in accordance with constitutional standards, we will entertain application of interested parties for further and appropriate relief."

In answer to the second question, we advise that the result, if the township that the supervisor moved to already has an elected supervisor, is merely that two members of the board are residing in the same township. The effect on the makeup of the board is unchanged until the next election. A supervisor does not vacate his office by moving from one township to another within the county and there appears to be no statutory prohibition against this. In fact §331.7, Code of Iowa, 1966, which you cite, expressly provides that "in counties having a special charter city of over seventy-five thousand population, two supervisors may be residents of the same township in which the city is located."

Your third question is answered by our answer to your first question. Whether or not, if a township has an elected supervisor holding over, another resident from the same township may be a candidate and elected supervisor depends on whether or not the exceptions provided by §39.19 and §331.7 apply to the case.

We must answer your fourth question the same as the third. That is, whether or not a resident of a township outside of a special charter city of over seventy-five thousand population may be a candidate for the office of supervisor if a hold-over supervisor is presently a resident of the same township depends on whether or not the exceptions provided by §39.19 apply.

May 22, 1968

COUNTIES: Auditor — §298.22, Code of Iowa, 1966. §298.22 does not require auditor to affix official county seal and his personal signature to general obligation school bonds. (Nolan to McNamara, Linn County State Representative, 5/22/68) #68-5-36.

The Hon. Walter L. McNamara, State Representative: In your letter dated February 29, 1968, you requested an opinion concerning the legality and liability in regard to the affixing of the official county seal by the auditor and the affixing of the personal signature of the auditor to general obligation school bonds and specifically raised the following questions:

"1. Does Section 298.22, 1966 Code of Iowa, as amended, require the County Auditor to affix the Official County Seal and the personal signature of the Auditor to all General Obligation School Bonds issued by all of the school corporations within the County?

"2. Does Section 298.22, 1966 Code of Iowa, as amended, require the County Auditor to only register in the office of the Auditor all General Obligation School Bonds issued by all of the school corporations within the County?

"3. Is the County responsible for the liability and the payment of the General Obligation School Bonds from the funds of the County when

issued by a school corporation and where the County Auditor affixes the Official County Seal and the personal signature of the Auditor is affixed to said bonds?

"4. Does the registering of General Obligation School Bonds in accordance with the provisions of Section 298.22, 1966 Code of Iowa, as amended, ('All of said bonds shall be registered in the office of the county auditor') also impose a legal duty upon the County Auditor to affix the Official County Seal and the personal signature of the Auditor on said General Obligation School Bonds when they are so registered under said section?"

In answer to the above questions we advise:

1. The language of §298.22, Code of Iowa, 1966, to be construed provides:

"All of said bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor; shall run not more than twenty years, and may be sooner paid if so nominated in the bond; be in denomination of not more than one thousand dollars or less than one hundred dollars each; bear a rate of interest not exceeding five percent per annum, payable semiannually; be signed by the president and countersigned by the secretary of the board of directors; and shall not be disposed of for less than par value, nor issue for other purposes than this chapter provides.

"All of said bonds shall be registered in the office of the county auditor.

"The expenses of engraving and printing of bonds may be paid out of the general fund."

Apparently the practice of having the auditor sign and stamp the bonds with the county seal has grown up from the fact that section of the code provides that said bonds shall be "substantially in the form provided for county bonds" without regard to the following clause which states, "but subject to changes that will conform them to the action of the board providing therefor." It is our view that §298.22 does not require the county auditor to affix the official county seal and his personal signature to all general obligation school bonds. However, inasmuch as all bonds are required to be registered in the office of the county auditor and §333.1(7) of the code requires the auditor to "deliver to any person who may demand it a certified copy of any record or account in his office on payment of his legal fees therefor" it is not improper for the auditor to affix his name and seal to such bond for certification purposes. His doing so does not affect the liability of the school district.

2. Your second question is answered in the affirmative.

3. The county is not responsible for the liability and payment of bonds issued by a school corporation regardless of whether or not the county auditor affixes his seal thereon. It is well settled that under Article XI, Section 3, of the Constitution of Iowa an incorporated town and school district within the limits thereof are separate and distinct corporations each with the legal right to incur indebtedness independent of the other to the extent of the constitutional limits. 1906 O.A.G. 197. The same principle is applicable here.

4. Your fourth question is answered in the negative.

May 22, 1968

COUNTIES: Permits for oversized vehicles. Ch. 285, Laws of 62nd G. A. (1) Boards of supervisors may use their employees as escorts. (2) Rate is fixed by statute. (3) Act does not require official escort to be a peace officer. (4) If sheriff's office refuses to supply escort board cannot require such escort to be furnished by that office. (Nolan to Gray, Calhoun County Attorney, 5/22/68) #68-5-35.

Mr. Dale E. Gray, Calhoun County Attorney: This is in answer to your letter of April 5, 1968, which requested an opinion interpreting Chapter 285 of the Laws of the 62nd General Assembly relating to the movement of vehicles and loads of excessive size and weight and presented the following questions:

"1. Whether or not the issuing authority, Board of Supervisors, have the right to use their own employees and equipment to escort any of the applicants for a moving permit.

"2. Whether or not the issuing authority, Board of Supervisors, have a right to set a definite rate by the hour for the use of their equipment and their employees.

"3. Whether or not the above can be carried out by the issuing authority or whether the issuing authority has to have an official escort, which would be any peace officer, (sheriff, deputy sheriff, policeman, highway patrolman, uniformed commission escort, on or off duty), when approved by the Board of Supervisors, and if so whether or not the issuing authority can set the hourly rate for the escort services.

"4. If the issuing authority requests an official escort, (sheriff's office), may the sheriff's office refuse because of a manpower shortage or other emergencies."

In answer to your first question we conclude that section 15 of the Act, which authorizes the commission or local authorities issuing permits for the movement of oversized vehicles to charge a fee and further provides for proration of the escort fee between state and local authorities when more than one governmental authority is required to provide escort for movement may be construed as providing authority for the board of supervisors to use its own employees and equipment to escort any of the applicants for a moving permit.

In answer to your second question the board of supervisors is required by section 15 of the law to set a definite rate for the use of its equipment and its employees as follows:

"Sec. 15. The commission or local authorities issuing such permits shall charge a fee of ten (10) dollars for an annual permit and a fee of five (5) dollars for a single trip permit. Fees for the movement of buildings, parts of buildings, or unusual vehicles or loads may be increased to cover the costs of inspections by the issuing authority. A fee not to exceed sixty (60) dollars per ten (10) hour day or prorated fraction thereof per man and car for escort service may be charged when requested or when required under this Act. Proration of escort fees between state and local authorities when more than one (1) governmental authority provides or is required to provide escort for a movement during the period of a day shall be determined by rule under section sixteen (16) of this Act. The commission and local authorities may charge any permit applicant for the cost of trimming trees and removal and replacement of natural obstructions or official signs and signals or other public or private property required to be removed during the movement of a vehicle and load."

Third, I find nothing in the Act cited which requires that the official escort be a peace officer. Consequently, it is my view that the issuing authority (board of supervisors) may designate any of the employees of the county to serve as the official escort for an oversized vehicle provided that no conflicting rule and regulation issued by the state highway commission pursuant to section 16 of the Act supersedes such authority. The rate to be charged is determined by §15 as set out above.

In answer to the fourth question, I advise that it is well settled in this state that the elected officer has control of the carrying out of the duties of his office and consequently if the sheriff's office refuses to supply an official escort the issuing authority has no power to require that the escort be provided by his office.

May 23, 1968

DEPARTMENT OF PUBLIC SAFETY: §565.3, Code of Iowa, 1966. Cash contributions made by individuals to the Department of Public Safety for instruction in defensive driving may not be accepted by such department as gifts under the provisions of §565.3, nor are such contributions made to the Department of Public Safety gifts to the state to be accepted by the council under the foregoing numbered statute. (Strauss to Robinson, Sec., Exec. Council, 5/23/68) #68-5-48.

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to your letter of April 16, 1968, in which you state:

"Enclosed please find copies of the request from the Department of Public Safety, to accept cash contributions as a result of Defensive Driving Courses which the Council has been accepting in accordance with Section 565.3 of the Code of Iowa.

"Some members of the Council, however, expressed concern as a result of a recent opinion from your office, and directed that I obtain from you an opinion as to not only the propriety of accepting these gifts, but whether or not the Executive Council may accept them and whether they can be used for the Defensive Driving Courses held throughout the State."

Attached to your letter are two requests from the Department of Public Safety directed to the Executive Council in substantially the same form and both dated April 8, 1968. The first request begins:

"In accordance with Section 565.3 of the Iowa Code, may we please accept this contribution to the Highway Patrol Defensive Driving Fund:"

This is followed by a listing of the names of 14 individual contributors and concludes:

"Total amount received $28.00 in cash. This money is for Defensive Driving Course which was held in Atlantic."

The second request is identical to the first except that it relates to a course held in Veteran Hospital, Des Moines, and involves 32 contributors and a total contribution of $64.00.

In reply thereto I advise as follows:

1. Insofar as the authority of the Department of Public Safety to accept cash contributions as a result of defensive driving courses conducted by the Department of Public Safety is concerned I am of the opinion, on the authority of an apinion of this department appearing in

the Report for 1948 at page 111, a copy of which is hereto attached, that the Department of Public Safety has no authority to accept these contributions.

2. Insofar as your second question is concerned, the authority of the executive council in the foregoing situation, if it has any, is contained in §565.3, Code of Iowa, 1966, providing as follows:

"A gift, devise, or bequest of property, real or personal, may be made to the state, to be held in trust for and applied to any specified purpose within the scope of its authority, but the same shall not become effectual to pass the title in such property unless accepted by the executive council in behalf of the state."

Insofar as such power exists in the council under the foregoing statute in application of the rule stated in the cited opinion, it is said in §56, Title States etc., 49 Am. Jur. page 269 that:

"A state may acquire real or personal property such as money, bonds or mortgages and the like, by purchase, conveyance, gift, or otherwise, can hold such property for uses distinct and independent of public uses; property so held becomes in effect private property."

However by the terms of the letters attached the executive council under §565.3 would have no authority therein. The authority to accept a gift is a situation where a gift of property, real or personal, is made to the state. The gift herein, according to the letters attached, is made to the Department of Public Safety and not to the state and for reasons assigned in paragraph 1 hereof the council is not authorized to accept the contributions. By way of suggestion, in addition it is to be said that while these cash contributions may be designated a gift or contribution by the several persons named it appears to be in fact payment for public service by a state agency and not a gift as designated.

May 27, 1968

STATE OFFICERS AND DEPARTMENTS: **Board of Nursing, public nursing**; S.F. 537, Ch. 106, Acts, 62nd G. A. Regulations adopted by the Board of Nursing are reasonable and in accord with Senate File 537, Chapter 106, Acts of the 62nd General Assembly. (Sell to Stoney, Exec. Director, Iowa Board of Nursing, 5/27/68) #68-5-50

Miss E. Frances Stoney, R.N., Executive Director, Iowa Board of Nursing: You have requested that the Attorney General's Office review certain regulations that the Board of Nursing has adopted in order to comply with the provisions of S.F. 537, Chapter 106, Acts 62nd General Assembly. As stated in your recent letter, they are as follows:

"1. The list of Registered Nurse licensees, approximately 36,500, and the list of Licensed Practical Nurse licensees, approximately 4,900, will be made available for use according to the provisions of S.F. 537 designated as Chapter 106, Acts 62nd General Assembly.

"2. Names and addresses from lists must be copied under supervision here in our office at 300 - 4th Street, Des Moines, Iowa. In order to prevent names and corresponding registration numbers from falling into the hands of imposters, registration (license) number may not be copied.

"3. Those copying the list must supply personnel and equipment for this purpose.

"4. Space will be provided in this office for this purpose.

"5. Supervision of the individual copying the names will be provided from Board of Nursing staff.

"6. A reasonable fee will be charged for this service."

The Attorney General's Office is satisfied that the foregoing regulations adopted by your department are reasonable and in accord with Senate File 537, Chapter 106, Acts of the 62nd General Assembly.

It should be noted, however, that Senate File 537, was presumably not intended as a revenue measure. Thus, the reasonable fee to be charged individuals desiring to copy or examine records should be closely related to the actual cost of providing space for this work, and to the actual cost of supervising such work.

May 27, 1968

TAXATION — Exempt, Property Tax — §427.1, Code of Iowa (1966). Property (dwelling) purchased from the State of Iowa by a non-exempt purchaser and moved onto his own lot in August, 1967, is not subject to tax for the year in which purchased (1967). (McLaughlin to Lynch, Winneshiek Co. Atty., 5/27/68) #68-5-41

Mr. Thomas C. Lynch, Winneshiek County Attorney: You have requested an opinion of the Attorney General as follows:

" 'Can a dwelling owned by the State of Iowa on January 1, 1967, and therefor not on the tax rolls, be restored to the tax rolls when a private person buys and moves said dwelling to his own lot in August, 1967?' "

You have further defined your question by inquiring "whether Op. Gen. May 26, 1953, would apply as in new construction, or whether an existing house that is moved to a new site would be treated differently."

Previously, this office considered a similar question, but in a slightly different factual picture. A copy of those two (2) opinions, dated April 12, 1967, and January 24, 1968, are attached. Briefly, in those opinions, we stated that property acquired from the State of Iowa was not, in the hands of a non-exempt purchaser, subject to property taxes in the year of purchase. Such opinions are consistent with the one issued on May 26, 1953 (1953 O.A.G. 58).

Accordingly, we are of the opinion that a dwelling acquired from the State of Iowa and moved onto the property of a non-exempt taxpayer in August, 1967, should not be restored to the tax rolls until the following year, in this instance, 1968.

May 27, 1968

LABOR — Boiler inspection, funeral home. §89.2, Code of Iowa, 1966. Funeral home and chapel is a place of public assembly, and steam boiler located therein is subject to inspection. (Zeller to Parkins, Labor Commissioner, 5/27/68) #68-5-44

Mr. Dale Parkins, Commissioner, Bureau of Labor: Reference is made to your recent letter asking our opinion as follows:

"The situation consists of a funeral home and chapel which hold services and funerals. The boiler therein is a hot water heating boiler carrying a pressure of 16 pounds and a safety vessel of 30 PSI.

"The owner contends this is not a place of public assembly. May we have an opinion as to whether or not this boiler is covered under Chapter 89.2, Code of Iowa, 1966."

Section 89.2, Code of Iowa, 1966, reads as follows:

"It shall be the duty of the state boiler inspector, to inspect . . . all steam boilers used for heating purposes carrying a pressure of not more than fifteen pounds per square inch gauge and located in places of public assembly, ..."

The word "public" is defined in Webster's Third International Dictionary as "providing services to the people on a business basis under some form of civic or state control (example, railroads as public agents)."

"Public" has also been defined in *Powell v. Utz*, U. S. D. C., Wash., 87 Fed. Supp. 811 (1949) specifically as follows:

"*a.* Open to the use of the public in general for any purpose, as business, pleasure, religious worship, gratification of curiosity, etc. *b.* Open to the enjoyment of the public under the rights and liabilities belonging to an action, occupation, use, or the like, called public, as a *public* carriage, a *public* house, etc."

This authority also held that a restaurant was a "place of public resort, accommodation or assemblage."

The word "assembly" is also defined by Webster's Dictionary "as a company of persons collected together in one place usually for some common purpose."

Accordingly, we are of the opinion that a funeral home and chapel is usually open to the use of the public for either funeral or religious purposes on a business basis, under some form of state control. Under this view, it is usually a place of public assembly, and therefore, the hot water heating boiler is subject to your regulation under the provisions of Chapter 89.2, Code of Iowa, 1966.

May 27, 1968

I.P.E.R.S. — §97B.53(5), Chapter 121, §13(3), 62nd G. A. "Retired members" of I.P.E.R.S. are not subject to the "three month" rule in §97B.53(5) with regard to reemployment. (Ivie to Biesendorfer, Pottawattamie County Auditor, 5/27/68) #68-5-49

A. W. Biesendorfer, Pottawattamie County Auditor: You have requested an opinion on the interpretation of §97B.53(5), 1966 Code of Iowa, as it affects the right of a retired employee to return to I.P.E.R.S. covered employment with a county.

Section 97B.53(5) reads, in part, as follows:

"A member shall not be considered as having terminated his employment if he accepts other employment in the state of Iowa under which he is eligible to membership in the Iowa public employees' retirement system, within three months after he has left public employment. . . ."

In conjunction with this, it is necessary to read Chapter 121, §14(3), 62nd G. A., which reads as follows:

"If, at any time a retired member be in regular full-time employment after his retirement under this chapter, his retirement allowance payments shall be suspended for as long as he remains in employment. However, after a member's normal retirement date, such reemployment shall not be regarded as full-time employment until he receives remuneration in excess of one thousand eight hundred (1,800) dollars for any calendar year. After an active member's seventy-second (72) birthday, he shall

be entitled to receive a retirement allowance determined under subsection two (2) and three (3) of section fifteen (15) of this Act regardless of the amount of remuneration received. Upon any retirement after reemployment, a reemployed member whose payments have been suspended shall be entitled to have his retirement allowance redetermined under sections ninety-seven B point forty-six (97B.46), ninety-seven B point forty-nine (97B.49) or ninety-seven B point fifty (97B.50) of the Code, whichever is applicable, based upon his and his employer's additional contributions and his membership service during his period of reemployment and upon his later retirement date."

It is apparent that §97B.53(5) is simply intended to prohibit an employee from terminating employment, withdrawing his accumulated contributions and then immediately returning to an I.P.E.R.S. covered employment. It does not affect individuals who are described as "retired members" in Chapter 121, §14(3), 62nd G. A., but affects only those employees who, prior to the commencement of retirement allowance, elect to withdraw their accumulated contributions.

The purpose of the "three month" rule set out in §97B.53(5) is to implement the purposes of Chapter 97B, as expressed in §97B.2, 1966 Code. It is a policy established that will prohibit an employee who is remaining in covered employment from continuously thwarting the expressed purposes by periodically resigning for the purpose of drawing his accumulated contributions.

A "retired member's" right to return to reemployment is therefore not controlled by §97B.53(5).

May 28, 1968

WORKMEN'S COMPENSATION: Rejection by employee of coverage — §§85.7 through 85.13, Code of Iowa, 1966. The benefits of the Workmen's Compensation Act may be waived as to one employer and not as to another employer by the same employee. (Haesemeyer to De Koster, State Senator, 5/28/68) #68-5-43

The Hon. Lucas J. De Koster, State Senator: By your letter of May 13, 1968, you have requested an opinion of the attorney general with respect to the following:

"Since the alteration in the Workmen's Compensation Act, Chapter 85, which brought corporate directors, including directors of non-profit corporations under the Workmen's Compensation laws, a question has arisen as to the interpretation of the Sections 85.7 through 85.13.

"The question in its essentials is whether or not an employee (a director in a non-profit corporation) can waive the benefits of Chapter 85 as to the non-profit corporation while retaining his status as an employee under the act as to another profit corporation for which he regularly works as a full time employee. Broadly, can the benefits of the Workmen's Compensation Act be waived as to one employer and not as to another employer by the same employee?"

The workmen's compensation law, chapter 85, Code of Iowa, 1966, contains provisions under which either the employer or the employee or both of them may reject the provisions of the chapter. As you note rejection by the employee is covered in §§85.7 through 85.13. We can find nothing in these statutory provisions which would require an employee who elects to reject workmen's compensation coverage as to one employer to reject such coverage as to all other employers as well, and we have been un-

able to find any Iowa cases or other authorities which adopt such a position. Accordingly, it is our opinion that the benefits of the Workmen's Compensation Act may be waived as to one employer and not as to another employer by the same employee.

This view is consistent with the position taken by the Iowa Industrial Commissioner. In this connection see the attached letter dated May 24, 1968, from Industrial Commissioner Harry W. Dahl in which he states, "An employee or executive may reject benefits of the Workmen's Compensation Act as to one employer and not to another employer." For your convenience I am also enclosing a number of forms which the industrial commissioner furnished me and which are to be used by an employee or executive who wishes to reject the benefits of the workmen's compensation law.

May 28, 1968

LIQUOR, BEER AND CIGARETTES — Possession of beer by minors — §§124.20, 125.33, Code of Iowa, 1966. Mere possession or control of beer by a minor may be a violation of §125.33, and not §124.20, but possession upon obtaining or purchasing may be a violation of either §124.20 or §125.33. (Claerhout to McKinley, Mitchell County Attorney, 5/28/68) #68-5-51.

Mr. Keith A. McKinley, Mitchell County Attorney: This is in response to your letter of May 15, 1968, wherein you have requested an opinion of the Attorney General regarding §124.20, 1966 Code of Iowa. Basically, your question may be briefly rephrased as follows:

"May a charge of possession of beer be brought against a young man 19 years of age in Justice of the Peace Court under §124.20 as well as §125.33?"

Section 124.20(4) of the Iowa Code states in pertinent part:

"No minor shall purchase, obtain, or attempt to purchase or obtain any alcoholic beverage or beer from any person, except within a private home and with the knowledge and consent of the parent or guardian of said minor."

Section 124.37 of the Code provides that any minor who violates any of the provisions of Chapter 124, ". . . shall be fined not to exceed one hundred dollars or imprisoned in the county jail, not to exceed thirty days." A "minor" is any person under the age of twenty-one according to the beer law, §124.2(11).

According to a previous opinion of the Attorney General, which viewed both the provisions of the Beer and Malt Liquor law and Chapter 232 regarding prosecution of minors under 18 years of age, it is clear that a minor under 18 years of age charged with the possession of beer can not be tried in a justice of the peace court. A minor, 18 years of age or over, charged with such an offense may be tried there. 1966 O.A.G. 161. Because the minor indicated by your letter is 19 years old the action has been filed in the proper court.

The key question remains, may either §124.20 (4) or §125.33 be used to charge illegal "possession" of beer by a minor. Section 125.33 states in part:

"Any person or persons under the age of twenty-one years who shall individually or jointly have in his or their possession or control beer as defined in section 124.2 . . . shall be subject to a fine of not more than one hundred dollars or imprisonment in the county jail for not more than thirty days."

Clearly, the above statute makes mere "possession or control" of beer a violation without regard to the manner in which the beer came into possession or control of the minor. Section 124.20(4) does not specifically mention "possession" as a violation but is directed toward purchasing or obtaining, and the attempt to purchase or obtain. There can be little doubt that by §125.33 the legislature attempted to remedy the evil of minors having beer but evading the proscribed penalties for themselves and those persons who illegally provided the beer, by simply refusing to disclose the sale, gift, supply, or offer. While such refusal by the minor might be justifiable under the constitutional right to remain silent, it would also conceal the person who, contrary to the law and public interest, would provide intoxicants to those too young to have them. Thus, §125.33 places no value on a refusal to disclose the source of the illicit beer and the possibility of bringing such person to justice is enhanced.

Does this mean that minors possessed of beer cannot be charged under §124.20(4)? The answer to that question must necessarily depend on the facts of each case. If the only evidence obtained goes to "possession or control" of beer, then §124.20(4) which calls for showing a purchase, obtaining, or an attempt to purchase or obtain, would not be proper and §125.33 should be used. On the other hand, if the evidence shows that the minor purchased or obtained beer (not merely attempted), then it follows that violation of either §124.20(4) or §125.33 may be charged. "Purchase" is defined as "transmission of property from one person to another by voluntary act or agreement, founded on valuable consideration." Black's Law Dictionary, 1399 (4th Ed. 1951). "Obtain" is defined as "to get hold of by effort; *to get possession of;* to procure; to acquire, in any way." (Emphasis supplied). Black's Law Dictionary, 1228 (4th Ed. 1951). Therefore, it is clear that "possession" of beer is a necessary part of a showing it was obtained or purchased by the minor. Obviously an "attempt" to obtain or purchase would fall short of possession.

Therefore, I am of the opinion that a charge of violation of §124.20 may be brought against a minor for possession of beer if that possession is a part of the purchase or obtaining of beer, but §125.33 should be charged if the evidence only discloses possession or control without a purchase or obtaining.

May 28, 1968

STATE BOARD OF PUBLIC INSTRUCTION. PROFESSIONAL TEACHING PRACTICES COMMISSION. F. 165, 62nd G. A., Ch. 23, Acts of the 62nd G. A., §565.3, Code of Iowa, 1966. There being no appropriation to finance the foregoing numbered Act, financing therein is uncertain, vague and incomplete and the Act is therefore inoperative and void. The proposed contribution by the Iowa State Education Association to the state is not a gift within the provisions of §565.3, Code of Iowa, 1966. (Srauss to Wellman, Deputy Sec., Executive Council, 5/28/68) #68-5-53.

Mr. W. C. Wellman, Deputy Secretary, Executive Council of Iowa: Reference is herein made to your letter of April 29, 1968, in which you

submitted a request from the Department of Public Instruction relative to a proposed Instrument of Gift by the Iowa State Education Association to fund the Professional Practices Commission established by House File 165, 62nd General Assembly and now designated as Chapter 238, Laws of the 62nd G. A., during the first year of operation of the foregoing commission. Attached to the request is a letter of W. T. Edgren, Assistant Superintendent, notifying you that the Instrument of Gift by the Iowa State Education Association had the approval of that Association and the Department of Public Instruction. The file also shows action of the executive board of the Education Association granting the sum of $6,743.00 to finance the commission until July 1, 1968. The gift is evidenced by a contract between the Iowa State Education Association and the State Department of Public Instruction, subject to the approval of the executive council.

I advise the following:

(1) H.F. 165, 62nd G. A., Chapter 238, Acts of the 62nd G. A., after creating a professional teaching practices commission, which shall be included in the state department of public instruction for administrative purposes, provides that the nine members of the commission be appointed by the governor and be allowed a per diem of $30 and necessary travel and expense while engaged in their official duties. Section 7 of the foregoing numbered Act provides:

"The commission shall be financed by the members of the teaching profession in the amount necessary to carry out the purpose of this Act."

The foregoing citation appeared in the Bill as section 6 as originally filed. In consideration of the Bill the Journal of the House, on page 534, shows the adoption of an amendment striking all after the enacting clause of the original Bill and inserting in lieu of section 6 of the original Bill the following:

"The commission shall be financed by an appropriation from the budget of the state board of public instruction."

Page 538 of the House Journal shows the adoption of the report of the committee on the foregoing H. F. 165. Page 641 of such Journal shows a report of the committee recommending the amendment and passage thereof. This amendment providing for the financing of the commission by an appropriation from the budget of the state department of public instruction failed of adoption and the Bill was adopted by the House by a vote of 112 ayes and 4 nays. The House Bill was passed by the Senate, became a law, and contained therein section 7 as it appears in the enrolled Bill providing the financing of the commission by the members of the teaching profession in the amount necessary to carry out the purposes of the Act.

It will be seen from the foregoing record that public money by way of appropriation was not to be used in the financing of the commission. As a result such financing appears to be made either by the members of the teaching profession or by gift of $6,743.00 by the Iowa State Education Association. Insofar as statutory financing is concerned the statute is faulty in that there is no identification as to members of the teaching profession who are to finance this commission. It could embrace members

of the teaching profession residing any place in the world. It is incomplete in that it does not state first, how the money is to be secured, whether by way of assessment or dues to be paid or voluntarily. Second, it does not state how much money will be secured. Third, it does not state where the money shall be placed on deposit and how and by whom it may be withdrawn. Fourth, if it is deposited with the Treasurer of State, there is no provision for withdrawing the money therefrom. According to the Constitution, Article III, §24, no money shall be drawn from the treasury but in consequence of apppropriations made by law.

The rule of law in this situation is provided by section 472 of 50 Am. Jur., at page 484, where it is stated:

"*Indefiniteness and Uncertainty.* In the enactment of statutes reasonable precision is required. Indeed, one of the prime requisites of any statute is certainty, and legislative enactments may be declared by the courts to be inoperative and void for uncertainty in the meaning thereof. This power may be exercised where the statute is so incomplete, or so irreconcilably conflicting, or so vague or indefinite, that the statute cannot be executed and the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended, with any reasonable degree of certainty. These principles have been applied to a statute providing for the revocation of a physician's license for publishing an advertisement relating to a disease of the sexual organs, a statute requiring that all electric wiring shall be in accordance with the national electrical code, a statute imposing a license tax on merchants who conduct department stores, but which fails to define the duration of the license to be issued, a statute prohibiting the sale in a specified county of intoxicating liquors within a specified distance of a church designated by name, where there are two churches of that name in the county, a section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another such purchaser, is void for indefiniteness, where the element of wrongful intent is not included, all such wilful discriminations not being of themselves unlawful, and to a statute penalizing the operation of an automobile in a manner which unnecessarily interferes with the free and proper use of the public highway, or unnecessarily endangers users of the public highway, is void for indefiniteness unless it can be read as condemning only the failure to exercise reasonable care, reasonable caution, or the reasonable foresight of a reasonably prudent and careful person. In order that a statute may be held valid, the duty imposed by it must be prescribed in terms definite enough to serve as a guide to those who have the duty imposed upon them. Indeed, where the meaning of a statute cannot be judicially ascertained, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain. In determining whether a statute is void for uncertainty, the statute should be considered as a whole."

And as far as the proposed gift from the education association is concerned there appears to be no legislative authority for the acceptance of a gift of that character. In other words, the use of private money for the performance of a governmental duty at the very least should have the support of legislative sanction. Such does not appear. With respect to a like situation an opinion of this department appearing in the Report for 1948 at page 111, is hereto attached and made a part hereof by reference. Such a gift is unacceptable under the provisions of §565.3, Code of Iowa, 1966.

I am therefore of the opinion that House File 165, Chapter 238, Acts of the 62nd G. A., is inoperative and void for uncertainty and the financing there provided does not constitute a gift within the terms of §565.3, Code of Iowa, 1966.

May 28, 1968

CITIES AND TOWNS — Withdrawal from county library district. §358B.16, Code of Iowa, 1966. Provisions of §358B.16, Code of Iowa, 1966, do not authorize general withdrawal by cities or towns from county library districts. §358B.16 requires the existence of some library within the city for at least ten years prior to the establishment of a county library before withdrawal may occur. The city of Dyersville does not appear to meet this requirement. (Martin to Miller, R. J., State Representative, 5/28/68) #68-5-55

The Hon. Raymond J. Miller, State Representative: I have received your request for an opinion of the attorney general of April 29, 1968, in which you inquire as follows:

"The Town of Dyersville requests that I ask your opinion on withdrawing from the Dubuque County Library System. The town of Dyersville would like to establish their own Public Library System using tax money from their area for its support."

A letter from John J. Goen, Councilman of the Second Ward, Dyersville, Iowa, in response to my inquiry to you as to the applicable facts, states as follows:

"In about 1952, the Dubuque Library District was established, including the Town of Dyersville, which at that time did not have a library. In 1959, Dyersville established its own City Library, and it is now levying a tax greater than the County Library levy."

In 1952 the Iowa Supreme Court in the case of *Isbell et al v. Board of Supervisors of Woodbury County et al,* 243 Iowa 941, 54 N. W. 2d 508 (1952) held that the establishment of a municipal library by the city of Correctionville did not constitute a withdrawal from the county library system. In that case at page 509 of the Northwest Reports the Court stated:

"When this county library was established Correctionville had no free public library — it was established later. It is not questioned that Correctionville was included within the county library district at the outset. Nothing has happened that constitutes a withdrawal of the town from that district unless the establishment of the town library has that effect. *We find no statute which so provides.* If formation of a town library is to constitute a withdrawal of the town from an existing county library district the legislature must so provide. Until it does there is no basis for such holding. Plaintiff's remedy at this point rests with the legislature, not the courts." (citing cases) (emphasis added)

The above quoted language, as well as the entire structure of Chapter 358B, Code of Iowa, 1952, has been interpreted to mean that under no circumstances could a withdrawal from a county library board be effected. See 62 O.A.G. 22.2.

To remedy this, the legislature in 1953 by Chapter 159, Acts of the 55th General Assembly, enacted what is now §358B.16, Code of Iowa, 1966. That section provides in pertinent part as follows:

"Whenever any incorporated city or town, having maintained an association library for at least ten years prior to the establishment of a county library which has become a part of the tax supported city or town library and being a part of the county library district, and having levied the tax of its own equal to or greater than that of the county library

district for the same purpose, shall decide to withdraw from the county library district, it may do so by giving notice by certified mail to the board of library trustees of said county library. . . ."

As will be noted, that section does not permit unlimited withdrawal from the county library district. Rather, it establishes two conditions which must be met before withdrawal may occur. These conditions are as follows:

1. The city or town involved must have maintained an association library for at least ten years prior to the establishment of a county library which has become a part of the tax supported city or town library.

2. The city or town involved must have levied a tax of its own equal to or greater than that of the county library district for library purposes.

The facts related to this office by Councilman Goen, do not require this office to define the words "association library." This is due to the fact that the town of Dyersville did not maintain any library until after the county library district was well established. Under this state of the facts, the city of Dyersville does not meet the first prerequisite to withdrawal; namely it has not maintained some library for at least ten years prior to the establishment of the county library.

It is therefore the opinion of this office that Chapter 358B of the Code does not allow general withdrawal by cities or towns from county library systems but only limited withdrawal under the conditions set forth in §358B.16, Code of Iowa, 1966. Further, the town of Dyersville does not appear to meet these conditions.

May 28, 1968

CIVIL DEFENSE: State and local authority to use fire apparatus under emergency powers. §§29C.3(2), 29C.3(3), 29C.4(2), 29C.7(3), 29C.8, Code of Iowa, 1966. State officials are authorized to require movement of fire apparatus and other equipment, under existing emergency powers. (Zeller to Orr, Director, Iowa Civil Defense Division, 5/28/68) #68-5-52

Mr. George W. Orr, Director, Iowa Civil Defense Division: Reference is made to your letter of May 8, 1968, requesting our written opinion concerning the authority to require the movement of local government-owned equipment and personnel under emergency conditions. Your letter refers to an attached letter of April 19, 1968, from the chief of the fire department of Davenport which inquires if the governor, or any official, has the authority to require the movement of fire apparatus under any existing emergency powers.

In answering these inquiries it is necessary to refer to Chapter 29C of the Civil Defense.

This chapter on civil defense authorizes and empowers the governor, the executive director of the Department of Public Defense (Adjutant General), and the Civil Defense Director to control and administer the civil defense including man-made or natural disasters at the state level. The state-wide authority of the governor is fully described in §29C.3, Code of Iowa, 1966. The Adjutant General as the executive director of the Department of Public Defense is given general direction and control of the Civil Defense Division also in §29C.3 under the control of the governor. See §29C.3(3), Code of Iowa, 1966.

The Director of Civil Defense is also vested with authority to administer civil defense affairs in the State including man-made or natural disasters. §29C.4(2), Code of Iowa, 1966.

At the county level provision is made for a joint county-municipal civil defense and the joint county-municipal defense is responsible for the administration and direction of civil defense including man-made or natural disasters. §29C.7(3), Code of Iowa, 1966. Provision is made for the appointment of a Director of Civil Defense under this same section at the county and municipal level by these local authorities.

In carrying out the duties of civil defense or protecting against disaster, the joint county-municipal administration has the right to use the county facilities including the county or municipal fire apparatus within the county for which the authority is responsible.

Section 29C.8, Code of Iowa, 1966, reads as follows concerning the use of existing facilities:

"In carrying out the provisions of this chapter, the governor, the executive director, department of public defense, and the director, civil defense division, and the executive officers or governing bodies of political subdivisions of the state are authorized to utilize, to the maximum extent practicable, the services, equipment, supplies and facilities of existing departments, officers, and agencies of the state and of political subdivisions at their respective levels of responsibility."

In applying this section it is our opinion that the governor of the State, the Adjutant General, and the Civil Defense Director have authority to use and direct and to control to the maximum extent practicable the services and equipment and facilities of each or any of the existing agencies of the State or of the political subdivisions of the State.

This in our opinion would give them authority to require the movement of fire apparatus under existing emergency powers by acting through the agency of the joint county and municipal administration which is authorized for each county.

May 28, 1968

TAXATION — Tax Certificate Holders Qualifying Action — §446.37, Code of Iowa, 1966. All steps necessary to secure a deed under a tax sale are part of the term "qualifying action." Included within that term are the filing and service of the Notice of Expiration of Right of Redemption, but such term does not embrace the issuance of the tax deed. (McLaughlin to Millhone, Page County Attorney, 5/28/68) #68-5-40.

Mr. James N. Millhone, Page County Attorney: You have requested an opinion of the Attorney General on the meaning of the words "qualifying action" as used in Section 446.37, as amended by the 62nd General Assembly.

Section 446.37, Code of Iowa (1966) after being amended by Section 3, Chapter 357, Laws of the 62nd G. A., provides:

"446.37. Failure to obtain deed — cancellation of sale. After five years have elapsed from the time of any tax sale, and action has not been completed during such time *which qualifies the holder of a certificate to obtain a deed,* it shall be the duty of the county auditor and county treasurer to cancel such sale from their tax sale index and tax sale register. Certificates outstanding on July 1, 1967 when this Act becomes

effective, five years or more from time of tax sale, on which such qualifying action has not been completed, shall be so cancelled, if such action is not completed before July 1, 1968." (Emphasis Supplied)

You have further delineated your inquiry by asking whether "qualifying action" means "the service and filing of Notice of Expiration of Right of Redemption only or does it mean the actual issuance of the tax deed by the County Treasurer?"

The Office of the Attorney General has given consideration to this problem in the past, but under statutes which contained different provisions. 1926 O.A.G. 487; 1930 O.A.G. 187; 1936 O.A.G. 273; 1944 O. A. G. 131 and 1946 O.A.G. 114. None of those opinions are considered authority in answering your inquiry, but the language of the amending provisions does supply an answer. Therein it is stated that "and action . . . which qualifies the holder of a certificate to obtain a deed." It is our opinion that the words "which qualifies the holder of a certificate to obtain a deed" modify the word "action" in the amending provision and that it does not modify the word "time." The "time" in which to secure a deed is fixed by the statute at "five years." Such construction gives a logical and literal meaning to the words "qualifying action." Consistent with the foregoing, we are of the further opinion that "qualifying action" means all steps leading up to the issuance of a deed, which is merely a ministerial act. Accordingly, service and filing of the Notice of Expiration of the Right of Redemption are a part of the "qualifying action" as embodied in the statute.

May 28, 1968

COUNTIES AND COUNTY OFFICERS: Compatibility of offices, police judge and special deputy sheriff. The offices of police judge and special deputy sheriff are incompatible and may not simultaneously be held by the same person. (Haesemeyer to Story, Jones County Attorney, 5/28/68) #68-5-42

Mr. Robert H. Story, Jones County Attorney: By your letter of April 24, 1968, you have requested an opinion of the attorney general on the question of whether or not there would be incompatibility in the same person holding both the offices of police judge and special deputy sheriff.

In our opinion these two offices are plainly incompatible and the same person may not hold both the office of police judge and the office of special deputy sheriff.

The rule in Iowa with respect to incompatibility of office is well stated in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965) as follows:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112

Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

The court in *State v. White*, supra, also pointed out the somewhat harsh results which may stem from the same person occupying two incompatible offices:

"If a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N. W. 128, 129, Bryan v. Cattell, 15 Iowa 538, 550."

Since a police court judge who is also a special deputy sheriff might find himself in the difficult position of being called upon to try a case in which he was himself the arresting officer it can hardly be gainsaid that the two offices are "inherently inconsistent and repugnant" or that the "nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both."

May 28, 1968

COUNTIES AND COUNTY OFFICERS — State Hospitals — §§230.20, 230.24, Chapter 2, §5, Acts of the 62nd General Assembly. The opinion of this office dated August 10, 1965, is still valid. Counties can obtain the benefits of Chapter 2, §5, Acts of the 62nd G. A., only if the patient for which the county is being billed is in a state hospital. (Seckington to Carr, Delaware County Attorney, 5/28/68) #68-5-39

Mr. E. Michael Carr, Delaware County Attorney: Receipt of your letter dated May 11, 1968, is hereby acknowledged. In that letter you asked the following questions:

"First, is the Attorney General's opinion dated August 10, 1965, still valid?"

* * *

"Is there any way that Delaware County or any other county sending a patient to a private institution in lieu of a state institution can benefit from this so-called 'silent 20% rebate' [of §230.20 as amended]? . . ."

After reviewing the opinion of this office dated August 10, 1965, I conclude that the conclusions are correct and therefore it is still a valid opinion.

In answer to your second question, Chapter 2, §5, Acts of the 62nd General Assembly provides as follows:

"The mental health institute's daily per diem as determined by §230.20, Code 1966, as amended, shall be billed at eighty (80) percent for the biennium."

Section 230.20, supra, charges the superintendent of each state mental institution with the duty of certifying to the comptroller the amount due the state from each county. This section, as amended, and Chapter 2, §5, Acts of the 62nd General Assembly, apply only to state hospitals as shown by the clear language contained therein.

It is therefore the conclusion of this office that there is no way for any county to obtain the benefits of Chapter 2, §5, Acts of the 62nd General Assembly, unless the patients for which the county is being billed are in a state hospital.

May 28, 1968

COUNTIES — **Poor Fund** — §252.27. The poor fund may not be used for the purchase of cigarette paper and tobacco for residents of the county home, however, such purchases made from county home receipts under authority of §253.2 are not illegal. (Nolan to Millhone, Page County Attorney, 5/28/68) #68-5-54.

Mr. James N. Millhone, Page County Attorney: This is in reply to your letter of May 17, 1968, in which you state:

"A medical doctor who is seriously concerned about the hazardous affect of cigarette smoking upon health has requested that I submit the following question:

" 'Is it lawful for the county, from the poor fund, to purchase tobacco and cigarette paper for the residents of the County Home when the hazardous affects upon the health of the use of such items has been demonstrated?'

"In the event that such purchases are lawful who is responsible for determining whether the poor fund shall, in fact, be used for such purchases?"

Contracts for all purchases required for the maintenance and management of the county home are to be made by the board of supervisors or a committee appointed by it for that purpose. §253.2, Code of Iowa, 1966. This section of the code empowers the board of supervisors to prescribe rules or regulations for the management and government of the same, and for the sobriety, morality, and industry of its occupants. I find no provision of law making it illegal for the county to purchase tobacco and cigarette papers for the residents of the county home regardless of the affects of tobacco upon the health of such residents. Under §253.3 the board of supervisors is required to publish a financial statement of the receipts of the county home or county farm, itemizing the same and stating the source thereof, and to report the total expenditures and the value of the property on hand on January 1 of the reported year with a comparison of the inventory of the previous year. It is my view that any expenditure made for the purchase of cigarette paper and tobacco should be made from the receipts of the county home rather than from the poor fund. The form of relief available from the poor fund is set out in §252.27 and is specified as "food, rent or clothing, fuel and lights, medical attendance, or . . . money." This section was amended by the 62nd General Assembly to permit the burial of nonresident indigent transients and the payment of the reasonable cost of such burial not exceeding $250.00. This section has been strictly construed and applying the rule of expressio unus est exclusio alterius it would appear that expenditures for cigarette paper and tobacco could not be made from such poor fund.

May 29, 1968

COUNTIES AND COUNTY OFFICERS: Publication of schedule of bills allowed by supervisors — §349.18, Code of Iowa, 1966. Except where

the legislature has by express provision made poor support information confidential the law requires the publication of not only the name of the payee of each warrant but also the name of each person benefitted together with the amount of the overall payment attributable to each such benefitted person. (Haesemeyer to Wegman, Chickasaw County Attorney, 5/29/68) #68-5-45

Mr. William L. Wegman, Chickasaw County Attorney: By your letter of April 18, 1968, you have requested an opinion of the Attorney General with respect to the following questions:

"Under *Iowa Code Section 349.18*, must the County publish only the name of the actual claimant and recipient of a Warrant or is the intent of the law such that the County must show additionally the names of the individuals for whom the actual claimant performed services and occasions the claim. For example, assume that the County Medical Examiner is called to three (3) suicides and two (2) other unusual deaths, should the County publish only 'Dr. James Murtaugh — Medical Examiner Fees — and the amount' or is the *intent of the law* such that the County is to apprise the public of the amount expended for each suicide and unusual death separately, such as, 'Dr. James Murtaugh — County Medical Examiner Fees — James Doe — $10.00 — Thomas Roe — $12.75 — Edna Moe — $16.50 etc.?' "

"Secondly, regarding Poor Fund Claims, must the County show only the actual claimant and recipient of a Warrant or is the *intent of the law* such that the County should publish the amounts spent and names of those who received services. For example, assume the Chickasaw Ambulance Service transports three persons who are on County aid, should the County publish only 'Chickasaw Ambulance Service — Ambulance for John Doe and Thomas Roe — $50.00 or should it be published 'Chickasaw Ambulance Service — Ambulance for John Doe — $30.00 — and Ambulance for Thomas Roe — $20.00?' "

"Thirdly, regarding State Institution Fund Claims, should the County publish 'XYZ Nursing Home, care for patients, $500.00' or must the County specify how much was expended for each patient even though XYZ Nursing Home is the only claimant and the only recipient of a Warrant?"

The questions you have raised may be answered by reference to the applicable statutory provision, §349.18, Code of Iowa, 1966, and a prior opinion of the attorney general, 63 OAG 92. §349.18 provides:

"349.18 Supervisors' proceedings — each payee listed — publication. All proceedings of each regular, adjourned, or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of *the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon.* The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board." (Emphasis supplied)

A copy of 63 OAG 92 is annexed hereto and made a part hereof. It appears to be directly in point and as stated therein:

". . . §349.18 provides the following must appear in the publication:

"(1) The name of each individual to whom the allowance is made.
"(2) For what such bill is filed.
"(3) The amount allowed thereon.

"The example in the letter from the Auditor was as follows:

'Johnson Grocery, groceries, John Doe, $20.00.'

"Number (1) above is satisfied since the allowance was made to 'Johnson Grocery.' Number (3) is satisfied since the allowed amount was $20.00. Thus the question boils down to whether number (2) above is satisfied by merely showing the bill was allowed for groceries, or whether John Doe's name should be included to show who the groceries were provided for.

"No court has apparently faced this problem before. Logically, it would appear that what the bill was allowed for was not merely groceries, but in addition thereto, it was groceries for John Doe. Not only is this logical, but it also would appear to correspond to the obvious intent of §349.18, that being a complete disclosure of expenditures of public funds. This would appear to be the obvious intent of §349.18 for the reason that before §349.18 appeared in its present form it read as follows:

" 'All proceedings of each regular, adjourned, or special meetings of the board of supervisors, including the schedule of bills allowed, shall be published promptly after such meeting.'

"This section was amended by the 45th G. A., said amendment appearing at Chapter 105, §2, of the Acts of the 45th G. A. By the amendment a much more specific and comprehensive disclosure was required.

"In addition, and in support of this conclusion, the legislature in Chapter 252 did not make poor support information confidential. In some financial assistance programs, e.g., ADC and Soldiers and Sailors Relief, such information has been made confidential, but not so in the case of poor support. This in itself would seem to indicate that the legislature did not intend that the payee's name go unpublished."

This prior opinion of the attorney general appears to be well reasoned and we see no reason to depart from the conclusions reached therein. Accordingly, it is our opinion that except where the legislature has by express provision made poor support information confidential the publication required by §349.18 should contain not only the name of the payee of each warrant but also the name of the person benefited together with the amount of the overall payment attributable to each such benefited person.

May 29, 1968

CITIES AND TOWNS: Retirement systems for policemen and firemen. §§411.6(10), 411.6(11), 411.6(3), 411.6(4), 411.6(5), 411.6(6), Code of Iowa, 1966. Upon retirement a beneficiary, at his election, is entitled under §411.6(11) to receive one of the following options: (1) the standard retirement allowance, or (2) the city pension portion of the standard retirement allowance plus a cash distribution which, with board of trustees approval, may equal up to 100% of his individual contributions. In the event of the board of trustees' refusal to pay the 100% cash distribution above alluded to, a beneficiary may elect to receive up to a 50% cash distribution which the board of trustees may not deny. Retirement under §411.6(11) includes leaving the service of the community by reason of disability. (Martin to Shaff, State Senator, 5/29/68) #68-5-46.

The Hon. Roger J. Shaff, State Senator: I have received your request for an opinion of the Attorney General dated May 1, 1968, in which you state as follows:

"It is the position of the actuaries that with board approval, a 100% refund of contributions may be made under [§411.6(11), Code of Iowa, 1966] and without board approval, a 50% refund of accumulated contri-

butions may be made. The actuaries opinion is premised on that situation wherein the benefits are to be paid as a result of retirement.

"It is the position of the City Attorney that [§411.6(10), Code of Iowa, 1966] and [§411.6(11), Code of Iowa, 1966] are tied together and that in no event can the refund exceed 50% of accumulated contributions where retirement is involved and that the 100% refund applies only to that situation where employment ceases other than by death or retirement."

Section 411.6(10), Code of Iowa, 1966, to which you refer provides as follows:

"*Return of accumulated contributions.* Should a member cease to be a policeman or fireman except by death or retirement, he shall be paid on demand the amount of his accumulated contributions standing to the credit of his individual account in the annuity savings fund."

Section 411.6(11), Code of Iowa, 1966, provides as follows:

"*Optional allowance.* With the provision that no optional selection shall be effective in case a beneficiary dies within thirty days after retirement, in which event such a beneficiary shall be considered as an active member at the time of death; until the first payment on account of any benefit becomes normally due, any beneficiary may elect to receive his benefit in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent at that time of his retirement allowance in a lesser retirement allowance payable throughout life with the provision that an amount in money not exceeding the amount of his accumulated contributions shall be immediately paid in cash to such member or some other benefit or benefits shall be paid either to the member or to such person or persons as he shall nominate, provided such cash payment or other benefit or benefits, together with the lesser retirement allowance, shall be certified by the actuary to be of equivalent actuarial value to his retirement allowance and shall be approved by the board of trustees; provided, that a cash payment to such member or beneficiary at the time of retirement of an amount not exceeding fifty percent of his accumulated contributions shall be made by the board of trustees upon said member's or beneficiary's election."

The provisions of §411.6(10), above set out, clearly require that if a member cease to be a policeman except by death or retirement that he shall be paid upon demand the entire amount of his accumulated contributions standing to the credit of his individual account in the annuity savings fund. It is this section that is used in the event of a member's voluntary withdrawal from the police or fire department, or his removal by proper authorities.

Section 411.6(11), above set out, provides for options in the case of the occurrence of some event which is compensable under the retirement system. This section clearly provides, with the exception that no election of an option shall be effective in the event of a beneficiary's death within thirty days after retirement, that a member may elect to receive any benefits accruing to him as a retirement allowance, payable throughout life. This retirement allowance is defined in §411.6(2), Code of Iowa, 1966. That section defines the retirement allowance as an amount of money which equals one-half of his average final compensation. This first option is the standard pension.

Under the second option of this same subsection, however, he may elect to receive any amount of his individual contribution, immediately in cash, with the approval of the board of trustees. Nothing in the statute

indicates that this may not be 100% of the individual contributions. Indeed, the statute indicates that the only limitation to be placed upon this cash distribution is the amount of the individual's contribution. Under this plan he would continue to receive the pension given by the city which would be an amount of money equal to one-half of his average final compensation less the acturial equivalent of his accumulated contributions at the time of his retirement.

You will note that in the event of a member's election to receive a 100% cash distribution, approval of the board of trustees is required. The last part of §411.6(11), however, states as follows:

". . . provided, that a cash payment to such member or beneficiary at the time of retirement of an amount not exceeding 50% of his accumulated contributions *shall be made by the board of trustees upon said member or beneficiary's election.*" (emphasis added)

It is clear from this language that in the event a member or beneficiary opts to receive 100% of his individual contributions upon retirement, and the board of trustees refuses to approve such a payment, he may in any event elect to receive 50% of his individual contributions. The board of trustees has no discretion in such a case, they must approve a 50% cash distribution.

Section 411.6(11) is not limited to those cases in which retirement by reason of age occurs. The options contained in this section may also be used by those retiring by reason of disability. The concept of retirement by disability appears repeatedly throughout the statute and it is clear that the two are equated.

Section 411.6(3), Code of Iowa, 1966, provides in pertinent part as follows:

"*Ordinary disability retirement benefit.* Upon the application of a member in service or of the chief of the police or fire departments, respectively, any member who has had five or more years of membership service *shall be retired* by the respective board of trustees, . . ." (emphasis added)

Section 411.6(4), Code of Iowa, 1966, provides as follows:

"*Allowance on ordinary disability retirement.* Upon *retirement* for ordinary disability a member shall receive a service *retirement* allowance if he has obtained the age of fifty-five, otherwise he shall receive an ordinary disability retirement allowance which shall consist of: . . ." (emphasis added)

Section 411.6(5), Code of Iowa, 1966, provides as follows:

"Upon application of a member in service . . . of the police or fire department . . . any member who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, . . . shall be *retired* by the respective board of trustees, provided, that the medical board shall certify that such member is mentally or physically incapacitated for further performance of duty, and that such incapacity is likely to be permanent and that such member should be *retired.*" (emphasis added)

Section 411.6(6), Code of Iowa, 1966, provides as follows:

"Retirement after accident. Upon *retirement* for accidental disability a member shall receive an accidental disability. . . ." (emphasis added)

The entire rubric of the chapter clearly contemplates that through not only the attainment of a specific age, but through disability or injury, a member or beneficiary is retired. Thus, the retirement options of §411.6(11) apply.

It is therefore the opinion of this office that upon retirement a beneficiary, at his election, is entitled under the provisions of §411.6(11) to receive one of the following options:

1. the standard retirement allowance, or

2. The city pension portion of the standard retirement allowance plus a cash distribution which, with board of trustees approval, may equal up to 100% of his individual contributions.

In the event of the board of trustees' refusal to pay the 100% cash distribution above alluded to, a beneficiary may elect to receive up to a 50% cash distribution which the board of trustees may not deny. Retirement under §411.6(11) includes leaving the service of the community by reason of disability.

May 29, 1968

CITIES AND TOWNS — Mayor — Justice of the Peace Courts — §§367.6, 367.7. Declaration by mayor that he is unable to conduct Mayor's Court invokes the jurisdiction of the nearest Justice of the Peace in all criminal matters including violations of city ordinances. (D. Hendrickson to Goodhue, Warren County Attorney, 5/29/68) #68-5-47.

Mr. Darrell Goodhue, Warren County Attorney: You have requested an opinion of this office on the following question, to wit:

"The Mayor of the City of Indianola has made a blanket written declaration to the effect that because of the burdens of his office he is unable to hold Mayor's Court, and that he wishes that jurisdiction of all offenses committed against the ordinances of the City of Indianola be transferred to the local Justice of the Peace Courts. The procedure is being carried out on a blanket basis rather than an individual basis and is apparently being done under the authority of Section 367.6 Code of Iowa (1966). The Justice of the Peace is concerned that he does not have jurisdiction to hear the case under a blanket authority, but that each case must be submitted to the Mayor in the original instance and then transferred to the Justice of the Peace."

Chapter 367.6, 1966 Code of Iowa, states:

"If the mayor or judge of the superior, municipal, or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold court in criminal cases, and receive the statutory fees, to be paid by the city or county as the case may be."

The facts as you have stated in your letter, indicate that the mayor is unable to act because of other burdens of his office. It is one thing for a mayor to fairly determine within the sound exercise of his discretion that he is temporarily incapacitated or unable to act in performing a major part of the duties of his office for a period of time, for specific reasons such as illness, conflict of interest, prejudice or other temporary disability, and quite another to abdicate his responsibility for such personal reasons as that they are burdensome or distasteful to him. Nevertheless,

the mayor has broad power and discretion in concluding that he cannot act and every inference should be indulged that he has not abused that discretion for reasons personal to himself. Chapter 367.6 does not specify reasons for which one can determine if the mayor is unable to act, however, it is our opinion that if the mayor in good faith, determines he is unable to act, the requirements of Chapter 367.6 are met.

Your attention is invited to Chapter 367.7 which states:

"When an information is filed before the mayor for the violation of an ordinance of the city or town, he may, upon his own motion only, at any time before trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and such justice of the peace shall have jurisdiction thereof to the same extent and with the same power as the mayor. . . ."

This section authorizes the mayor's court while functioning as such, to transfer an individual case concerning an ordinance violation to the Justice of the Peace court. However, if there is no mayor's court because of the absence of the mayor or because the mayor is unable to act then, it is our opinion that the provisions of Chapter 367.6 are applicable and the nearest Justice of the Peace has jurisdiction to hold court in *criminal* cases which include violations of city ordinances. See 1911 Op. Atty. Gen. 325 and 1911 Op. Atty. Gen. 348.

May 29, 1968

EXECUTIVE COUNCIL: Use of contingency fund to pay sales tax on admissions to 1967 state fair — H.F. 786, §5, Chapter 77, Acts 62nd G. A. The contingent fund may not be used to pay sales tax on admission tickets to the Iowa State Fair held in August, 1967. The fair board had both constructive and actual notice of the applicability of the tax to fair admissions and fact that tickets had already been printed showing no tax was not a contingency so as to justify use of contingent fund. (Turner to Executive Council, 5/29/68) #S68-5-2

The Executive Council of Iowa: On February 8, 1968, your secretary, Stephen C. Robinson, forwarded me your request for an opinion of the attorney general as to whether the executive council may grant the request of the fair board to pay, from the contingent fund, sales tax on admission tickets sold at the State Fair in August, 1967.

It is clear that the legislature, in enacting H.F. 702, the new tax bill, specifically imposed a sales tax on admission tickets sold at state, county, district and local fairs. See §§422.43 and 422.45(3), Code of Iowa, 1966, as amended by Chapter 348, §§23 and 22(3), Acts, 62nd G. A., pp. 678-679. The law became effective as to fairs on July 29, 1967, the day after its last publication. See O.A.G. November 2, 1967. At the time the law became effective the rate of sales tax was 2% and the 3% rate did not go into effect until October 1, 1967, after the State Fair. Chapter 348, §20, Acts, 62nd G. A., p. 678. Thus, at the time of the fair in August, 1967, a clear statutory mandate required collection of a 2% tax on the sale of all admission tickets to the state fair.

The fair board and its secretary had constructive notice of the new law by virtue of its publication. Furthermore, the materials from Kenneth R. Fulk, secretary of the fair board, attached to your letter, show

that he was personally notified by the tax commission on July 31, 1967, that the fair was obligated to pay the tax and that on August 1, 1967, he asked the tax commission for "instructions on how to legally collect the tax." In addition, on July 31, 1967, I sent Harry Griger, an assistant attorney general assigned to the tax commission, to visit with Mr. Fulk and other fair officials and to explain to them how to collect the tax, which Mr. Griger says he did. And Joseph Zeller, assistant attorney general assigned to represent the fair board, says he also explained to these officials that the tax would have to be collected or paid from receipts if not collected.

It was, and is, the contention of Mr. Fulk and the fair board that the admission tickets had already been printed and there was insufficient time before opening day on or about August 16, 1967, in which to have new tickets printed. Nevertheless, those facts do not absolve the fair board from its statutory liability for the tax. If it was not practicable to add the tax to the admission price, it must be absorbed by the fair board. §422.48, Code of Iowa, 1966.

As the executive council has suggested, "since the sales tax is paid into the general fund and the contingency fund is financed from the general fund, if the council were to approve the request for an allocation from the contingency fund, it would, by this means, eliminate the tax." I agree with the council that it cannot thus repeal this law. Nor can it, thereby, create or enhance an appropriation to the fair board.

Furthermore, the difficulty of collecting the tax, or obtaining new tickets, was not of an unforeseeable nature at the time the tax was imposed and unforeseeability is a prerequisite to the expenditure of monies from the contingency fund. See O.A.G. January 29, 1968.

June 6, 1968

BOARD OF SUPERVISORS — Incompatibility — §358.10, Code of Iowa, 1966. A member of the county board of supervisors is ineligible to hold at the same time, the office of sanitary trustee established by §358.10 as these offices are incompatible. (Nolan to Freeman, State Representative, 6/6/68) #68-6-1

The Hon. Lester M. Freeman, State Representative: This is in response to your March 12, 1968, letter in which an official opinion of this office was sought on the question of whether or not the office of county supervisor is compatible or incompatible with the office of sanitary district trustee.

After considering the statutes and cases applicable to such an inquiry we have come to the conclusion that the two offices are incompatible although there appears to be no express statutory provision prohibiting an individual from holding the two offices in question at the same time. Our conclusion is based chiefly on the fact that under §358.10 of the 1966 Code of Iowa:

"Each trustee shall, before entering upon the duties of his office, execute a bond payable to the district, with security to be approved by the board of supervisors which had jurisdiction of the petition for establishment of the district, in such form and amount as said board of supervisors may determine, which bond shall be filed with the county auditor of said county."

In the recent case entitled *State ex rel Le Buhn v. White*, 257 Iowa 606, 133 N. W. 2d 902, the Iowa Supreme Court ruled that a person cannot serve as a member of a local school board and the county board of education concurrently. In that case the court applied as a test of incompatibility whether there is "an inconsistency in the function" of the two offices as where one is "subordinate to the other" or "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both."

It is our view that it would be against public policy for a member of the board of supervisors to have approval power over the security which such member would be required to file as a member of a board of trustees of a sanitary district. Consequently we must conclude that the two offices are incompatible.

June 24, 1968

STATE OFFICERS AND DEPARTMENTS — Governor determines use and assessment of costs of state aircraft — Chapter 1, §39, Acts, 62nd G. A.; Chapter 20, §1, Acts, 60th G. A. Authority to assign the use of and assess operating costs for the aircraft purchased to support the administrative flights of the governor is vested solely in the governor. (Turner to Clarke, Administrative Assistant to Governor, 6/24/68) #S68-6-1

Mr. Wade Clarke, Jr., Administrative Assistant, Office of the Governor: By your letter of June 7, 1968, you have requested my opinion as to whose responsibility it is to make regulations concerning the use of the governor's airplane.

I find no statute to answer this problem except the appropriation provided in chapter 1, §39, Acts of the 62nd General Assembly (page 18) which provides:

"For support, maintenance, purchase of state owned aircraft, and miscellaneous purposes including not more than one hundred fifty thousand dollars ($150,000.00) for the replacement of one aircraft which shall be the only aircraft to be assigned to the military department for the support of administrative flights of the governor ..... $670,720.00."

As I understand it, this is the second airplane purchased for this purpose. The first airplane, which I understand has now been replaced, was purchased by the appropriation provided in chapter 20, §1, Acts of the 60th General Assembly, as follows:

"For the purchase of a twin engine aircraft to be assigned to the military department for the support of administrative flights of the governor *and other state officials*. The authority to assign utilization of the aircraft shall be vested in the executive council with the assessing of maintenance and operational costs on the basis of such utilization vested in the adjutant general ..... $ 68,000.00."

Thus it appears that the first airplane was purchased not only for the governor but for other state officials, too. In that instance, the authority to assign the utilization of the airplane was specifically vested in the executive council and the adjutant general was specifically authorized to assess the operational costs of the utilization.

Since the appropriation of the 62nd General Assembly for the second

airplane deleted the words "and other state officials" and made no reference to authority to assign the use or assess the maintenance and operational costs, it is my opinion that these matters were deliberately left entirely in the hands of the governor.

June 24, 1968

ELECTIONS — Form of ballot, constitutional amendments — Article X, §1, Constitution of Iowa; §§49.43, 49.44 and 49.45, Code of Iowa, 1966. While the full text of a proposed constitutional amendment which is being submitted to a vote of the people must be printed on the ballot, those portions of the bill or joint resolution proposing such amendment which are clearly not a part of the amendment itself are surplusage and need not be printed on the ballots. (Turner to Landess, 6/24/68) #S68-6-2

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of May 8, 1968, in which you submitted the following:

"At the general election on November 5, 1968, five (5) constitutional amendments must be submitted to the vote of the people of the state. This office must prepare the form of ballot to be used in such election. The amendments (S.J.R. 1, S.J.R. 2, S.J.R. 4, S.J.R. 8 and S.J.R. 10) each contain in Section 1, the prefatory statement 'Section 1. The following amendment to the Constitution of the State of Iowa is hereby proposed.' They also contain, as Section 2, the following:

" 'The foregoing proposed amendment, having been adopted and agreed to by the Sixty-first (61st) General Assembly, thereafter duly published, and now adopted and agreed to by the Sixty-second (62nd) General Assembly in this Joint Resolution, shall be submitted to the people of the State of Iowa at the general election in November of the year nineteen hundred sixty-eight (1968) in the manner required by the Constitution of the State of Iowa and the laws of the State of Iowa.'

"Is it necessary or even desirable that these clauses be printed on the ballot with the actual amendatory portion of the resolution?

"The form of the ballot must, of course, contain the language set out in Code Section 49.45, and the constitutional amendment must be set out in full. But is the surplusage contained in the Senate Joint Resolutions, which is necessary for the adoption of the resolutions by the General Assembly, a part of the constitutional amendment which must be submitted to the voters?"

Article X, §1, Constitution of Iowa, provides that when a proposed amendment to the Constitution has been agreed to by a majority of each house in two successive sessions of the general assembly, "then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time as the General Assembly shall provide;".

Provision has been made for submission of such amendments to the people in §§49.43, 49.44 and 49.45, Code of Iowa, 1966. But the following are the only sections relevant to your question:

"*Constitutional amendment or other public measure.* When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, 'Shall the following amendment to the constitution (or public measure) be adopted?'.

* * *

"*General form of ballot.* Ballots referred to in sections 49.43 and 49.44 shall be substantially in the following form:

'Shall the following amendment to the constitution (or public measure) be adopted?' ☐ YES ☐ NO

(Here insert in full the proposed constitutional amendment or public measure.)"

While the constitutional amendment, itself, must be printed in full under both of these sections, those portions of the sections of the bill or Joint Resolution which are clearly not a part of, and are separable from, the body of the proposed amendment itself, are, as you suggest, surplusage and need not be printed on the ballot. Nothing in either Article X or the provisions made by the general assembly thereunder (§§49.43 and 49.45) suggest otherwise. Inclusion of such surplusage not only makes it more difficult and tedious for the elector to read the ballot but it cannot possibly add anything to his understanding of the amendment and, indeed, may actually detract therefrom. Certainly, such surplusage has never been inserted by the code editor. See Volume I, Code of Iowa, 1966, commencing at page lxxxii.

It is not difficult to separate out the relevant portions of a constitutional amendment from the Act or Joint Resolution proposing them since they are always in quotation marks while the surplusage is not. Furthermore, the amendments already adopted, as shown in the Code, may serve as a guide for showing the full proposed constitutional amendment to be printed on the ballot. Of course, this always includes the adopting clause, the repealer clause or the amending clause, as the case may be, of the amendment itself. But it does not include the clause of the general assembly by which the amendment is proposed by them. Nor does it include the direction of the general assembly for the submission of the amendment to the people.

The Constitution and its amendments are a voice of the people, not the legislature, and while it is true that under this method of amending the Constitution they must accept or reject the identical words submitted to them by two general assemblies, they should not be required to vote on whether the amendment has, in fact, been proposed, but only whether it should be adopted.

Thus while it is apparent that inclusion of such surplusage on the ballot for a constitutional amendment is obviously, logically and technically incorrect, confusing, bad practice and an incalcuable waste of the time of the many voters the legislature must have presumed would read it, the additional printing cost would not appear significant and if, from a super abundance of caution or negligence, the surplusage was included on the ballot, it would not, in my opinion, render the proposition void if adopted by a majority of the people. *Subsequens matrimonium tollit peccatum praecedens.*

June 27, 1968

STATE OFFICERS AND DEPARTMENTS — Members of the general assembly, acceptance of honorariums — Chapter 107, Acts of the 62nd G. A. A member of the general assembly may accept a speaker's honorarium and/or travel expenses in excess of $25.00 from the state,

a political subdivision of the state or a private group even though the legislator is selected as a speaker primarily because he is a member of the general assembly so long as the payment is not a subterfuge to circumvent the prohibition of the law against payments to influence legislation. (Turner to Gaudineer, 6/27/68) #S68-6-3

The Hon. Lee H. Gaudineer, Jr., State Senator: Reference is made to your letter of June 15, 1968, in which you raise certain questions with respect to the application of the Iowa Public Officials Act, Chapter 107, Acts of the 62nd G. A., which will become effective as of July 1, 1968, hereinafter referred to as the "Act."

Specifically you request an opinion of the attorney general upon the following questions:

"1. May a legislator receive an honorarium in excess of $25 from the state of Iowa for appearing before a group when the legislator is selected for such appearance primarily because he is a member of the General Assembly?

"2. May a legislator receive travel expenses in excess of $25 from the state of Iowa incurred for appearing before a group when the legislator is selected for such appearance primarily because he is a member of the General Assembly?

"3. May a legislator receive an honorarium in excess of $25 from a political subdivision of the state of Iowa or a private group when the legislator is selected for such appearance primarily because he is a member of the General Assembly?

"4. May a legislator receive travel expenses in excess of $25 from a political subdivision of the state of Iowa or a private group when the legislator is selected for such appearance primarily because he is a member of the General Assembly?"

Sec. 5 of the Act provides:

"No official, employee, member of the general assembly, or legislative employee shall, directly or indirectly, solicit, accept, or receive any gift having a value of twenty-five (25) dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form. No person shall, directly or indirectly, offer or make any such gift to any official, employee, member of the general assembly, or legislative employee which has a value in excess of twenty-five (25) dollars. Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state employment."

It is well settled that statutes should be construed so as to give effect to manifest legislative intent as embodied therein, to be determined from a consideration of the entire statute. *State v. City of Des Moines*, 221 Iowa 642, 266 N. W. 41 (1936). Upon examining the Act in its entirety it is immediately discernible that the manifest purpose of the Act was to prevent and inhibit the legislators and other state officers and employees from receiving gifts which might affect the independence of judgment which they ought to bring to bear in the performance of their official duties. Thus, insofar as members of the general assembly are concerned it is not all gifts which are prohibited but only those which would be likely and intended to have the effect of influencing legislative action. In this connection it is to be observed that the last sentence of section 5 of the Act provides, "Nothing herein shall preclude campaign contributions or gifts which are unrelated to legislative activities or to state

employment." Moreover, it should be noted that section 5 of the Act prohibits a member of the general assembly only from soliciting, accepting or receiving a "gift." This latter term clearly carries with it connotations of a want of consideration. Webster's Third New International Dictionary of the English Language, unabridged, G. & C. Merriam Company, 1967, in relevant part defines "gift" as follows:

"gift . . . 2: something that is voluntarily transferred by one person to another without compensation: as a . . . (3): a voluntary transfer of real or personal property without any consideration or without a valuable consideration. . . ."

An honorarium on the other hand is defined in the same dictionary as follows:

"honorarium . . . an honorary payment or reward usu. given as compensation for services on which custom or propriety forbids any fixed business price to be set or for which no payment can be enforced at law (supplementing his income by honoraria from speaking engagements). . . ."

The word "honorarium" is never used except to denote a compensatory payment. *Bogardus v. Helvering*, C.C.A. 2, 88 F. 2d, 646, 649. In the case of a legislator who accepts a speaking engagement which carries with it travel expenses and/or an honorarium there is no element of gift involved. The speech is the consideration for the honorarium and/or travel expenses.

Accordingly, it is our opinion that each of the four questions you have raised must be answered in the affirmative. A legislator accepting a speaking engagement may receive an honorarium and/or travel expenses in excess of $25 from the state of Iowa, a political subdivision of the state of Iowa or a private group regardless of the fact that the legislator may have been selected for such appearance primarily because he is a member of the general assembly so long as the honorarium and/or expenses were not so grossly disproportionate to the value of the services of the legislator as to make it clear that the entire arrangement was a transparent ruse to circumvent the prohibitions of the Act against legislators receiving gifts for influencing legislative action.

June 28, 1968

MOTOR VEHICLES, HIGHWAYS, IOWA STATE HIGHWAY COMMISSION, STATE OFFICES AND DEPARTMENTS, SPECIAL PERMITS FOR OVERSIZE VEHICLES: §§2, 16 and 26 of Chapter 285 and §§1 and 2 of Chapter 277 of the Acts of the 62nd General Assembly, §306B.3, 1966 Code of Iowa, §2.3 of the January 1966 Supplement IDR 17, §§2.2(3) through 2.2(7), 1966 IDR 300. Pursuant to Section 16 of Chapter 285 of the Acts of the 62nd General Assembly, the Iowa State Highway Commission could promulgate rules regulating the movement of vehicles of excess size and weight upon the interstate highway system of the State more restrictive than those applicable to the general non-interstate highway systems provided such rules are designed tc prevent the movement of any vehicles exceeding the limitations of Section 127 of Title 23 of the U.S.C. and the rules bear a reasonable relationship to the preservation of the safety of the traveling public and the protection of highway surfaces and structures with due consideration given to the weight, length, width and height of the vehicle, its mobility, traffic needs, the physical limitations of the system as constructed and to the nature of the move. (Graham to Welden, State Representative, 6/28/68) #68-6-2.

The Hon. Richard W. Welden, State Representative, Hardin County: This is in response to your letter of recent date wherein you request an answer to the following question:

"Does the Highway Commission, under the terms of the Act, (Chapter 285 of the Acts of the 62nd General Assembly) have authority to make rules and regulations for the movements on the interstate system which are different from those prescribed by the Act for other portions of the primary system except for those restrictions on weight and width required to avoid conflict with Section 127, Title 23 of the Federal Code? I refer specifically to length of load and distance."

The applicable sections of Chapter 285 of the Acts of the 62nd General Assembly are, with emphasis supplied, in pertinent part:

§2 "The state highway commission and local authorities may in their discretion and upon application and with good cause being shown therefor issue permits for the movement of vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified . . . but not to exceed the limitations imposed in sections two (2) through sixteen (16) of this Act . . . When in the judgment of the issuing local authority in cities, towns, and counties the movement of a vehicle with an indivisible load which exceeds the maximum dimensions and weights will be unduly hazardous to public safety or will cause undue damage to streets, avenues, boulevards, thoroughfares, highways, curbs, sidewalks, trees, or other public or private property, the permit shall be denied and the reasons therefor endorsed upon the application."

§16 "The commission may adopt and make available upon request to interested parties printed rules and regulations necessary for the movement by permit of vehicles and indivisible loads under the provisions of this Act. No rule or regulation shall be adopted without prior notice to city, town, and county officials and without a hearing on the proposed rule or regulation. All rules and regulations adopted shall have due regard for the safety of the traveling public and the protection of the highway surfaces and structures. *Rules and regulations for permit travel on the interstate system shall be consistent with the federal requirements for the system.*"

§26 "*Use of* the national system of *interstate* and defense *highways* under the provisions of this Act *shall be restricted by regulation and other appropriate action* of the Iowa state highway commission *in such a manner as to not be in conflict with* the applicable provisions of Section 127, Title 23, United States Code."

Further reference to Chapter 285 of the Acts of the 62nd General Assembly will be to "the Act."

Section 127, Title 23, United States Code states in pertinent part:

"No funds authorized to be appropriated for any fiscal year under section 108(b) of the Federal-Aid Highway Act of 1956 shall be apportioned to any State wthin the boundaries of which the Interstate System may lawfully be used by *vehicles with weight in excess* of eighteen thousand pounds carried on any one axle, or with a tandem-axle weight in excess of thirty-two thousand pounds, or with an over-all gross weight in excess of seventy-three thousand two hundred and eighty pounds, *or with a width in excess* of ninety-six inches, or the corresponding maximum weights or maximum widths permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, whichever is the greater. . . ."

Owing to the nature and purpose of the highway, the national system of interstate and defense highways has long been recognized as a special

highway requiring special controls and vesting special powers to enable their creation and maintenance, §2.3 of the January 1966 Supplement IDR 17, *Iowa Power and Light Co. vs. Iowa State Highway Commission,* 254 Iowa 534, 117 N. W. 2d 425 (1962), §306B.3 of the 1966 Code of Iowa. Section 321.285 of the 1966 Code as amended by Section 2 of Chapter 277 of the Acts states in pertinent part:

"Notwithstanding any other *speed restrictions,* the speed limits for all vehicular traffic except vehicles subject to the provisions of section 321.286 *on fully controlled-access, divided, multilaned highways* included in, and as a part of, the national system of interstate highways designated by the federal bureau of public roads and this state (23 'U.S.C. 103(d)) shall be seventy-five miles per hour . . . For the purposes of this subsection a fully controlled-access highway is a highway that gives preference to through traffic by providing access connections with selected public roads only and by prohibiting crossings at grade or direct private driveway connections. *It is further provided that a minimum speed of forty miles per hour, road conditions permitting, shall be established on the highways referred to in this subsection.*

It is further provided that any kind of vehicle, implement, or conveyance incapable of attaining and maintaining a speed of forty miles per hour shall be prohibited from using the interstate system."

Section 1 of Chapter 277 of the same Act then specifies:

"It shall be unlawful for the driver of a freight-carrying vehicle, with a gross weight of over five thousand pounds, to drive the same at a speed exceeding the following:

1. *Sixty-five (65) miles per hour on all interstate highway systems.*
2. Fifty-five (55) miles per hour on all primary roads.
3. Fifty (50) miles per hour on all secondary roads.

. . ."

Sections 321.467 and 321.469, 1966 Code of Iowa, repealed by Section 1 of the Act, authorized the regulation and movement of vehicles of excess size and weight but prohibited certain vehicles from the use of any part of the interstate highway system:

1. Construction and agricultural machinery equipment or material could be hauled, as a load, for distances exceeding 25 miles but not on the interstate highway system. See also, §§2.2(3), 2.2(4) and 2.2(5), 1966 IDR 300.

2. Mobile homes of 10'9" in width could be moved only by manufacturers, dealers or ICC or ISCC permit holders but not on any part of the interstate highway system. In addition such moves could not exceed 35 miles per hour. See also, §§2.2(6) and 2.2(7), 1966 IDR 300.

3. Construction machinery or equipment manufactured or assembled in Iowa could be moved only temporarily at 25 miles per hour or less but not upon any part of the interstate highway system.

Section 16 of the Act is a general grant of authority to the Highway Commission to regulate the movement of vehicles of excess size and weight including movements on the interstate highway system. *Iowa Power and Light Co. v. Iowa State Highway Commission,* supra. The Commission is authorized to regulate such use of the interstate highway system as is in their judgment necessary to promote and preserve the safe and efficient use of the system by the traveling public, the protection of highway surfaces and structures consistent with the federal require-

ments for the system. *Wood Bros. Co. v. Eicher*, 231 Iowa 550, 560-562, 1 N. W. 2d 655, 660, 661 (1942), 1940 OAG 132, Sections 2 and 16 of Chapter 285 of the Act.

Section 26 of the Act is a mandatory direction to the Highway Commission to restrict by regulation and other appropriate action the use of the interstate highway system in such a manner as not to conflict with the applicable provisions of Section 127, Title 23 U.S.C. *Thorson v. Board of Supervisors of Humboldt County*, 249 Iowa 1088, 90 N. W. 2d 730 (1958), *Sutherland Statutory Construction*, Third Edition Volume 3, Section 5808, Statutory Directions to Public Officers.

Section 127 of Title 23 of the United States Code speaks only of width and weight. Yet all vehicles possess not only widths and weights but also lengths and heights, each of which contribute to the relative hazard or safety of the move. Section 10 of the Act.

CONCLUSION

It is therefore the opinion of this office that in light of the legislative history of prohibiting such vehicles from use of the interstate highway system, the nature of the system itself, its function and purpose and its peculiar traffic safety problems, the Highway Commission could promulgate rules more restrictive than those applicable to the general non-interstate highway systems of the State. *Anderson v. Jester*, 206 Iowa 452, 221 N. W. 354 (1928), 1966 OAG 205, *Michigan Towing Association, Inc. v. City of Detroit*, ...Mich....., 122 N. W. 2d 709 (1963). Such rules should be designed to control the movement of such vehicles so as to prevent moves exceeding the limitations of Section 127 of Ttile 23 of the United States Code and must bear a reasonable relationship to the preservation of the safety of the traveling public and the protection of the highway surfaces and structures. Due consideration should be given to the weight, length, width and height of the vehicle, its mobility, traffic needs, the physical limitations of the system as constructed and the nature of the move. Insofar as such rules bear a reasonable relationship to the preceeding, they would be valid.

June 28, 1968

MOTOR VEHICLES, HIGHWAYS, IOWA STATE HIGHWAY COMMISSION, COUNTIES, CITIES AND TOWNS, STATE OFFICERS AND DEPARTMENTS, SPECIAL PERMITS FOR OVERSIZE VEHICLES: Chapter 285, Sections 2 through 16, Acts of the 62nd General Assembly of Iowa, Sections 321.1(46), 321.235, 321.236, 321.452, 321.453, 321.467, 321.469, 321.471, and 321.473, 1966 Code of Iowa, 1966 IDR 300, 1963 Supplement IDR 34. Counties, cities and towns will be subject to rules and regulations adopted by the Highway Commission under authority of Section 16 of Chapter 285 of the Acts of the 62nd General Assembly as it was the intent of the Legislature in adopting the Chapter and making all permits issued thereunder subject to said rules to promote uniform administration of such highway use consistent with public safety and the protection of public and private property, and with the exception of single trip permits issued by the Commission for moves on primary highway extensions, permits can be issued by the Commission, counties and cities and towns but only for moves on that system of roads for which they are by law responsible to maintain. (Graham to McLean, Deputy Chief Engineer of Operations, Highway Commission, 6/28/68) #68-6-3

Mr. D. E. McLean, Deputy Chief Engineer of Operations, Iowa State Highway Commission: This is in reply to your letter of recent date wherein you requested an opinion on the following:

1. Will counties and cities be governed by the rules to be adopted by the Highway Commission so far as their issuance of permits for the movement of vehicles of excess size and weight is concerned or may counties and cities adopt their own set of rules?

2. Would an annual permit issued by the Highway Commission give the permit holder the authority to travel on a primary road extension?

Applicable sections of the 1966 Code of Iowa are in pertinent part herein set out:

Section 321.235. "The provisions of this chapter shall be applicable and uniform throughout the State and in all political subdivisions and municipalities therein *and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter.*" (Emphasis supplied)

Section 321.1(46). " 'Local authorities' mean *every county, municipal,* and other local board or body *having authority to adopt local police regulations* under the constitution and laws of the state." (Emphasis supplied)

Section 321.236. "*Local authorities shall have no power to enact, enforce or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this chapter,* and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, *however the provisions of this chapter shall not be deemed to prevent local authorities* with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power *from*.

* * *

8. *Restricting the use of highways as authorized* in sections 321.471 to 321.473, inclusive." (Emphasis supplied)

Section 321.471. "Local authorities with respect to highways under their jurisdiction may by ordinance or resolution *prohibit the operation of vehicles* upon any such highway *or impose restrictions as to the weight of vehicles* to be operated upon any such highway *for a total period of not to exceed ninety days in any one calendar year,* whenever any said highway by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced." (Emphasis supplied)

Section 321.473. "*Local authorities* with respect to highways under their jurisdiction, *may* also, by ordinance or resolution, *prohibit* the operation of trucks or other *commercial vehicles,* or *may impose limitations as to the weight* thereof, *on designated highways,* which prohibitions and limitations shall be designated by appropriate signs placed on such highways." (Emphasis supplied)

Section 321.452. ". . . it is a misdemeanor . . . for any person to drive or move . . . on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this chapter, and the maximum size and weight of vehicles herein specified shall be lawful throughout the state, *and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this chapter.*" (Emphasis supplied)

Section 321.453. "The provisions of this chapter governing *size, weight, and load shall not apply* to . . . or to a *vehicle* operating *under* the terms of a *special permit* issued as provided in Sections 321.467 to 321.470, inclusive." (Emphasis supplied)

Section 321.467. "The state highway commission with respect to highways under its jurisdiction and *local authorities with respect to highways under their jurisdiction may, in their discretion,* upon application in writing and good cause being shown therefor, *issue a special permit* in writing authorizing the applicant to operate or move. . . ." (Emphasis supplied)

Section 321.469. "The state highway commission or *local authority is authorized to issue or withhold such permit at its discretion;* or if such permit is issued, *to limit the number of trips, or to establish seasonal or other time limitations* within which the vehicles described may be operated on the highways indicated or otherwise to limit *or prescribe conditions of operation of such vehicle or vehicles,* when necessary to assure against undue damage to the road foundations, surfaces or structures, *and may require such undertaking or other security as may be deemed necessary* to compensate for any injury to any roadway or road structure." (Emphasis supplied)

Chapter 285 of the Acts of the 62nd General Assembly then repealed Sections 321.467 through 321.470, 1966 Code of Iowa, and enacts, in pertinent part, the following:

Section 2. "The state highway commission and *local authorities may in their discretion* and upon application and with good cause being shown thereof *issue permits* for the movement of vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified in sections three hundred twenty-one point four hundred fifty-two (321.452) through three hundred twenty-one point four hundred sixty-six (321.466) of the Code, *but not to exceed the limitations imposed in sections two (2) through sixteen (16) of this Act. . . . When in the judgment of the issuing local authority in cities, towns, and counties the movement* of a vehicle with an indivisible load which exceeds the maximum dimensions and weights *will be unduly hazardous to public safety or will cause undue damage to streets,* avenues, boulevards, thoroughfares, highways, curbs, sidewalks, trees, *or other public or private property,* the *permit shall be denied* and the reasons therefor endorsed upon the application." (Emphasis supplied)

Section 3. "*Annual* permits *and single trip* permits *shall be issued by the authority responsible for the maintenance of such system of highways* or streets *except that the commission shall have authority to issue single trip permits on primary road extensions in cities and towns in conjunction with movements on the rural primary road system.*" (Emphasis supplied)

Section 4 establishes a schedule of maximum permissible distances for over-width load movements on pavement widths of 24 feet or more with traffic of 4,000 or more vehicles per day.

Sections 5, 6 and 7 provide for certain adjustments in the scheduled maximum load widths of Section 4 by reason of road widths, traffic volumes and types of road surface.

Section 8 establishes certain maximum axle weights for such permit vehicles.

Section 9, 10 and 11 prescribe certain conditions under which respectively annual and single trip permits might be issued. These conditions vary between the three subsections of Section 9 and the six subsections

of Section 10 but include: maximum widths, lengths, heights, weight, trip distance and escort requirements for all vehicles falling within the class of vehicles described in each of the subsections. Subsection 6 of Section 10 states:

"6. Vehicles with indivisible loads exceeding a total gross weight of ninety thousand (90,000) pounds may be moved in special or emergency situations provided the gross weight on any axle shall not exceed the maximum prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code. *The issuing authority may impose any special restrictions deemed necessary on movement by permit under this subsection.*" (Emphasis supplied)

Section 12 provides time limitations during which such moves may and cannot be made.

Section 13 provides for weight registration. Sections 14 and 15 authorize permit issuing authorities to require security for damage to public and private property that may be incidentally caused as a result of the move and specifies permit and escort fees.

Section 16. "*The commission may adopt* and make available upon request to interested parties printed *rules and regulations necessary for the movement by permit of vehicles and indivisible loads under the provisions of this Act. No rule or regulation shall be adopted without prior notice to city, town and county officials and without a hearing* on the proposed rule or regulation. *All rules and regulations adopted shall have due regard for the safety of the traveling public and the protection of the highway surfaces and structures.* Rules and regulations for permit travel on the interstate system shall be consistent with the federal requirements for the system." (Emphasis supplied)

Section 16 of Chapter 285 of the Acts of the 62nd General Assembly, except as modified by Section 10.6 of the same, expressly authorizes only the Commission to adopt rules and regulations necessary for the movement of such permit vehicles. Section 2 of the Chapter subjects all permits issued under the Chapter to the limitations of Sections 2 and 16 of the same. The only limitations imposed by Section 16 are those adopted by the Commission.

Section 321.235 and Section 321.236 declare that it is the public policy of this state that the provisions of Chapter 321 of the Code be applicable and uniform and apply to local authorities throughout the state. These sections declare that local authorities are not only prohibited from enacting inconsistent controls but also from enforcing or maintaining any such ordinances, rules or regulations. This for the reason that consistent enforcement of traffic laws is of major importance in light of increasing injury death and destruction on the highway. *City of Vinton v. Engledow*, 258 Iowa 861, 866, 140 N. W. 2d 857, 861 (1966).

With the exception of Section 321.471 and Section 321.473 of the Code and Section 10.6 of Chapter 285 of the Acts of the 62nd General Assembly, there is no longer any specific authority granted local authorities to regulate vehicles of excess size and weight. In fact, Section 321.452 forbids them to authorize the movement of any vehicle exceeding the maximum legal size and weight restrictions of the Chapter except where expressly authorized to do so. Section 321.469, 1966 Code of Iowa, did authorize both local authorities and the Highway Commission to adopt rules governing the operation of such vehicles. Pursuant to the same, the Com-

mission adopted the rules found in 1966 IDR 300 and first appearing in 1963 Supplement to IDR 25. Some confusion arose on the question of the respective authority of the Commission and local authorities to issue such permits. 1966 OAG 237, 1966 OAG 250.

The Legislature then enacted Chapter 285 of the Acts of the 62nd General Assembly. It is noted that the Act largely displaces the function of Section 321.469. It specifies those vehicles eligible for permits, determines the nature, extent, time, duration and frequency of the move and authorizes certain security requirements. All the above apply equally to all such moves irrespective of jurisdiction. It is manifest that the intention of the Legislature was to secure uniformity in the administration of such highway use. *City of Vinton v. Engledow*, supra; *State v. Robinson*, 87 W. Va. 374, 104 S. E. 473 (1920); *Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660, 262 Pac. 334 (1927); *City of Albany v. Ader*, 173 Ga. 391, 168 S. E. 1 (1933); *City of Fargo v. Glaser*, ...N. D......, 244 N. W. 905 (1932).

While local authorities retain their ability to temporarily regulate weight and traffic where in their judgment such will seriously damage or destroy the street, Section 321.471, and their ability to prohibit or restrict weights of commercial vehicles on designated highways, Section 321.473, they no longer possess the authority to generally regulate the movement of vehicles of excess size and weight. *City of St. Louis v. Stenson*, ...Mo. App.....,, 333 S. W. 2d 529 (1960); *City of Vinton v. Engledow*, supra.

The conclusion that the Legislature intended local authorities to be subject to the rules promulgated under Section 16 of Chapter 285 of the Acts of the 62nd General Assembly is strengthened by the fact that the said section quarantees local authorities notice and an opportunity to be heard and forbids the adoption of any rule by the Commission without a hearing on the same.

It is, therefore, my opinion that counties and cities will be governed by the rules to be adopted by the Highway Commission subject to the Commission's compliance with the requirements of the Act as to notice and hearing and provided that the rules are consistent with the guidelines of the Act itself and bear a reasonable relationship to the promotion of the safety of the traveling public and the protection of highway surfaces and structures.

In answer to your second question, it is my opinion that a Highway Commission Annual Permit will not authorize the permit holder to move on primary extensions.

It is clear that primary extensions are city streets. *Smith v. City of Algona*, 232 Iowa 362, 5 N. W. 2d 625 (1942); *Wallace v. Foster*, 213 Iowa 1151, 241 N. W. 9 (1932). Section 3 of Chapter 285 empowers the authority responsible for the maintenance of the road system to issue the permit. It may be that the Commission has assumed a contractual duty to maintain certain primary extensions under Section 306A.7 or Section 313.21 of the 1966 Code of Iowa. *Gardner v. Charles City*, ...Iowa....., 144 N. W. 2d 915 (1966), 1966 OAG 208. Such would not charge the

Commission with the responsibility of maintaining the cities general street system. Nor would it, without specific legislative authority, authorize the Commission to issue a permit for the movement of a vehicle of excess size and weight over a primary extension.

Section 3 of Chapter 285 specifically grants to the Commission authority to issue only single trip permits for movement on primary extensions. It is a primary rule of statutory construction that the expressed mention of one thing in a statute implies the exclusion of others. Dotson v. City of Ames, 251 Iowa 467, 101 N. W. 2d 711 (1960); Archer v. Board of Education, 251 Iowa 1077, 104 N. W. 2d 621 (1960).

I, therefore, conclude that, with the exception of single trip permits issued by the Commission for moves on primary highway extensions, permits can be issued by the Commission, counties and cities and towns but only for moves on that system of roads for which they are by law responsible to maintain.

June 28, 1968

MOTOR VEHICLES, HIGHWAYS, IOWA STATE HIGHWAY COMMISSION, STATE OFFICERS AND DEPARTMENTS, SPECIAL PERMITS FOR OVER-SIZE VEHICLES: Chapter 285, Section 14, 16 of Acts of 62nd General Assembly. Sections 321.453, 325.26, 327.15, 327A.5, 1966 Code of Iowa, and Sections 2.2(10) F(2) of the Highway Commission Rules governing the movement of vehicles of excess size and weight, 1966 IDR 307, 1963 Supplement IDR 34. Section 16 of Chapter 285 of the Acts of the 62nd General Assembly would authorize Highway Commission to require liability insurance in amounts of 100/200/20 as a condition to issuance of permit for vehicle of excess size and weight the same being consistent with similar Commerce Commission liability insurance requirements, reasonable and designed to promote safety of public and protection of highway surfaces and structures. (Graham to Fisher, St. Representative, 6/28/68) #68-6-4

The Hon. Harold O. Fisher, State Representative: I am in receipt of your letter of recent date wherein you request an opinion as to whether or not Chapter 285 of the Acts of the 62nd General Assembly would authorize the Iowa State Highway Commission to require public liability insurance as a condition to the issuance of a permit for the movement of vehicles of excess size and weight; and if so, are the limits of 100/200/20 called for in the Highway Commission's August 2, 1967, Temporary Rules and Regulations Governing the Issuance of Special Permits in conflict with similar requirements of the Iowa Commerce Commission.

Section 325.26, 1966 Code of Iowa, relating to the issuance of Commerce Commission certificates to motor vehicles for public transportation of freight or passengers from fixed termini and over regular routes provides in pertinent part:

"No certificate shall be issued until after the applicant shall have filed with the Commission an insurance policy. . . . The minimum limits of liability of any policies . . . shall for each motor vehicle thereby covered, be as follows:

"1. Passenger motor carriers.

a. To cover . . . bodily injury or death resulting therefrom as a result of any one accident or other cause, *twenty-five* thousand dollars for any recovery by one person and subject to said limit for one person *one hundred fifty* thousand dollars for more than one person.

b. To cover . . . for damage to or destruction of any property . . ., as a result of any one accident or other cause, *ten* thousand dollars."

Subsection 2(a) and (b) of Section 325.26, 1966 Code of Iowa, relating to freight motor carriers similarly requires limits of 25/50/10.

Chapter 327, 1966 Code of Iowa, relating to the issuance of Commerce Commission permits to operate a vehicle used for the public transportation of freight for compensation other than between fixed termini or over regular routes, also contains insurance requirements.

Section 327.15 sets these limits at 25/50/10.

Section 327A.5 relating to liquid transport carriers provides for insurance limits of 100/100/100.

Sections 14 and 16 of Chapter 285 of the Acts of the 62nd General Assembly relating to the issuance of permits for the movement of vehicles and loads of excess size and weight state in pertinent part:

"Section 14. Prior to the issuance of any permit, the applicant for a permit shall at the discretion of the issuing authority be required to file proof of financial responsibility or to post a bond not to exceed ten thousand ($10,000) dollars with the issuing authority. Such bonds shall be used as *security for repair or replacement* of official signs, signals, and roadway foundations, surfaces, or *structures which may be damaged or destroyed during the movement* of a vehicle and load operating under such permit." (Emphasis Supplied)

"Section 16. The Commission may adopt and make available upon request to interested parties printed rules and regulations necessary for the movement by permit of vehicles and indivisible loads under the provisions of this Act. . . . *All rules and regulations adopted shall have due regard for the safety of the traveling public and the protection of the highway surfaces and structures.* . . ." (Emphasis Supplied)

On August 2, 1967, the Iowa State Highway Commission adopted by resolution "Temporary Rules and Regulations Governing the Issuance of Special Permits."

Section 2.7 states in pertinent part:

"2.7 The Director of Traffic Weight Operations is hereby authorized and empowered to issue permits for a move or moves in accord with these temporary procedures when and in the event the applicant furnish and provide the Director with . . . proof of financial responsibility. . . ."

Section 2.7(F) then requires the applicant to furnish proof of public liability insurance in the limits of 100/200/20. These insurance limits were required in prior rules and regulations governing the movement of vehicles of excess size and weight. See Section 2.2(10) F.(2) in both 1966 IDR 307 and 1962 IDR 307.

One of the purposes, if not the primary purpose, of Chapter 285 of the Acts of the 62nd General Assembly and its predecessors was to make travel upon the highways as safe as it can reasonably be made consistent with their efficient use. In construing a statute, we must never lose sight

of its objective and intent. *Wood Bros. v. Eicher,* 231 Iowa 550, 560; 1 N. W. 2d 655, 660 (1942); *Smith v. Behrendt,* 278 Mich. 91, 270 N. W. 227 (1936).

Section 14 of Chapter 285 authorizes the issuing authority to require security to assure payment of the costs of repair and replacement of public property that may through no negligence of the mover be damaged during the move. Section 16 gives the Iowa State Highway Commission the authority to regulate movement of such vehicles so as to promote the safety of the traveling public and the protection of highway surfaces and structures. To this end, the Iowa State Highway Commission requires 100/200/20 liability insurance coverage.

In determining whether or not the requirement is proper, the judgment of the Commission must be upheld unless the same is arbitrary or capricious or bears no relationship to the promotion of the safety of the traveling public and the protection of highway surfaces and structures. *State v. Rivera,* ____ Iowa____, 149 N. W. 2d 127 (1967); 1966 OAG 322. The power to regulate in order to promote the security and safety of the traveling public is a sufficient constitutional delegation to support a rule requiring liability insurance. *Sanford Co. v. Western Ins. Co.,* 229 Iowa 283, 289; 294 N. W. 406, 409 (1940); *James v. Young,* 77 N. D. 451, 43 N. W. 2d 692, 696 (1950); *State v. Wetzel,* 208 Wis. 603, 243 N. W. 768, 771 (1932).

The Iowa Supreme Court has at least on one occasion recognized that liability insurance requirements do tend to keep irresponsibles off the street and have a tendency to make drivers more careful. But at the same time their limits must be reasonable. *Star Trans. Co. v. City of Mason City,* 195 Iowa 930, 958; 192 N. W. 873, 885 (1923).

No Chapter 325, Chapter 327 nor Chapter 327A operator need acquire a Highway Commission permit as a condition precedent to their operation. Such vehicles need obtain a Highway Commission permit only where the vehicle and load exceeds the provisions of Chapter 321 of the Code governing size, weight and load. Section 321.453, 1966 Code of Iowa. Since not all Highway Commission excess size and weight permit applicants will have Commerce Commission certificates or permits, it would appear reasonable for the Highway Commission to require liability insurance.

The limits of 100/200/20 are properly substantial. *Star Trans. Co. v. City of Mason City, supra.* They are uniform and apply to applicants whether they are for hire or not and are comparable to the limits required in Sections 325.26(1) and 327A.5. They exceed Sections 325.26(1) by $50,000.00 and 327A.5 by $100,000.00 as they relate to injury to more than one person arising out of the same accident, but are $80,000.00 less than the limits of Section 327A.5 for property damage. A judgment by the Highway Commission that greater incidence of accidents arising out of movements of vehicles of excess size and weight are likely to involve two or more people would appear reasonable. This if for no other reason than the fact that such vehicles often obstruct traffic proceeding in two directions on the same highway. With such exposure doubled a requirement to correspondingly increase the insurance limit would appear to bear a reasonable relationship to the end sought.

In conclusion, it is therefore my opinion that the Highway Commission may require liability insurance for the reason that such is reasonably calculated to promote the safety of the traveling public and the protection of the highway surfaces and structures, that limits in the amount of 100/200/20 do not conflict with Commerce Commission liability insurance requirements of Sections 325.26, 327.15 nor 327A.5 for the reason that they each apply to separate classes of vehicles and such limits when viewed in light of the guidelines of Sections 325.26(1) and 327A.5 considering the nature of the vehicle moved under Chapter 285 of the Acts of the 62nd General Assembly would appear reasonable.

July 1, 1968

CONSERVATION — Transfer of boats registered to a decedent — Chapter 124, Acts of the 62nd G. A., §§9, 10, and 21; §§633.350 and 633.351, 1966 Code of Iowa. The transfer of title to a motorboat is governed by Chapter 124 of the Acts of the 62nd G. A. However, when the title to a decedent's boat is to be transferred, the appropriate sections of the Iowa Probate Code must be considered in equal light. (§§633.350 and 633.351, Code of Iowa, 1966). (Turner to Boswell, Acting Director, State Conservation Comm., 7/1/68) #68-7-1

Mr. William Boswell, Acting Director, State Conservation Commission: On April 5, 1968, we received from Mr. Speaker, then Director of the State Conservation Commission, a letter pertaining to the transferring of boats registered to a deceased person, together with a copy of a proposed letter to the county recorders and county conservation officers regarding the method of transferring boats registered to a deceased person, and a copy of a proposed affidavit to be used in cases where the deceased does not have an estate. He asked that we review the enclosures and advise the Commission regarding the proposed procedures.

The applicable statutes governing the transfer of a motor boat are Subsections 9 and 10 of Chapter 124, Laws of the 62nd General Assembly, which provide as follows:

"9. Upon the transfer of ownership of any motor boat, the owner, except as otherwise provided by this chapter, shall complete the form on the back of the registration certificate and shall deliver it to the purchaser or transferee at the time of delivering the motor boat."

"10. The purchaser or transferee shall, except as otherwise provided by this chapter, within five (5) days file a new application form with the county recorder with a fee of One (1) Dollar and the appropriate writing fee, and a transfer of numbers shall be awarded in the same manner as provided for in an original registration."

The provisions of Section 21 of Chapter 124, Laws of the 62nd General Assembly, state that no motor boat shall be registered by the county recorder until satisfactory evidence that the sales or use tax has been paid for the purchase of the boat and has been received. Please note that this Subsection 21 refers to sales or use tax and has no reference to state inheritance taxes or other taxes that may be owing due to the decedent's death.

You will note that there is not a specific statute pertaining to the transfer of boat registrations of a deceased boat owner. All that is required is that the "owner" shall complete the form on the back of the registration certificate and shall deliver it to the purchaser or transferee

at the time of delivering the motor boat. This necessarily means that the county recorder may want protection that the person proposing to transfer the ownership of the motor boat is the "owner." In the case of a deceased owner, the provisions of Section 633.350 and .351 apply. These two statutes read as follows:

"633.350 Title to decedent's estate — when property passes — possession and control thereof — liability for administration expenses, debts and family allowance.

"Except as otherwise provided in this Code, when a person dies, the title to his property, real and personal, passes to the person to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in this Code, but all of his property shall be subject to the possession of the personal representative as provided in section 633.351 and to the control of the court for the purposes of administration, sale, or other disposition under the provisions of law, and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges against his estate. There shall be no priority as between real and personal property, except as provided in this Code or by the will of the decedent."

"633.351 . . . Every personal representative shall take possession of all the personal property of the decedent, except the property exempt to the surviving spouse. The personal representative may maintain an action for the possession of such real and personal property or to determine the title to any property of the decedent."

The actual title transfer of property in a probate must be in accordance with the provisions of the probate code. Consequently, the county recorder may want some type of proof, that probate procedures have been followed and that the transfer of the motor boat registration is based upon a valid sale or transfer as contemplated by the probate code.

There is no statutory requirement of an affidavit of ownership as attached to your letter of April 5, 1968. The proposed affidavit would serve no other purpose than to provide some proof to the county recorder that the person signing the affidavit purports to be the owner. Consequently, I suggest that you strike that portion that says the said motor boat is free of any liens or encumbrances and accordingly, the following is suggested:

STATE OF IOWA)
COUNTY OF.....) SS:

I (we),....., being first duly sworn, on mine (our) oath, depose and say: That I (we) am (are) the.....of....., who died on the.....day of....., 19....., that said ....., died (estate) intestate) and did not have sufficient estate to warrant a probate proceeding being opened and said estate will not be placed in probate; that at the time of death there was registered in.....name as (sole owner) (a party in joint tenancy), a motor boat bearing Iowa registration number..... .....; That this affidavit is made in order that I (we) may transfer ownership of said motor boat to..... and I (we) do hereby agree to hold the State of Iowa harmless from any claim by anyone for the making of said transfer.

.....

.....

Subscribed and sworn to before me this.....day of ....., 19.....

.....

Notary Public

If you have any further questions regarding this matter, please advise.

July 5, 1968

LABOR — Resident Alien Employment Status. Fourteenth Amendment to Federal Constitution. A resident alien is eligible to appointment as Migratory Labor Inspector provided no statute of the state prohibits performance of such labor by a resident alien or the established policy of the state bars resident aliens from such employment. (Strauss to Robinson, Sec., Exec. Council, 7/5/68) #S68-7-1

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to your letter of May 8, 1968, in which you advise that the council in a meeting held May 6, 1968, considered the request from the bureau of labor for council approval to employ the services of one Francisco M. Ibarra, as Migratory Labor Inspector, pursuant to §91.6, Code of Iowa, 1966. The council approved the request, subject to a determination by this department that the labor bureau has authority to hire a person who is not a citizen of the United States. The file further shows that the aforementioned person was born in Mexico and also shows a copy of his declaration of intention to gain citizenship.

As far as public agencies having authority to employ alien labor in construction work is concerned it is stated in 2 Am. Jur., Title Aliens, §17, at page 471, as follows:

"*Employment on Public Works.* If work sought to be controlled by the government is private, and the public welfare is in no way involved, it is clear that the legislature cannot deny to the individual employer the right to employ aliens. In such case it is held that to deprive aliens, merely because of their alienage, of the opportunity of earning a livelihood, would be equivalent to the assertion of the right to deny them entrance and abode in the state. On the other hand, if the work, though private, is such that the exclusion of aliens is, in fact, necessary to the protection of the public welfare, such exclusion is within the police power. Where the work is public and therefore wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be valid, and a statute prohibiting the employment of aliens on public work by a state, municipality, or contractor does not unconstitutionally discriminate against aliens. It should be observed, however, that the state, though authorized to exclude aliens from employment on public works in favor of citizens, may not exclude aliens from the enjoyment of those works after completion."

As far as resident aliens are concerned, according to 3 C.J.S., Title Aliens, page 529:

"[They] are entitled to the enjoyment of many personal and property rights and privileges, including usually the right to engage in gainful employment and occupations, to the same extent as citizens."

And such aliens, while they are permitted to remain, are in general entitled to the protection of the laws with regard to their rights of person and property and to their civil and criminal responsibility.

And it is further stated:

"In general aliens residing in the United States, while they are permitted to remain, are entitled to the safeguards of the constitution with regard to their rights of person and property and to their civil and criminal responsibility. Thus resident alien friends are entitled to the benefit of the provision of the Fourteenth Amendment to the federal con-

stitution that no state shall deprive 'any person' of life, liberty, or property without due process of law, or deny to 'any person' the equal protection of the law, and the protection of this amendment extends to the right to earn a livelihood by following the ordinary occupations of life. So an alien is entitled to the protection of the provision of the Fifth Amendment to the federal constitution that no person shall be deprived of life, liberty, or property without due process of law."

And the several states have power to confer upon aliens rights within their jurisdiction which otherwise they would not have. In that respect, as far as public building and construction is concerned, Iowa, by statute, has provided in contracts for such activities preference shall be given to residents of Iowa. See §73.3, Code of Iowa, 1966. While this statute has not been interpreted in Iowa to exclude resident aliens from its provisions a like statute of the State of New York has been so interpreted. See *Heim vs. McCall*, 108 N. E. 1095, 214 N. Y. 629, 239 U. S. 175, 60 L. Ed. 206, 36 Sup. Ct. 78. For a like construction see *Crane v. New York*, 108 N. E. 427, 214 N. Y. 154, 239 U. S. 195, 60 L. Ed. 218, 36 Sup. Ct. 85.

There appears to be no legislative enactment concerning the employment of resident alien labor other than as to contracts involving construction or building. The first section of the Fourteenth Amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This has been held to protect both citizens and resident aliens from state interference. In *Cornelius et al v. City of Seattle, et al, Koseki, et al, intervenors*, 213 P. 17, 123 Wash. 550, there was action by the plaintiffs to enjoin the enforcement of an ordinance by the City of Seattle which in general required the keeper of any hotel, restaurant or other public eating house to place swill in sanitary containers and to provide for letting of a contract to responsible citizens of the United States to collect and remove such swill from the city. Pursuant to the terms of the ordinance a contract was made with the respondent to remove the swill of the city. It further appears that certain Japanese subjects were engaged in buying and selling swill without compensation to the plaintiffs and such subjects appeared in the action alleging they had been for some years collecting garbage without danger to the health of the community and had complied with all of the ordinances and rules of the city in respect thereto, and alleged that said ordinance was in violation of sections 3 and 12 of Article I of the Washington State Constitution and of section 1 of the Fourteenth Amendment to the Federal Constitution, previously exhibited in this opinion. As pertinent to the question here under examination, the Court said:

"The interveners in this appeal claim a violation of the same constitutional provisions upon the theory that they, as aliens, are barred from bidding for the contract. They also claim a violation of rights guaranteed them by a treaty existing between Japan and America. It may be admitted without cavil, as is so thoroughly and conclusively argued in

the brief of appellants, that the Fourteenth Amendment applies equally to aliens as to citizens. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283.

"It is also true that common occupations and businesses of the community are protected under these provisions of the Constitutions from prohibition by the legislative power. But, as we have seen, the right of a city to prohibit scavenging and garbage collecting has been repeatedly sustained as not falling within the rule of common occupations and businesses. The service performed is a public service and the contractor becomes in effect a public employee. And this court, has held in Jahn v. Seattle, 207 Pac. 667, that a city may limit public employment to citizens of the United States."

A comparable conclusion was reached in the case of *Lee et al v. City of Lynn*, 111 N. E. 700, 223 Mass. 109, where was in question the constitutionality of a Massachusetts statute requiring that in the construction of public works by the commonwealth, county, city or town, preference be given to citizens of the commonwealth, and after stating that the foregoing constitutional question had been modified since the argument of the case in the case of *Heim v. McCall*, infra, the *People vs. Crane*, decided that the Massachusetts statute was not inconsistent with the Federal Constitution. The court observed:

"Where the state, either directly or through its governmental departments, acts as proprietor or employer, a determination not to engage aliens in its service cannot be pronounced unreasonable or violative of any constitutional mandate."

In view of the foregoing, I am of the opinion that until the employment of migratory labor inspectors has been prohibited, by a constitutional statute, or until there appears to be an established policy of the state, its agents and subdivisions, as a proprietor or employer not to engage resident aliens in the foregoing type of service, the labor bureau has authority to hire a resident alien as migratory labor inspector pursuant to the authority contained in §91.6, Code of Iowa, 1966.

July 5, 1968

STATE OFFICERS AND DEPARTMENTS — Revolutionary war memorial commission — Chapter 36, Code of Iowa, 1966. The 1925 act creating the revolutionary war memorial commission was impliedly repealed by the abolition of the office of the curator of the historical, memorial and art department of the state library, the ex officio chairman of such commission, and by the failure since 1936 to make any appointments to such commission. (Turner to Clarke, Adm. Asst. to Governor, 7/5/68) #S68-7-2

Mr. Wade Clarke, Jr., Administrative Assistant, Office of the Governor:
Reference is herein made to your letter of March 18, 1968, in which you have submitted the following:

"Attached you will find correspondence which the Governor has received from Jack W. Musgrove, Curator of the State Department of History and Archives. You will note that the Historical, Memorial and Art Department of the State Library has been replaced by the Department of History and Archives, and that Mr. Musgrove states that no action has been taken by Governors in this area since 1936.

"Would you please advise us — formally or informally — whether the Revolutionary War Commission should still be in existence. If it should be, I would presume that we will want to make the appropriate appointments."

Accompanying your letter is a brief history of the revolutionary war memorial commission exhibited here as follows:

"Under Senate File 227, 1925, the Revolutionary War Memorial Commission was enacted into law to make it possible to locate and mark the graves of Revolutionary war soldiers in Iowa. The commission functioned and carried out its purposes until 1936. War memorial graves were suitably marked and no further action by this commission was carried out.

"While a small appropriation for the marking of the grave was established, correspondence of this commission indicates that in many ways the appropriation was deficient in allowing no money for travel to locate graves and for other expenses that might be incurred. It must be pointed out that no expenses have been incurred by this commission since 1936, and no records of any commission members being appointed by any of the governors since this time exist.

"There are no indications that this commission functioned after 1936. However, the act establishing the commission has been carried in the Code of Iowa to the present day. About the only argument that can be proposed to retain this commission is that should a revolutionary war soldier's grave be found, an act for marking such would exist.

"In all probability, should a Revolutionary War grave be found today, some means of marking it consistent with those marked in the past should be available. This could possibly be handled by Local D.A.R. Chapters as the amount appropriated in the original bill for this purpose would be inadequate by todays standards."

The act creating the revolutionary war memorial commission has remained in the Iowa code since its enactment in 1925 up until the present time where it appears as Chapter 36, Code of Iowa, 1966. It is to be noted that pursuant to §36.2 the curator of the historical, memorial and art department of the state library is designated ex officio as chairman of the commission.

In 1939 the legislature abolished the state library, state historical, memorial and art department and the state library commission and repealed the means for appointment of the curator of the historical, memorial and art department of the state library. §§1 and 15, Chapter 113, Acts, 48th G. A. Instead there was created the new office of curator of the state department of history and archives. Both the duties and manner of appointment of this curator of the state department of history and archives differ substantially from those of the curator of the historical, memorial and art department of the state library. §3.2, Chapter 113, Acts, 48th G. A., now §303.3(2), Code of Iowa, 1966.

In other words, the curator named as an ex officio member of the revolutionary war memorial commission is not the same office as the current curator of the state department of history and archives.

The foregoing when considered together with the fact that from and after the year 1936 no action has been taken under the act creating the revolutionary war memorial commission leads us to conclude that such act was impliedly repealed and is no longer in force and effect.

While the Iowa supreme court seems to hold to the view that nonuser of a statute by itself is insufficient to constitute an implied repeal, such nonuser in the present situation is accompanied by the repeal of the statute creating the office of curator referred to in chapter 211 by the 48th General Assembly. See C.J.S., §296, page 506, where it is said:

"Although there is some early authority declaring a statute obsolete for nonuser, it is generally held that a statute is not repealed by nonuser, unless such nonuser is accompanied by the enactment of irreconcilable statutes or the establishment of an opposite legislative policy. It has also been held that a statute may be repealed only by further legislation and not by time or changed conditions, and that the repeal of an act cannot be implied from the mere fact that some of the evils provided against in it are removed by a subsequent act; and according to some authorities the courts are not at liberty to disregard, dispense with, or refuse to enforce, a statutory rule on the ground that conditions and circumstances have so changed that the object, reason, or policy of the statute has ceased, but other authorities have expressed an opinion to the contrary. A statute may provide for its own expiration so that on the lapse of the stated time or the happening of the specified condition, the statute expires and ceases to operate."

In the case of *Pearson et al v. The International Distillery et al*, 72 Iowa 348, 356, 34 N. W. 1, 128 U. S. 1, 32 L. Ed. 346, 9 S. Ct. 6, it is said:

"Counsel contend that the statute is in effect repealed by non-user; that is to say, it has been so long without enforcement that it is obsolete. Surely, it will not do to hold that this statute, though not enforced, ceased to have due force of law. There are many criminal statutes of the state which are often violated, under which there have never been prosecutions of which we have heard, though they have been in force for a great many years. It would surely astonish the profession should it be announced that these statutes cease to have the force of law through non-user. We know of no principle which supports such doctrine. Hill v. Smith, Morris, 95, is cited in support of counsel's position now under consideration. It was held in that case that an old United States statute was inoperative and repealed by non-user, by the enactment of other irreconcilable statutes, and by the establishment of an opposite legislative policy. It is not said that the statute was repealed by non-user alone, and it cannot be presumed that the court intended to present such a thought. Non-user indicates the purpose of repeal by conflicting statutes, and the recognition of opposite legislative policy. Thus far non-users was an element upon which to base the conclusions that the statute was repealed."

By reason of the foregoing, the revolutionary war memorial commission is no longer a statutory body and no duty thereby devolves upon the governor in connection therewith.

July 8, 1968

ELECTIONS—Nomination for state representative, signatures required—§§43.16, 43.17, Code of Iowa, 1966. Nomination papers of a person seeking the office of state representative are not defective by reason of the fact that the address of one of the signers threof was omitted nor because the same person who made the affidavit as to the signature thereon was also one of the signers of the nomination paper. (Turner to Synhorst, Sec. of State, 7/8/68) #S68-7-3

The Hon. Melvin Synhorst, Secretary of State: You have requested an opinion of the attorney general with respect to the sufficiency of nomination papers filed with you at 3:30 p.m. on June 30th, 1968, on behalf of a candidate for state representative from a representative district (subdistrict) newly created for representation in the 63rd General Assembly of Iowa by Chapter 105, page 156, 62nd G. A. (H.F. 763).

As I understand it, you and the county auditor have determined that there must be forty-three (43) signatures on the nomination papers of the candidate for that office from that district and that while the three nomination papers filed on behalf of this particular candidate appear to contain a total of that exact number of signatures, the affiant who circulated one of these nomination papers and signed the affidavit on the back as to the signatures thereon, also signed that same nomination paper and his is one of the forty-three (43) signatures. Furthermore, no street and number, city or town, or date, is shown after the last signature, included in the forty-three (43) signatures, on one of these papers. Your question is whether these papers are either one (1) or two (2) signatures short, and thus invalid, as a consequence of these facts, and you want to know whether you should certify the name of this particular candidate to the county auditor so that his name may be printed on the ballot for the primary election on September 3, 1968.

You have shown me the three nomination papers and forty-two (42) of the forty-three (43) signers appear to have included their street address or route number, as well as the city and the date of signing. On their face they show that forty-two (42) of the forty-three (43) signed on June 28, 1968.

The signer who did not include address or date was the last signer of a list of eleven (11) signers on a nomination paper which contained lines for thirty-three (33) signatures, addresses and dates, and it might well be argued that this signer must have signed the paper on June 28, 1968, since all of the preceding signatures were dated June 28 and the affiant's signature on the back was notarized on June 28. Of course, the signature could have been added after the paper was notarized. And, it is possible, although most unlikely, that the signer signed on the eleventh (11th) line before any or all of the other signers inserted their signatures ahead of this signature.

The law requires that each signer "shall add his residence, with street and number, if any, and the date of signing." §43.15(2), Code of Iowa, 1966. The word "shall" when used in the statute is ordinarily to be construed as mandatory. *Hansen v. Henderson*, 244 Iowa 650, 56 N. W. 2d 59. However, under the facts before me, and in view of my ultimate opinion, I do not consider it necessary to reach a conclusion as to whether the lack of an address and date following one of the signatures would, of itself, render this candidate's nomination papers invalid. *Gibson v. Winterset Community School District*, 1965, 258 Iowa 440, 138 N. W. 112. Certainly it could be argued that a signature must include residence, with street and number, if any, and the date, since the affiant specifically swears among other things that the "respective residences are truly stated therein and that each signer signed the same on the date stated opposite his name." §43.17.

Section 43.17, Code of Iowa, 1968, provides as follows:

"*Affidavit to nomination papers.* The affidavit of a qualified elector, *other than the candidate*, shall be appended to each such nomination paper, or papers, if more than one for any candidate, stating that he is personally acquainted with all the persons who have signed the same; that he knows them to be electors of that county and believes them to be

affiliated with the party named therein; that he knows that they signed the same with full knowledge of the contents thereof; *that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name.*" (Emphasis added)

In 1909 O.A.G. 339, the purpose of the requirement of the address is stated to be "to identify and locate the signer if any question should ever be made as to the validity of his signature." Omission of the name "Burlington" was there said not to invalidate the nomination paper and that the person who circulated and made the affidavit to the papers "would have the right to write 'Burlington' after the addresses of the several signers *even after the papers were filed.*" Since that opinion, however, §43.16 was enacted to provide that a nomination paper, when filed, "shall not be withdrawn nor added to, nor any signature thereon revoked."

Another old opinion (1910 O.A.G. 254) says.

"Where the person circulating a nomination paper, and who makes affidavit as to the signatures thereon, also signs said nomination paper, his signing would not make the nomination paper illegal, but his name would not be counted among the signers of said paper."

No reason is given in the opinion for this ruling. The statute indicates that the affidavit may be signed by any qualified voter "other than the candidate" and does not appear to prohibit a non-candidate signer from making the affidavit. *Expressio unius est exclusio alterius.* In my opinion there is no reason why the affiant cannot swear to his own qualifications as a signer, as well as to the qualifications of the other persons signing. Indeed, under §45.3, in the chapter on nominations by petition, the nomination papers must be endorsed by an affidavit "of at least one of the signers of said petition." Accordingly, that particular part of the 1910 opinion is hereby withdrawn.

On January 8, 1968, in an opinion to Senator Gaudineer, I said that where, as here, a county has been subdivided to form a new single member senatorial or representative district (district being the same thing as subdistrict) candidates for office from such districts shall obtain signatures of 2% of the electors of the district from which they are running regardless of the provisions of §43.20, since such §43.20 does not contemplate a situation where an office is to be filled by the voters of less than an entire county. Since the 2% of the voters has always, under the statute, been determined by the last general election, and no statutory certification of the number of votes cast in less than a full county was required to be made to the secretary of state, I said in an opinion to you on the same day (January 8, 1968) that the percentage may be determined by the vote cast in each precinct within a district (subdistrict) for governor and that if one or more precincts have been divided in creating the new district (subdistrict), and there is no way of determining the number of voters who resided in the portions of such precincts included in the new districts, the entire party vote cast in each of said precincts could, as a practical matter, be included in computing the total party vote in the new district to be used in arriving at the requisite minimum number of signatures.

Thus, the number of signatures required is necessarily based upon in-

formation obtained from the county auditor on the votes cast in each precinct and, without statutory requirement of certification, this necessarily arbitrary number may or may not be entirely accurate for a given newly created district (subdistrict). In view of the fact that this candidate's papers do contain forty-three (43) signatures, based upon uncertified figures given you by the county auditor, it is my opinion that in this instance, under these circumstances, the papers which on their face completely comply except for the address and date on one of the signatures, should be accepted. Less injustice will be done by certification for inclusion of the name on the primary ballot than by leaving it off. It could be that an elector could successfully attack the papers on these grounds, or other possible latent defects, and enjoin the printing of the name on the ballot. But, if not, the people of his political party will decide, in the primary election, whether he is to be his party's candidate for this office.

July 9, 1968

MOTOR VEHICLES, HIGHWAYS, IOWA STATE HIGHWAY COMMISSION, COUNTIES, CITIES AND TOWNS, STATE OFFICERS AND DEPARTMENTS, SPECIAL PERMITS FOR OVERSIZE VEHICLES: Section 2 of Chapter 285 of the Acts of the 62nd G. A. §§321.452, 321.453 and 321.469, 1966 Code of Iowa. Section 2 of Chapter 285 of the Acts of the 62nd G. A. requires the Highway Commission and local authorities to issue permits for the movement of vehicles of excess size and weight to all applicants except where such a move will in their judgment cause undue hazard to public safety or undue damage to public or private property and to issue permits to all vehicles falling within the same statutory classification on an equal basis. (Graham to Fischer, State Rep., 7/9/68) #68-7-2

The Hon. Harold Fischer, State Representative: Reference is made to your letter of February 2, 1968, wherein you request an answer to the following questions:

"Is the use of the word 'may' in Section 2 intended to make the issuance of special permits mandatory or optional by the Highway Commission and local authorities?"

". . . It was my understanding that the word 'may' would permit the Commission and local authorities to get into the business of issuing permits but if they did, then they would be required through the use of the word 'shall' throughout the bill to adhere to uniform laws and regulations. Here in Wellsburg, we have no provisions or intentions of getting into the business of issuing permits for the movement of anything except buildings."

Applicable sections of the 1966 Code of Iowa are:

Section 321.452. "Except for offenses punishable under the provisions of Section 321.463 it is a misdemeanor, punishable as provided in Section 321.482, for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this chapter, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, *and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this chapter.*" (Emphasis supplied)

Section 321.453. "*The provisions of this chapter governing size, weight, and load shall not apply to* fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to im-

plement moved between the dealer and farm purchaser within a fifty-mile radius from corporate limits wherein his place of business is located, except on any part of the interstate highway system, or *to a vehicle operating under the terms of a special permit issued as provided in Section 321.467 to 321.470, inclusive.*" (Emphasis supplied)

Chapter 285 of the Acts of the 62nd General Assembly repeals Section 321.467 through Section 321.470, 1966 Code of Iowa, and adopts in pertinent part:

Section 2. "The state highway commission and *local authorities may in their discretion* and upon application and with good cause being shown therefor *issue permits* for the movement of vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified in sections three hundred twenty-one point four hundred fifty-two (321.452) through three hundred twenty-one point four hundred sixty-six (321.466) of the Code, but not to exceed the limitations imposed in sections two (2) through sixteen (16) of this Act. Permits so issued may be single trip permits or annual permits. All permits shall be in writing and shall be available for inspection at all times. The vehicle and load for which the permit has been issued shall be open to inspection by any peace officer or to any authorized agent of any permit granting authority. *When in the judgment of the issuing local authority in cities, towns, and counties the movement* of a vehicle with an indivisible which exceeds the maximum dimensions and weights *will be unduly hazardous to public safety or will cause undue damage to streets,* avenues, boulevards, thoroughfares, highways, curbs, sidewalks, trees, or other public or private property the *permit shall be denied and the reasons therefor endorsed upon the application.*" (Emphasis supplied)

Section 2 of Chapter 285 of the Acts of the 62nd General Assembly is a statutory direction given to the Highway Commission and local authorities. It provides for the exercise of the power or authority to issue permits for the movement of such vehicles and the lawful movement of the same is dependent upon the exercise of such power or authority. Under such circumstances the direction to permit issuing authorities is mandatory and not merely directory and this is true regardless of whether or not the statute uses the word "may." *Willesen v. Davidson,* 249 Iowa 1104, 1108, 90 N. W. 2d 737 (1958), *Thorson v. Board of Supervisors,* 249 Iowa 1088, 1095, 90 N. W. 2d 730 (1958), *Whitfield v. Grimes,* 229 Iowa 309, 294 N. W 346 (1940).

The last sentence of Section 2 of Chapter 285 of the Acts of the 62nd General Assembly specifically defines and delimits the discretion of permit issuing authorities to deny or refuse the issuance of such permits. The same does not authorize permit issuing authorities to refuse to accept permit applications. Instead, it requires them to exercise their judgment thereupon. And then to deny the application only where specific traffic considerations would make the proposed move unduly hazardous to the public safety or where the condition of public roads and public and private property is such that it will suffer undue damage as a result of the proposed move. 1940 OAG 132.

The Legislature authorized and did thereby determine that it was proper to permit the movement of those vehicles which fall within the various subsections of Section 9 and Section 10 of Chapter 285 of the Acts of the 62nd General Assembly. *City of St. Louis v. Stenson,* .....Mo. App....., 333 S. W. 2d 529, 533 (1960). Each of these subsections in turn authorizes the movement of vehicles with indivisible loads in terms

of their physical dimensions and weights. Except for Section 10(5), vehicles designed for the exclusive movement of grain bins, the exception or restriction upon the movement of mobile homes as found in Section 10(1) and Section 11 concerning certain truck trailers manufactured and assembled in the state, the Chapter makes no mention of the type (mobile home, truck house) of the vehicle eligible for such a move.

It is self-evident that buildings are of various physical dimensions and weights. Certain of them could conceivably fall within each of the subsections of both Section 9 and Section 10. If this is the case, the Highway Commission and local authorities may not grant a permit to a building and at the same time deny a permit to another vehicle within the same category simply because it is not a building. *Anderson v. Jester*, 206 Iowa 452, 221 N. W. 354 (1928), 1966 OAG 205.

It is, therefore, my opinion that the Highway Commission and local authorities have a duty to apply the law and in so doing to issue permits for the movement of vehicles of excess size and weight to all applicants except where such a move will in their judgment cause undue hazard to the safety of the public or undue damage to public or private property and to issue permits to all vehicles falling with the same statutory classification on an equal basis

July 9, 1968

WELFARE: Legal Settlement — §252.16 and §222.60, 1966 Code of Iowa. A mentally retarded child about to be committed to the Woodward State Hospital-School at Woodward, Iowa, takes the legal settlement of his father. (Williams to Armknecht, Montgomery County Attorney, 7/9/68) #68-7-3

Mr. Philip C. Armknecht, Esq., Montgomery County Attorney: In your letter dated May 17, 1968, you requested an Attorney General's opinion concerning the interpretation of the statutes dealing with legal settlement of indigents and minor children as contained in Chapter 252.16 of the 1966 Code of Iowa.

You state the facts as involved in the problem as follows:

"The parents of a 12 year old Mongoloid child while residents of Fort Dodge, of Webster County, Iowa, voluntarily admitted said child to the Woodward State School in Woodward, Iowa. There is no question but what the parents had legal settlement in Webster County at that time. Subsequent to the admission of the retarded child to Woodward, the parents voluntarily withdrew him from the State school and placed him in a private institution in Montgomery County, Iowa, said institution being known as the Powell School. This is a licensed private institution run for pecuniary profit. The retarded child still resides at the Powell school.

"From the time of the child's admission at the Powell school, Webster County furnished payments to the Powell school and continued to make payments until June 2nd of 1966.

"The child's parents are now divorced and the father was granted custody in the divorce decree. The father has since moved from Fort Dodge and has now established legal residence in Polk County, Iowa. He has resided there for more than one year and has, therefore, acquired a legal settlement.

"The Powell school in Red Oak must now remove the boy from their institution since no party is paying any portion of the tuition due the school and there are accumulated charges in excess of $5,000.00. The

State school at Woodward has refused to accept the child unless either Polk County or Webster County assumes responsibility. The difficulty seems to be that Polk County thinks that Webster County is still responsible and vice versa.

* * *

"Besides the question of which County is responsible there remains the other question as to whether or not the Powell school is entitled to payments from and after June 2, 1966 when Webster County ceased making payments."

Section 252.16, 1966 Code of Iowa, states in Part as follows:

"A legal settlement in this state may be acquired as follows:

"1. Any person continuously residing in any county in this state for a period of one year acquires a legal settlement in that county . . .

* * *

"5. Legitimate minor children take the settlement of their father, if there be one, if not, then that of their mother . . ."

Chapter 222, 1966 Code of Iowa provides for the care of mentally retarded persons in state hospital-schools and specifically names Woodward State Hospital-School. Section 222.60 reads in part as follows:

"Costs paid by county or state. All necessary or legal expense for the cost of admission or commitment or for the treatment, training, instruction, care, habilitation, support and transportation of patients in a state hospital-school for the mentally retarded shall be paid by either:

1. The county in which such person has legal settlement as defined in section 252.16."

Since the child is not at the present time in a state institution but is in a private school upon the voluntary admission of the parents, and since the father's legal settlement has been in Polk County for more than one year last past, the child acquires such legal settlement of his father.

Therefore, if the minor child referred to in your letter is admitted to the Woodward State Hospital-School in Woodward, Iowa, it would be the responsibility of Polk County, Iowa, to provide the costs for the keep of said child at Woodward in accordance with section 222.60.

As to the second question, please be advised that since the Powell School is a private institution in which the parents voluntarily placed the child, it seems that the school should seek advice from its own attorneys as to how it should proceed to collect its back tuition.

July 9, 1968

SCHOOLS — School bonds — §§298.22 and 333.1(7). County Auditor must issue certified copy of record of each school bond registered in his office on demand. The form for certification, as submitted, if printed on each bond is adequate for the formal execution of such a certificate. (Nolan to Faches, Linn County Attorney, 7/9/68) #68-7-4

Mr. William G. Faches, Linn County Attorney: This replies to your letter of June 22, 1968, in which the following questions were submitted for an opinion from this office:

"(1) Does the Iowa law require that the County Auditor, if requested, to give a certificate to each bond in a school bond issue, certifying that his records indicate that that bond has been registered in his office?

"(2) Would a certificate on the school bond itself in the following form, to-wit:

"STATE OF IOWA)
) SS.
COUNTY OF LINN)

"I, the undersigned, County Auditor of Linn County, Iowa, do hereby certify that the within bond has been duly recorded in a book in my office as required by Section 298.22 of the Code of Iowa.

"Witness my official signature and the seal of said county as of the first day of....., 19.....
(Seal) /s/ County Auditor

"be sufficient to fulfill the request mentioned in our first question?"

The answer to both of these questions is affirmative. This matter was touched upon in our opinion of May 22, 1968, where the provisions of §298.22 and §333.1(7) were distinguished and in which it was stated:

". . . inasmuch as all bonds are required to be registered in the office of the county auditor and §333.1(7) of the code requires the auditor to 'deliver to any person who may demand it a certified copy of any record or account in his office on payment of his legal fees therefor' it is not improper for the auditor to affix his name and seal to such bond for certification purposes."

If on demand, the auditor should refuse to give a separate certificate as to the registration of each bond in a school bond issue upon appropriate demand for such he would not be complying with §333.1(7) set out above. The county auditor has no discretion in issuing certified copies of such records.

To certify means to testify in writing; to give certain information of fact in writing; to vouch for the truth of; to give a certificate of, or make a declaration about, in writing under hand or under a seal. While it appears that in the absence of a statutory provision declaring the particular form of certification, any form which affirms the fact in writing is sufficient and it is not necessary to use the word certify or certified in order to create a valid certificate attesting a purported copy of a document as a certified copy; such certificate could be given in a separate instrument under the hand and seal of the auditor acting in his official capacity. The preparation of a single separate document certifying to the registration of all bonds of an issue would not suffice should demand for certification of the registration of each and every bond be made. Further, since there is no provision in the law at the present time for facsimile signatures, the auditor's certification would be incomplete without his signature and seal. See §622.60, 1966 Code of Iowa. However, the form which was submitted in your request appears to meet all of the requirements for the formal execution of such a certificate as may be demanded under §333.1(7).

July 10, 1968

STATE OFFICERS: Secretary of State's Certification — §43.22, Code of Iowa, 1966. The duty of the secretary of state in certifying the names of persons whose nomination papers are filed in his office does not include therein any nicknames. (Strauss to Synhorst, Secretary of State, 7/10/68) #68-7-5

The Hon. Melvin D. Synhorst, Secretary of State: Reference is herein made to your letter of June 11, 1968, in which you submitted the following:

"Enclosed is a copy of the Affidavit of Candidacy filed by Raymond M. Fairholm of Denver, Iowa, who is a candidate for the office of State Representative, Bremer County. You will note as a part of his name he has included in parentheses the nickname Ray. Shall I certify this candidate's name as Raymond M. (Ray) Fairholm or as Raymond M. Fairholm?

"It has been the policy in the past not to certify nicknames to be placed on Primary or General Election ballots."

Under the provisions of §43.22(1), Code of Iowa, 1966, you have the duty to certify:

"1. The name and post-office address of each person for whom a nomination paper has been filed in his [secretary of state] office, and for whom the voters of said county have the right to vote at said election."

According to the opinion of this department appearing in the Report for 1932 at page 218 this duty extends no further than certification of the name of the candidate, unqualified by any nickname or title. This opinion states:

"We acknowledge receipt of your letter under date of May 8, 1932, requesting an opinion of this department on the following question:

" 'Is a candidate for county office entitled to use the prefix 'Dr.' before his name and 'M.D.' after it on the ballot in the primary election?'

"You are advised that a candidate for office, either county or otherwise, is not entitled to have his name printed upon the ballot with the prefix 'Dr.' before it or with the initials 'M.D.' after it. He is only entitled to have his name, such as 'John J. Jones,' printed on the ballot. The fact that his name appeared on his nomination papers with the 'Dr.' and 'M.D.' in front and after his name would not affect his right to a place upon the ballot, but the 'Dr.' and 'M.D.' must be eliminated upon the ballot."

29 C.J.S. Title Elections, §161, page 463, states:

"As a general rule, the official ballot should contain the names of the candidates to be elected. In view of the common-law rule that a name consists of one Christian or given name and of one surname, patronymic or family name, stated in Names §3, the name printed ordinarily should be the Christian and surname; . . ."

In view of the foregoing you should certify the candidate's name as Raymond M. Fairholm.

July 10, 1968

COUNTIES: County levy for improvement, maintenance, and replacement of the county hospital. §347.7, Code of Iowa, 1966. No levy for improvement, maintenance, or replacement of a hospital may occur until

a county has a hospital consisting of at least a physical plant. (Turner-Martin to Graham, State Representative, 7/10/68) #68-7-6

The Honorable J. W. Graham, State Representative: I have received your letter of May 20, 1968, in which you request an opinion of the attorney general on the following issue:

"Humboldt County is making a levy of .989 mills for maintenance of a hospital under Code section 347.7. I would appreciate receiving from your office an attorney general's opinion as to whether this levy is legal. . . .

"No hospital has been constructed and as far as I know no contract has been let for the construction of a hospital. I wish to raise the question as to whether a levy is legal for the maintenance of a hospital when no hospital exists nor has any contract been let to construct the hospital."

From the County Attorney of Humboldt County and from the Humboldt County Hospital Administrator, I have received considerable information as to the stage of this project. It appears that about the year 1940, pursuant to an election, Humboldt County issued $100,000 in bonds to construct a hospital. The proceeds of this issuance were invested, additional gifts and bequests obtained, and a current drive has added funds and pledges to the point that the funds available for construction total $615,000. A full time hospital administrator has been engaged and maintains an office in Humboldt, Iowa. Twenty to twenty-three acres of land have been purchased as a site for the hospital. This land has been at least partially cleared.

Original plans were drawn by a firm of architects. These plans are now being modified to reflect a lower construction cost, due to the fact that the current fund drive has fallen short of the desired goal. In addition to the physicians in the community, efforts are being made to secure the services of a surgeon. Project plans indicate that a contract should be let before November for construction which it is contemplated will take place over the following year and one-half. A non-profit corporation has been established to escrow funds collected during the current fund drive. In short, a great deal of effort and planning and funds have gone into the project thus far.

The statute to which you refer provides in pertinent part as follows:

"347.7 *Tax levy. If the hospital be established,* the board of supervisors, at the time of levying ordinary taxes, shall levy a tax at the rate voted not to exceed two mills in any one year for the erection and equipment thereof, and also a tax not to exceed one mill for the improvement, maintenance, and replacements of the hospital, as certified by the board of hospital trustees; . . ." (Emphasis added)

We are not presented with the question of whether the two mill levy for erection and equipment of a hospital is lawful. We are concerned only with the one mill levy for the improvement, maintenance and replacement of a hospital.

We consider it unnecessary to determine whether the words "if the hospital be established" mean "constructed or built," or merely that the proposition referred to in the immediately preceding sections was adopted by the electors. The one-mill levy may be made "for the improvement, maintenance and replacements of the hospital." In my opinion this means there must be a hospital in existence which may be improved, maintained, or replaced, prior to the levy.

It is therefore the opinion of this office that unless a county hospital actually exists, there may lawfully be no levy for the improvement, maintenance, and replacements of such a structure.

July 11, 1968

PRIMARY ELECTION — Chapter 43, Code of Iowa, 1966. The candidate's affidavit to the primary nomination provided for in §43.18 is mandatory and must be signed by the candidate and by no other. A power of attorney authorizing such signing by another is neither expressly nor impliedly permitted under the foregoing numbered statute. (Strauss to Murphy, Clarke County Attorney, 7/11/68) #68-7-7

Mr. Richard J. Murphy, Clarke County Attorney: Reference is made to your letter of July 11, 1968, in which you state the following:

"On July 10, 1968, on the evening of the final day for filing Nomination Candidacy of Office, a Petition was brought to the Clarke County Auditor for filing, it being the Petition for County Attorney. The Petition, however, was not signed by the candidate personally but was signed by a third party claiming to have the power of attorney of the candidate to sign said Petition.

"At the time of the filing, there was no power of attorney on file in Clarke County nor was any power of attorney or certified copy thereof attached to the petition or shown to the Auditor. The party claiming to have the power of attorney stated that a power of attorney would be arriving in the mail but as of yet it has not been presented.

"Our problem is, of course, whether this filing is within the specified laws of Iowa and whether the County Auditor shall place the name of the candidate on the ballot."

In reply thereto I advise the following:

The affidavit to be filed by a candidate for office in the primary election is contained in Chapter 43, Code of Iowa, 1966, as follows:

"Every candidate shall make and file an affidavit in substantially the following form:

" 'I,_____, being duly sworn, say that I reside at_____ street, (city or town) of_____, county of_____ in the state of Iowa; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the_____ party; that I am a candidate for nomination to the office of_____ to be made at the primary election to be held in September, 19_____, and hereby request that my name be printed upon the official primary ballot as provided by law, as a candidate of the_____ party. I furthermore declare that if I am nominated and elected I will qualify as such officer.

(Signed)_____

" 'Subscribed and sworn to (or affirmed) before me by_____ on this_____ day of_____, 19_____

_____

(Name)

_____, "

(Official title)

This statute by its terms requires each candidate shall make and file an affidavit in this statutory form. This statute is mandatory and as such

the candidate's name signed to the affidavit by another is not in compliance therewith. Nor does the statute either expressly or impliedly permit such certificates to be attached by and through a power of attorney. Your county auditor is within his statutory power in declining to place such candidate's name so signed upon the ballot.

July 12, 1968

CONSTITUTIONAL LAW — Submitting and printing of bills prior to convening of legislative session — Art. III, §15, Constitution of Iowa; H.F. 633, Chapter 82, Acts of the 62nd G. A. Since H.F. 633 does not purport to authorize the introduction of bills but only their submission and printing, it is not constitutionally defective. (Haesemeyer to Koch, Woodbury County Representative, 7/12/68) #68-7-8

The Hon. Edgar Koch, Woodbury County Representative: In your letter of May 31, 1968, you state:

"I am specifically requesting an opinion concerning several sections of House File 633 of the 62nd General Assembly 'Relating to the prefiling and printing of bills and resolutions prior to the convening of the General Assembly.

"1. Can 'any person elected to serve in the forthcoming regular or special session of the general assembly be granted the right to submit and have printed bills and joint resolutions for introduction to the next session of the General Assembly' since they would not have yet been made a member of that session of the General Assembly and would be incurring costs to be passed on to the General Assembly for payment?

"2. Can a legislative interim committee of the general assembly be granted the right to submit and have printed bills and joint resolutions for introduction to the next session of the General Assembly, since they may not be a member of the next General Assembly, and further would be incurring costs to be passed on to the General Assembly for payment, and further would not be active as a legislator if he chose not to run for reelection or was not reelected?

"3. Can a department or agency of the state government be allowed the legislative function of introducing legislation by special permission from the presiding officers of the respective houses, or must the bills be introduced by a legislator or committee?"

House File 663, now Chapter 82, Acts of the 62nd General Assembly, hereinafter referred to as the "Act," provides:

"Section 1. Within thirty (30) days prior to the convening of any regular or special session of the general assembly, any person elected to serve in the forthcoming regular or special session of the general assembly, or any interim legislative committee when authorized by statute or rule may submit and have printed bills and joint resolutions for introduction into the general assembly. The submission and printing shall be made under the rules on introduction of bills and resolutions and on printing prevailing at the previous session of the general assembly. Costs of printing shall be paid in accordance with section two point ten (2.10) of the Code. Such bills and joint resolutions so printed shall be distributed to all legislators and legislators-elect who shall be serving in the general assembly in which the proposed legislation is to be introduced by the chief clerk of the house and the secretary of the senate. All bills and joint resolutions so proposed and printed shall be assigned to regular standing committees by the presiding officers of the houses when the general assembly convenes.

"Departments and agencies of state government shall within thirty (30) days prior to the convening of any regular or special session of the

general assembly, or by special permission from the presiding officers, may file with the president of the senate and speaker of the house of representatives, bills and resolutions which such departments and agencies wish to be considered by the general assembly. All bills and resolutions so filed shall be assigned by the presiding officers to regular standing committees for consideration."

1. The language of the Act is clear and unambiguous. Hence, unless it contravenes the constitution the Act must be given effect according to its plain meaning. The constitution, Art. III, §15, merely provides in relevant part that "bills may originate in either house." However, the Act does not purport to authorize the introduction of bills but merely the submission and printing thereof *for* introduction into the general assembly. Any proposed bill or joint resolution printed in accordance with the Act would still have to be introduced by the legislator-elect sponsoring the same after the convening of the session of the general assembly to which such legislator had been elected. In our opinion the Act is not constitutionally defective and any person elected to serve in the forthcoming regular or special session of the general assembly will, within thirty days prior to the convening of such general or special legislative session, have the right to submit and have printed bills and joint resolutions for introduction at such general or special session. The cost of printing of any such bills and joint resolutions would be paid from the standing appropriation created by §2.10, Code of Iowa, 1966, which provides:

"2.10 Legislative printing-appropriation. There is hereby appropriated out of the general funds of the state not otherwise appropriated, a sum sufficient for the purpose of paying the cost of printing for each legislative session.

"The state comptroller is hereby authorized to issue warrants for the payment of said bills upon vouchers approved by the state printing board."

2. By the same reasoning any legislative interim committee when authorized by statute or rule could submit and have printed bills and joint resolutions for introduction into the general assembly. The fact that all or any of the members of any such committee might not be members of the next general assembly is irrelevant since the Act does not purport to authorize them or any of them to introduce bills but only to submit and have printed bills and joint resolutions *for* introduction in the next session of the general assembly.

3. The Act does not authorize a department or agency of the state government to introduce legislation. The constitution, Article III, §15, requires that all bills originate in one or the other of the two houses of the general assembly. Under the Act bills filed by state agencies with the president of the senate or the speaker of the house are assigned to an appropriate committee for consideration. It is up to the committee to decide whether or not a bill should be introduced.

July 12, 1968

MOTOR VEHICLES, HIGHWAYS, IOWA STATE HIGHWAY COMMISSION, COUNTIES, CITIES AND TOWNS, STATE OFFICES AND DEPARTMENTS, SPECIAL PERMITS FOR OVERSIZE VEHICLES: Sections 2, 4, 5, 6, 7, 10.1 through 10.6, 16 and 25 of Chapter

285 of the Acts of the 62nd General Assembly of Iowa. Sections 10 and 16 of Chapter 285 of the Acts of the 62nd General Assembly would authorize the Iowa State Highway Commission to adopt rules that would require civilian escort for vehicles exceeding the roadway lane width or 75,000 lbs. total gross weight and official escort where their widths exceed 12′ 5″, total gross weights exceed 90,000 lbs. or for a combination of total gross weights in excess of 75,000 lbs. and widths exceeding 12′ 0″ and which would authorize permit issuing authorities to require 2 official escorts where the total gross weight of the vehicle exceeds 90,000 lbs. notwithstanding the vehicles are 80′ 0″, or less, in length and Section 25 of the Act. (Graham to Welden, State Representative, 7/12/68) #68-7-9

The Hon. Richard W. Welden, State Representative: By your letter of February 6, 1968, you posed the questions which are paraphrased as follows:

1. Chapter 285 of the Acts of the 62nd General Assembly permits movement of vehicles of lengths to 80 feet without requiring escorts and requires an escort on loads over 80 feet. Does the Commission have authority to require escort on loads under 80 feet?

2. §10.5 of Chapter 285 requires a civilian escort or an official escort and §25 of the Acts of the 62nd General Assembly provides for warning devices visible from the rear of all loads over 65 feet, may the Commission issue rules requiring two escorts, front and rear, because of length?

The applicable Sections of Chapter 285 of the Acts of the 62nd General Assembly are, in pertinent part:

§2 "The State Highway Commission and local authorities may in their discretion and upon application and with good cause being shown therefore issue permits for the movement of vehicles with indivisible loads carried thereon which exceed the maximum dimensions and weights specified (citations omitted) but not to exceed the limitations imposed in §Two (2) through Sixteen (16) of this Act . . ."

§4 "All movements of mobile homes and other vehicles, the width of which, including any loads, exceeds the roadway lane width of the highway or street being traversed, shall be under escort . . ."

Then follows a schedule correlated to the vehicle width and maximum eligible trip distance on 24 foot pavement carrying 4,000 or more vehicles per day.

§§5, 6 and 7 allow for adjustments in maximum eligible trip distance as set out in the schedule of §4 as caused by the roadway lane width the nature of the roadway surface and end of volume of traffic carried by the same.

§10 "Except as provided in section four (4) of this Act and subject to the discretion and judgment provided for in section two (2) of this Act, single trip permits shall be issued in accordance with the following provisions:

1. Vehicles with indivisible loads having an overall width not to exceed twelve (12) feet five (5) inches or mobile homes including appurtenances not to exceed twelve (12) feet five (5) inches and an overall length not to exceed eighty (80) feet zero (0) inches may be moved for unlimited distances. No mobile home may be moved under the provision of this subsection if the actual mobile home unit exceeds sixty-eight (68) feet in length. No unit moved under the provisions of this subsection shall exceed the height as prescribed in section three hundred twenty-one point four hundred fifty-six (321.456) of the Code and the total gross

weight as prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code.

2. Vehicles with indivisible loads having an overall width not to exceed twelve (12) feet zero (0) inches, an overall length not to exceed eighty (80) feet zero inches, and *a total gross weight not* to exceed seventy-five thousand *(75,000) pounds* may be moved for unlimited distances over specified routes. The height of such vehicle and load shall be limited only to the height limitations of underpasses, bridges, power lines, and other established height restrictions on the specified route.

3. Vehicles with indivisible loads having an overall width not to exceed twelve (12) feet zero (0) inches, an overall length not to exceed eighty (80) feet zero (0) inches, and *a total gross weight not to exceed ninety thousand (90,000) pounds* may be moved for unlimited distances over specified routes *when accompanied by a civilian escort* approved by the issuing authority. The height of such vehicle and bridges, power lines, and other established height restrictions on the specified route. *An official escort may be provided for such movement at the option of the permit holder.*

4. Vehicles with indivisible loads of *widths exceeding* twelve (12) feet zero (0) inches, lengths not to exceed one hundred twenty (120) feet zero (0) inches, and total gross weights including both vehicle and load not to exceed ninety thousand (90,000) pounds shall be moved according to the schedule established in section four (4) of this Act *when accompanied by an official escort* approved by the issuing authority. The height of such vehicle and load shall be limited only to the height limitations of underpasses, bridges, power lines, or other established height restrictions on the specified route.

5. Vehicles especially designed for the exclusive movement of grain bins or vehicles with indivisible loads having an *overall length not to exceed* one hundred twenty *(120) feet* zero (0) inches may be moved for unlimited distances over specified routes *when accompanied by a civilian escort* approved by the issuing authority. The vehicle and load *shall not exceed the width as prescribed* in section three hundred twenty-one point four hundred fifty-four (321.454), the height as prescribed in section three hundred twenty-one point four hundred fifty-six (321.456), and the total gross weight as prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code. *An official escort may be provided for such movement at the option of the permit holder.*

6. Vehicles with indivisible loads *exceeding a total gross weight* of ninety thousand *(90,000)* pounds may be moved in *special or emergency situations* provided the gross weight on any axle shall not exceed the maximum prescribed in section three hundred twenty-one point four hundred sixty-three (321.463) of the Code. *The issuing authority may impose any special restrictions deemed necessary on movements by permit under this subsection.*" (Emphasis Supplied)

§16 "The commission may adopt and make available upon request to interested parties printed rules and regulations necessary for the movement by permit of vehicles and indivisible loads under the provisions of this Act. No rule or regulation shall be adopted without prior notice to city, town, and county officials and without a hearing on the proposed rule or regulation. All rules and regulations adopted shall have due regard for the safety of the traveling public and the protection of the highway surfaces and structures . . ." (Emphasis Supplied)

As a result of the hearing of February 12, 1968, the hearing officers have made several recommended changes in the rules, and the Commission has ordered another hearing upon the rules as amended. The amended rules, concerning single trip permits, affords an appropriate vehicle through which to answer your inquiries.

The single trip escort provisions of the amended rules, are as follows:

§2.4(4) "Except as otherwise specifically provided, approved civilian and official escorts shall be required for movement under single trip permits as follows:

§2.4(4) a) One approved civilian escort shall be required when the vehicle with load exceeds:

1. The roadway lane width and the total gross weight of the vehicle with load is 73,280 lbs. or less and its width does not exceed 12′ 5″ and its length does not exceed 80′ 0″ and its height does not exceed 13′ 6″.

2. The roadway lane width and the total gross weight of the vehicle with load is more than 73,280 lbs. but less than 75,000 lbs. and its width does not exceed 12′ 0″ and the length does not exceed 80′ 0″.

3. 75,000 lbs. but not more than 90,000 lbs. total gross weight and its width does not exceed 12′ 0″ and its length does not exceed 80′ 0″.

4. 80′ 0″ in length but not more than 120′ 0″ in length, or the vehicle is one especially designed for the exclusive movement of grain bins with a length of more than 80′ 0″ but not more than 120′ 0″, and their widths do not exceed 8′ 0″ and their total gross weights do not exceed 73,280 lbs. and their heights do not exceed 13′ 6″.

§2.4(4) b) An official escort operator shall include any peace officer (sheriff, deputy sheriff, policeman, highway patrolman, and uniformed highway commission escort) on or off duty and one such official escort shall be provided when the vehicle with load exceeds any one or more of the following:

1. 12′ 5″ in width.

2. 80′ 0″ in length and either its width exceeds 8′ 0″ or its height exceeds 13′ 6″ or its total gross weight exceeds 73,280 lbs.

3. 75,000 lbs. total gross weight and either its width exceeds 12′ 0″ or its length exceeds 80′ 0″.

4. 90,000 lbs. total gross weight.

The amended rules further specify that, where the vehicle with load exceeds 90,000 lbs. total gross weight, movements may be made in special and emergency situations and state in §2.3(2)g.5:

"The issuing authority at its discretion may require an additional escort either official or civilian approved."

Hereafter Chapter 285 of the Acts of the 62nd General Assembly will be referred to as "the Act" and the proposed rules, the subject of the pending hearing will be referred to as "the rules."

§4 of the Act requires vehicles with load whose width exceeds the roadway lane width to be under escort. §2.4(4)a(1) and (2) of the Rules require that when the vehicles described in §10 (1) and (2) of the Act exceed the roadway lane width the same shall be under civilian escort. This is consistent with §4 of the Act wherein neither vehicle would require escort except for the fact that it exceeded the roadway lane width.

§10, Subsection 2 of the Act would exempt vehicles of the described width and length from escort provided the same did not exceed 75,000 lbs. total gross weight and provided they did not exceed roadway lane width. §10, Subsection 3 of the Act requires civilian escort for vehicles

of the same dimensions, provided that their total gross weight does not exceed 90,000 lbs., regardless of whether roadway lane width is exceeded.

§2.4(4)a(3) of the Rules requires civilian escort for the same vehicles where the total gross weight exceeds 75,000 lbs. but does not exceed 90,000 lbs. The rule in effect construes the exemption of §10, Subsection 2 to mean that no escort is required where the described vehicles do not exceed 75,000 lbs. but civilian escort shall be required where the same does exceed 75,000 lbs. total gross weight. But it should be emphasized again that §4 requires an escort in any case where the roadway lane width is exceeded.

§16 of the Act empowers the Commission to adopt rules and regulations giving due regard to the safety of the traveling public and the protection of highway surfaces and structures.

It might be noted that total gross weights of vehicles of 73,280, or more, bears a relationship to the safety of the traveling public. See, Section 321.463, 1966 Code of Iowa. Rule §2.4(4)a(3), assumes, as did the Legislature, that an escort will tend to mitigate or to reduce traffic dangers and hazards incident to the movement of vehicles with loads having total gross weights exceeding 75,000 lbs. The rule would thus appear to bear a reasonable relationship to the promotion of the safety of the traveling public.

§2.4(4)a(3) of the Rules focuses upon the length of vehicles and appears to be a paraphrase of §10, Subsection 5 of the Act requiring civilian escort for all such vehicles exceeding 80′ 0″ in length.

§2.4(4)b(1) of the Rules requires an official escort where the vehicle with load exceeds 12′ 5″ in width regardless of other dimensions. Movement of vehicles over 12′ 5″ wide are authorized only by §10.4 of the Act. Their widths could extend from 12′ 5″ up to and through 40 feet with effective load width adjustments under §§5, 6 and 7 of the Act.

The described vehicle in §10.4 of the Act is:

1. "Widths exceeding 12′ 0″ and
2. "Lengths not to exceed 120′ 0″ and
3. "Total gross weights including both vehicle and load not to exceed 90,000 lbs. . . . when accompanied by an official escort . . ."

§10.4 of the Act authorizes the movement of a vehicle with the sum total dimensions of 40 feet effective load widths, 120′ 0″ long and 90,000 lbs. total gross weight. Such a vehicle must be under escort. §10.1 of the Act exempts vehicles from escort only up to 12′ 5″ in width if they are no wider than the roadway lane width and do not exceed 80′ and the height and weight limitations set forth therein. §10.2 of the Act exempts vehicles only up to 12′ 0″ in width, again subject to the roadway lane width limitations and the weight, length and height limitations thereof. §10.3 of the Act requires an escort for a vehicle whose total gross weight exceeds 75,000 but not more than 90,000 lbs. §10.5 of the Act requires an escort for a vehicle legal in all respects except its length exceeds 80′ 0″.

Just as it is not a condition precedent to the issuance of a permit under §10.4 of the Act that the vehicle be at once 40′ wide, 120′ long and weigh exactly 90,000 lbs., it is not necessary that the vehicle possess the maximum sum of all such dimensions before requiring official escort. Since §2.4(4)b(1) of the Rules focuses upon widths exceeding the maximum permissable without escort, 12′ 5″, (See §10.1 of the Act) it would appear to be consistent with the Act and reasonably designated to promote the safety of the traveling public. *Wood Bros. Co. v. Eicher,* 231 Iowa 550, 560-562, 1 N. W. 2d 655, 660, 661 (1942).

§2.4(4)b(2) of the Rules deals with vehicles that are basically de-described in §10.5 of the Act except that the vehicle described in the rule exceeds not only 80′ 0″ in length but also another of the limitations of the same section of the Act. Since §10.5 of the Act requires civilian escort for vehicles which only exceed 80 feet in length a rule requiring official escort where the vehicle also exceeds legal width, or height or weight would appear to be consistent with the promotion of the safety of the traveling public and with the Act. *Wood Bros. Co. v. Eicher,* supra.

§2.4(4)b(3) of the Rules is a case of a vehicle exceeding two of the three limitations of §10.2 of the Act. Since an increase in total gross weight from 75,000 lbs. through 90,000 lbs. would require a civilian escort (§10.3 of the Act) it appears reasonable to require an official escort where the vehicle also exceeds either the width limitation or the length limitations of §10.2 of the Act.

§2.4(4)b(4) and §2.3(2)g(5) of the Rules deal with vehicles moved under authority of §10.6 of the Act. In light of the foregoing rule requiring such vehicles to be under one or more official escorts can not be said to bear no reasonable relationship to the promotion of the safety of the traveling public. It is noted that such a vehicle may be of legal dimension in every respect except weight. Or it may exceed legal dimension in one or more respects. If it does not exceed 65 feet in length the Act requires no warning of the presence of the slow moving vehicle except that of escort. See, §25 of the Act. A rule informing applicants for permits to move such a vehicle that the issuing authority may require, among other special restrictions (§10.6 of the Act) two official escorts where such is necessary in the judgment of the issuing authority to promote safe use of the highway, would appear reasonable and proper.

CONCLUSION

It is noted that application of Rules 2.4(4)a(1), (2) and (3) and 2.4(4)b1), (2) and (4) would, or could, require escort for vehicles that do not exceed 80′ 0″. Civilian escort is required for vehicles exceeding the roadway lane width or 75,000 lbs. total gross weight. Official escort is required for widths exceeding 12′ 5″, total gross weights exceeding 90,000 lbs. or for a combination of total gross weights in excess of 75,000 lbs. and widths in excess of 12′ 0″.

The Act is for the most part three dimensional with excesses in each dimension contributing to and increasing the extent of the traffic hazard involved in their movement. In light of the foregoing it is my opinion that insofar as the above rules require escorts on vehicles 80′ 0″ or less they are valid.

The rules do not require two escorts (front and rear) for length alone. Instead they authorize issuing authorities to require two escorts only where the total gross weight of the vehicle exceeds 90,000 lbs. In my opinion, in light of the nature of the vehicles, the dual escort provision is valid. It is consistent with the purpose and scope of the rule making authority of §16 of the Act. Moreover, it appears to bear a rational relationship to the promotion of the safety of the traveling public and at the same time is consistent with §25 of the Act. See also *Danner v. Hass*, 257 Iowa 654, 134 N. W. 2d 534 (1965).

July 15, 1968

COUNTIES: Contracts — §332.7. Provisions of §332.7 apply to contracts for the erection of 2-car garage and tool shed costing approximately $4,600.00. (Nolan to Bruner, Carroll County Attorney, 7/15/68) #68-7-10

Mr. Robert S. Bruner, Carroll County Attorney: I reply to your letter of July 11, 1968, requesting advice on the applicability of §§23.2, 332.7 and 345.1 of the 1966 Code of Iowa to a situation in Carroll County where it is proposed that a two car garage and tool shed be built at the County Home at a cost of approximately $4,600.00.

From the facts presented, it is our view that the requirements of §23.2, to-wit: proposed plans, specifications, proposed form of contract and public hearing do not apply in this case inasmuch as the building will not cost "five thousand dollars or more."

Likewise, the provisions of §345.1 which specify that the board of supervisors shall not erect any "building, except as otherwise provided, when the probable cost will exceed ten thousand dollars" until the proposition has been voted by a majority of persons voting for and against such proposition at a general or special election do not appear to be applicable in this case.

On the other hand, the provisions of §332.7 do apply where the cost of labor and materials for the building exceeds $2,000.00. Oral contracts for such construction are void. Madrid Lumber Company v. Boone County, 255 Iowa 380, 121 N. W. 2d 523, 1963.

July 15, 1968

NATIONAL GUARD: Active Service — §§97C.2(2), 97C.3(4) and 29A.28, Code of Iowa, 1966. A state employee or officer who is a member of the national guard is not in the employment of the state when in active state military service insofar as the federal social security system is concerned. (Strauss to May, Deputy, Office of the Adjutant General, 7/15/68) #68-7-11.

Joseph G. May, B. G., Deputy, Office of The Adjutant General: Reference is herein made to your letter of February 14, 1968, in which you presented the following:

"Employees of the State of Iowa were included under the Old-Age and Survivor Insurance provisions of the Federal Social Security Act through legislation, now identified as Chapter 97C Code 1966, 'Federal Social Security Enabling Act,' enacted by the 1953 Session of the General Assembly of Iowa, wherein the Iowa Employment Security Commission was designated to enter, on behalf of the State, into an agreement with the Federal Government for the purpose of implementing and administering the Program.

"Section 97C.3(3) Code 1966 provides as follows:

'Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein, but in no event may it be effective with respect to any such services performed prior to the first day of the calendar year in which such agreement is entered into or in which the modification of the agreement making it applicable to such services is entered into, providing that in the case of an agreement or modification made after the effective date of this chapter (May 3, 1953) and prior to January 1, 1954, such agreement or modification of the agreement shall be made effective with respect to any such services performed on or after January 1, 1951.'

"Section 97C.3(4) limits services that constitute employment as follows:

'All services which constitute employment as defined in Section 97C.2, and are performed in the employ of the State, or any political subdivision, by employees of the State, or of any political subdivision, shall be covered by the agreement.'

"Section 97C.2(2) defines employment as follows:

'* * * any service performed by an employee in the employ of the State, or any political subdivision thereof, for such employer, except (1) service which in the absence of an agreement entered into under this chapter would constitute 'employment' as defined in the Social Security Act; or (2) *service which under the Social Security Act may not be included in an agreement between the State and the Federal Security Administrator entered into under this chapter.*' (Emphasis added)

"Service of members of the Federal Armed Forces while on active (Federal) duty or full time training duty (Sections 502-505, Title 32, USC) did not constitute employment for Old-Age and Survivors Insurance purposes until the Federal Social Security Act was amended to extend the benefits of the system for such service by the Servicemen's and Veteran's Survivor's Benefit Act of 1956.

"For the reason stated in the preceding paragraph, and based upon the assumption that military service is performed in accordance with a contractual concept wherein the status of the individual is changed rather than the normal employment contractual concept of performance of services in consideration for the employer's agreement to remunerate therefor, this Headquarters has traditionally considered service of the State Military Forces and service of the National Guard in Active State Service as not constituting employment for old-age and survivor's insurance purposes as provided in the Federal Social Security Act. The Federal-State Agreement does not appear to have been modified for the purpose of extending the benefits of the system for such State service, and this Headquarters has not, therefor, collected the FICA tax from personnel in State military service, or paid the employer's tax, in accordance with the provisions of Sections 97C.6 and 97C.10 respectively.

"The Iowa Employment Security Commission has questioned this policy and has suggested that an opinion clarifying the matter be requested from the Attorney General of Iowa. An opinion is therefor respectfully requested as to whether or not service of the State Military Forces and service of the National Guard in Active State Service is service performed by employees in the employ of the State, constituting employment for old-age and survivors insurance purposes, within the purview of Chapter 97C, Code 1966, and the Federal Social Security Act."

In reply thereto I advise the following:

While §§97C.3(4) and 97C.2(2) define what constitutes state employment and identify a state employee as he relates to the applicability of the Social Security Act to the benefits thereof conferred upon such state

officers and employees, such act does not in terms implied or express define the status of such state officers and employees when called into active military service. In my opinion the administrative construction of such employee and officer status when engaged in active service is confirmed as legally correct. When engaged in such service the state has provided the statute for all its officers and employees in the enactment of §29A.28, Code of Iowa, 1966, providing as follows:

"All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

This statute in the same form has been interpreted by prior opinions of this department to effect a vacancy in office or employment and the relationship of employer and employee is temporarily abolished. In an opinion appearing in the Report for 1942 at page 41, 42, it was stated:

"It is our opinion that under the provisions of Section 467.25 as amended, it is not necessary for a person coming within the terms of said section to ask for a leave of absence, and it is not necessary that a leave of absence be obtained to make the provisions of the section effective.

"We believe that the leave of absence is based on the order of the proper authority ordering said person to active service, and when that person responds to the order there is a temporary vacancy in the office or position held by him and he shall be considered as having left his office or position on a leave of absence."

In an opinion appearing in the Report for 1944 at page 18, 19, it was stated:

"It is clear from reading the above quoted law that the Legislature intended that a public officer, such as mentioned in your letter, when entering the military service should be entitled to a leave of absence and entitled to pay for the first thirty days only of such leave of absence. There is no authority for the Board of Supervisors to authorize payment of salary beyond the first thirty days that the above mentioned public officer is in active military service and the Board of Supervisors cannot enter into any sort of an agreement contrary to the provisions of the law above mentioned.

"It is significant that the Legislature, in amending Section 467.25 and providing for a leave of absence for persons entering the military service, refers to a 'vacancy' and providing for the filling of such vacancy. It is true that the vacancy is a temporary one but it cannot be fairly said that a county officer entering the military service could continue to draw his salary where the Legislature has said that a vacancy exists which may be filled by the proper appointing authority. The true test, it seems to us, in determining whether a county officer may continue to draw his salary, even though he has entered the military service, is whether or not a situation exists which authorizes the Board to make a temporary appointment. It clearly appears in the instant case that such a situation is present and that a temporary vacancy has occurred and the Board of Supervisors no longer may legally pay a salary to the county officer who has departed for military service.

"The provision of Chapter 73, Acts of the 49th General Assembly, relative to the appointment of a person to fill the temporary vacancy is as follows:

" 'The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence.'

"It will be observed that the use of the word 'may' in this law denotes that it was the intention of the Legislature to make it possible for the proper appointing authority to make a temporary appointment to fill the temporary vacancy if it deems it advisable. It is our opinion that it is not mandatory that the Board of Supervisors, in the instant case, appoint a person as Clerk to fill the temporary vacancy."

In view of the foregoing I am of the opinion that a state employee or officer who is a member of the national guard is not in the employment of the state when in active state military service insofar as the federal social security system is concerned.

July 15, 1968

ELECTIONS: Withdrawal before primary elections — §§43.22 and 43.59, Code of Iowa, 1966. Since the enactment of §43.59 a candidate may withdraw from the primary election after his nomination papers have been filed and his name may be taken off the ballot. (Nolan to Synhorst, Sec. of State, 7/15/68) #68-7-12

Mr. Melvin D. Synhorst, Secretary of State: This is in answer to your request for an opinion on the question of whether the name of a candidate may be withdrawn from the ballot in the primary election after the names of nominees have been certified pursuant to §43.22, Code of Iowa, 1966.

Section 43.59 of the Code provides in pertinent part as follows:

"When any primary candidate dies or resigns between the date for filing nomination papers and the holding of the primary election, the appropriate county or state central committee or district convention may place one additional name on the ballot."

This section was enacted by the 61st G. A. in 1965. Prior to this enactment there were several Attorney General's Opinions stating that after a candidate has qualified by filing his nomination papers and affidavit and the Secretary of State certifies his name to the County Auditor he may not withdraw his name from the ballot. 1925 O.A.G. 346, 1926 O.A.G. 687, 1934 O.A.G. 534, 1946 O.A.G. 153.

The 1946 opinion states at page 154:

". . . the printing date of the ballot has no bearing on the rights of the candidate or the party as far as the withdrawal or the filling of vacancies are concerned, and it follows that after the statutory date of filing, a candidate may not withdraw until after the primary election."

However, in view of the subsequent enactment of the provisions of §43.59 it appears that a candidate may now withdraw his affidavit of candidacy prior to the primary election and in such cases the county auditor may be informed of such resignation and if the ballot has not yet been printed such person's name may be removed. See §43.25.

July 15, 1968

EXECUTIVE COUNCIL — Providing first aid kits and fire extinguishers for state vehicles — §19.25, Code of Iowa, 1966. There is no authority

in the Executive Council to purchase such equipment through the Car Dispatcher nor is there authority to use the state contingent fund for that purpose. §19.25 is available. (Strauss to Robinson, Sec., Executive Council, 7/15/68) #68-7-13

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to your letter which submitted the following:

"The Executive Council considered a report given by the State Comptroller relative to providing First Aid Kits and Fire Extinguishers for State Vehicles.

"The Council instructed their Secretary to obtain from you an opinion as to whether the Executive Council has the authority to purchase these items through the State Car Dispatcher and have such equipment funded by the Executive Council State Contingent Fund."

I am of the opinion that the council through the state car dispatcher has no authority to make such purchase nor is the state contingent fund under the control of the council available for such purpose. See Opinion of Attorney General (Turner to Selden) 1/29/68. Such purchase is within the authority of the executive council. See §19.25, Code of Iowa, 1966.

July 16, 1968

TAXATION: Homestead Tax Credit and Military Service Tax Exemption — §§425.4 and 426A.3, Code of Iowa, 1966. Although the furnishing of a list of applicants for homestead tax credit and military service tax exemption to the Department of Revenue is not expressly required by law, the furnishing of such a list is implied by §§425.4 and 426A.3 of the Code of Iowa (1966). The uses to which such list is made by the Department impliedly necessitate that it be furnished to the Department. (McLaughlin to Peterson, Black Hawk County Attorney, 7/16/68) #68-7-14.

Mr. Roger F. Peterson, Black Hawk County Attorney: You have requested an opinion of the Attorney General on the following:

Is each county required to send lists of all applicants for homestead credits and military exemptions to the State Bureau of Revenue, or can they merely certify the assessed valuation on homesteads, and in the case of military exemptions, the amount of taxes which would be levied?

With respect to homestead tax credit claims, Section 425.4, Code of Iowa (1966), as amended, provides:

"425.4 Certification to treasurer. All claims which have been allowed by the board of supervisors shall be certified on or before August 1, in each year, by the county auditor to the county treasurer, which certificates shall list the name of each owner, legal description of the claimed homestead, and the assessed valuation of said homestead in an amount not to exceed twenty-five hundred dollars for each homestead. The county treasurer shall forthwith certify to the *department of revenue* the total assessed valuation of all homesteads so certified in an amount not to exceed twenty-five hundred dollars for each homestead." (Emphasis material provided by Section 144, Chapter 342, Laws of the 62nd General Assembly).

For military exemption purposes, Section 426A.3, Code of Iowa (1966), as amended, provides:

"426A.3. Computation by auditor. On or before August 1 of each year the county auditor shall certify to the county treasurer all claims for military service tax exemptions which have been allowed by the board of supervisors. Such certificate shall list the name of each owner

and the legal description of the property upon which military service tax exemption has been granted, or the nature of the property upon which such military service tax exemption has been allowed on property other than real estate. The county treasurer shall forthwith certify to the *department of revenue* the amount of taxes which would be levied upon each property not in excess of twenty-five mills on each dollar of assessed valuation, at the regular property rate imposed on other real and personal property in the taxing district where such military service tax exemption has been granted, were such property subject to normal property taxation." (Emphasis material provided by Section 149, Chapter 342, Laws of the 62nd General Assembly).

As its authority to require a list of applicants, the Department of Revenue is relying primarily upon §425.8 and §426A.7, Code of Iowa (1966) as amended:

"425.8 Forms — Rules. The director of revenue shall prescribe the form for the making of verified statement and designation of homestead, and the form for the supporting affidavits required herein, *and such other forms as may be necessary for the proper administration of this chapter.* As soon as practicable after the effective date of this chapter, and from time to time thereafter as necessary the department of revenue shall forward to the county auditors of the several counties in the state such prescribed sample forms, and the county auditors shall furnish blank forms prepared in accordance therewith with the assessment rolls, books, and supplies delivered to the assessors.

"The director of revenue may prescribe rules and regulations, not inconsistent with the provisions of this chapter, necessary to carry out and effectuate its purposes." (Emphasis supplied).

"426A.7. Forms — Rules. The director of revenue shall prescribe the form for the making of a verified statement and designation of property eligible for military service tax exemption, and the form for the supporting affidavits required herein, *and such other forms as may be necessary for the proper administration of this chapter.* As soon as practicable after the effective date of this chapter, and from time to time thereafter as necessary, the department of revenue shall forward to the county auditors of the several counties of the state, such prescribed sample forms. The director of revenue shall have the power and authority to prescribe rules and regulations, not inconsistent with the provisions of this chapter, necessary to carry out and effectuate its purposes." (Emphasis supplied)

The question you are raising appears to be whether when the Director of Revenue requires a list of applicants for homestead tax credit and military service tax exemption purposes he is acting within the framework of §425.8 and §426A.7, as he contends, or whether he is asking for something which is not required by the law.

It appears that the procedure followed in the county is for the board of supervisors to pass upon and allow or reject, in whole or in part, all claims filed for homestead tax credit and military service tax exemption purposes. The claims are then sent to the County Auditor who is required to certify to the County Treasurer the name of each owner, the legal description of the claimed homestead and the assessed valuation of said homestead and in the case of military service exemptions, the name of such owner and the legal description of the property upon which the exemption has been granted. The County Treasurer is then required to certify to the Department of Revenue the total assessed valuation on homesteads and the amount of taxes which would be levied on each property on which the military service tax exemption has been granted were such property subject to normal property taxation.

Although the requirement of the Department for furnishing a list of applicants is not specifically mentioned in the statute, its authority for requiring such list may be gleaned from a reading of Chapters 425 and 426A. Such list has many and varied uses, such as that of furnishing the basis upon which the Director can make the certification to the Comptroller, that of providing the basis for fulfilling the Department's function with respect to the disallowance of claims for homestead credits and military exemptions under §425.7 and §426A.6, Code of Iowa (1966), and that of supplying a basis for taking action to correct the Department and County records when a claim is reversed on appeal, under §425.10 and §426A.9, Code of Iowa (1966). In addition there are other uses which such a list serves, among which are that it serves as a basis for auditing all claims, and it provides a medium through which a county may obtain information and, if necessary, in the event of destruction of county records, a complete duplication of all claims filed in each county.

Accordingly, it is our opinion that while the furnishing of such lists is not specifically required by §425.4 and §426A.3, Code of Iowa (1966), that such lists are required under the provisions of §§425.8 and 426A.7 for the above mentioned reasons.

July 16, 1968

MOTOR VEHICLES: Emergency vehicles — §321.1(26), Code of Iowa, 1966. Cars owned by sheriff are not emergency vehicles if not authorized as such by commissioner. (Zeller to Letz, Hardin County Attorney, 7/16/68) #68-7-15.

Mr. Carl R. Letz, Hardin County Attorney: Reference is made to your recent letter wherein you request an opinion of this office as follows:

"Section 321.1(26) describes 'emergency vehicles.' Said section, as I interpret it, creates emergency vehicles by operation of law when the vehicles are owned and operated as fire vehicles, police vehicles, and ambulance and emergency vehicles, owned by the state or any municipality therein. The question arises as to whether or not vehicles used by the sheriff's office, owned personally by the sheriff, are emergency vehicles by operation of law, or whether said vehicles may be emergency vehicles only upon authorization of the commissioner of public safety."

Section 321.1(26) reads as follows:

" 'Authorized emergency vehicle' means vehicles of the fire department, police vehicles, ambulances and emergency vehicles owned by the United States, this state or any subdivision of this state or any municipality therein, and such privately owned ambulances, rescue or disaster vehicles as are designated or authorized by the commissioner."

In Webster's New International Dictionary, Second Edition, the word "police" is defined as:

"The organized body or force of civil officials and officers in this department, esp. as a collective pl., the police officers or constabulary of a town, city or other community."

The word "sheriff" is defined in the same dictionary as:

"The chief executive officer of a . . . county, charged with the execution of the laws, the serving of judicial writs and processes, and the preservation of the peace."

The duties of sheriff are more fully defined in Chapter 337, Code of Iowa, 1966. Apparently, the sheriff is not defined as a policeman, although he is included under the heading of peace officer in §748.3, Code of Iowa, 1966.

The statute in question provides that an emergency vehicle owned by any subdivision of the state, such as the county, is also an authorized emergency vehicle. Thereby it infers by omission, that if such emergency vehicle is not owned by the county, but by the sheriff, or his deputy that it should not be considered to be an authorized emergency vehicle. Private ownership permits the sheriff's car to be used for many different purposes which are not police protection, in any sense of the word. Also, it is not owned or operated by a policeman. It may be used at times, for the preservation of the peace, but it is still a private car and is not included as an emergency vehicle within the provisions of §321.1(26) Code of Iowa, 1966. And it is my opinion that a sheriff's private car is not an emergency vehicle until authorized as such by the commissioner of public safety.

July 16, 1968

STATE OFFICERS AND DEPARTMENTS — Superintendent of Printing to furnish printing to department of public instruction. §§15.37 and 15.38, Code of Iowa, 1966, as amended by H.F. 92, Chapter 90, Acts of 62nd G. A.; §§15.43, 16.3, 16.4, 257.18(20), 257.19 and 283.1, Code of Iowa, 1966. Notwithstanding the fact that some of its operations are partially financed by federal funds, the department of public instruction has no right to maintain and operate its own printing and duplicating department and all printing for such department of public instruction is to be provided by the superintendent of printing. (Haesemeyer to Moore, Supt. of Printing, 7/16/68) #68-7-16

Mr. J. C. Moore, Supt. of Printing: Reference is made to your letter of June 13, 1968, in which you state:

"Pursuant to a determination by the Executive Council, I herewith request an official Attorney General's Opinion to clarify the duties of the Printing Board and the Superintendent of Printing as set out in Chapters 15 and 16 of the 1966 Code.

"(1) Can H.F. 92 (62nd G. A.) be enforced where Federal Funds are involved.

"(2) Does the Department of Public Instruction have the right to maintain their own printing and duplicating department since Federal Funds are involved.

"A prior ruling issued October 2, 1964 seems to have some bearing on the question. (Ruling enclosed)

"Our attention has also been called to Chapter 257.18(20) and Section 260.29, 1966 Code."

§§15.37 and 15.38, Code of Iowa, 1966, as amended by H.F. 92, Chapter 90, Acts of the 62nd G. A., provide:

"15.37 Printing machinery centralized — exception

"With the exception only of machines purchased at a cost of two thousand dollars ($2,000.00) or less of the offset type, mimeographs and similar duplicators, no department or agency of the state located in the city of Des Moines shall purchase, possess or operate any presses and other printing equipment without the written permission of the state

printing board. All other presses and printing equipment owned by the state of Iowa or possessed by any of its departments or agencies operating such equipment in the city of Des Moines shall be centralized in a state building at the city of Des Moines to be and remain under the control of the state printing board."

"15.38 Powers and duties of board

"The state printing board is hereby authorized and directed:

1. To possess itself of all such presses and other printing equipment, inventory all of such described equipment, and through the executive council sell such of the above described machinery and equipment as is no longer necessary or is unfit for use."

§§15.43, 16.3 and 16.4, Code of Iowa, 1966, provide:

"15.43 Approval required for printing

"No department or commission of state located in the city of Des Moines shall expend any funds for the publication or distribution of books or pamphlets or reports unless the publication thereof be expressly required by law or approved by the budget and financial control committee and the state printing board. A violation of this section shall constitute misfeasance in office."

"16.3 Manuscript — editing — general directions

"The manuscript of every report or document, or for any book, booklet, bulletin, or anything to be printed, or a copy thereof, shall be transmitted to the superintendent of printing at the time it is filed or as soon as it is ready for printing, with all photographs, drawings, maps, engravings, charts, or other material properly a part thereof. He shall edit, revise, condense, and arrange the same for printing, simplify where practicable the typographical arrangement, and, when not otherwise covered, give all necessary instructions for the type, illustrations, headings, titles, paper, cover, binding, and other similar details. The authority here given to edit, revise, condense, and eliminate portions of manuscript shall apply notwithstanding any provisions elsewhere. Where tables or other matters are once printed it shall be sufficient thereafter to refer to the same without repeating them."

"16.4 Co-operation

"It shall be the duty of the said superintendent to advise with the officials and heads of departments as to the preparation of manuscript or copy for any printed matter, so the same may be handled in the most economical manner in the editing and printing. Officials or employees shall conform so far as practicable to all regulations of the superintendent for the improvement of the reports or other publications, or for decreasing the expense of preparation, printing, or distribution."

The language of the foregoing statutory provisions is plain, clear and altogether unambiguous. Thus, unless it can be said that the department of public instruction is not a department or agency of this state, or unless the fact that the department of public instruction's activities are in part financed by funds derived from the federal government can be found to justify ignoring the legislative mandate contained in §§15.37 and 15.38, the department of public instruction would be obliged to immediately discontinue the operation of its own printing and duplicating department and forthwith turn over to the superintendent of printing operating control of its printing and duplicating equipment and facilities.

It is clear beyond cavil that the department of public instruction is a

department or agency of the state of Iowa. §257.19, Code of Iowa, 1966. Thus, the only remaining question is whether or not the factor of federal funds is sufficient to authorize the department of public instruction to ignore §§15.37 and 15.38.

It is our understanding that the federal funds in question are those authorized to be appropriated under 20 U.S.C.A. §861-870 We can find nothing in these provisions of the federal law which would require the department of public instruction to maintain a printing plant and to do its own printing or which would prohibit such department from utilizing the services of the printing board in the same manner as other state agencies and departments.

The state board of public instruction is given rather broad and plenary powers with respect to accepting and administering federal funds. §283.1, Code of Iowa, 1966, provides:

"283.1 Federal funds accepted

"The state board of public instruction is hereby designated as the 'state educational authority' for the purpose of accepting and administering such funds as may be appropriated by congress for educational purposes and all such funds shall be deposited with the treasurer of state and disbursed through the office of state comptroller on vouchers audited as provided by law. When state matching funds are required as a condition to the acceptance of such federal funds, the state board of public instruction is authorized to make expenditures for matching only from funds provided by the legislature for such purpose; provided, however, that when federal funds may be matched with expenditures from funds appropriated for the general operation of the department of public instruction such may be done with the approval of the budget and financial control committee."

However, we do not consider this grant of authority as sufficient to permit the department of public instruction to flout another provision of Iowa law.

§§257.18(20) and 260.29 to which you make reference in your request for this opinion provide:

"257.18 Responsibilities of superintendent

"It shall be the responsibility of the state superintendent of public instruction to exercise all powers and perform all duties hereinafter listed; provided, in those categories where policies are to be initiated by the superintendent and approved by the state board, such policies are to be executed by the superintendent only after having been approved by the state board.

* * *

"20. Develop, print, and disseminate such information and facts as necessary to promote among the people of Iowa an interest and knowledge in education."

"260.29 Printing

"The board of educational examiners shall have authority to obtain all the necessary printing for the performance of their duties, as required by law, in the same manner as the printing is provided for state officers."

"260.29 is, in our opinion, irrelevant and does not bear upon the issue raised in your request. The word "print" in the language of §257.18(20) is susceptible of the interpretation that the superintendent of public instruction is authorized to do his own printing. However, the term is at

best ambiguous and is equally amenable to the interpretation that the superintendent of public instruction is to have or cause to be printed the materials described in subsection (20). In any event, there is no ambiguity in the language of §15.37.

Accordingly, in response to specific questions you present it is our opinion that, (1) §15.37, Code of Iowa, 1966, as amended by H.F. 92, Chapter 90, Acts, 62nd G. A., can and should be enforced regardless of the fact that federal funds are involved and; (2) the department of public instruction has no right to maintain its own printing and duplicating department. The prior opinion of the attorney general dated October 2, 1964, to which you make reference is not dispositive of the questions which you raise in your present request.

July 16, 1968

STATE OFFICERS AND DEPARTMENTS — State Printing Board — purchase of new equipment — H.F. 771, Chapter 71, Acts of 62nd G. A. Funds appropriated by H.F. 771 may not be used for the lease or lease-purchase of copy-center equipment for centralized printing. (Haesemeyer to Moore, Supt. of Printing, 7/16/68) #68-7-17

Mr. J. C. Moore, Supt. of Printing: By your letter of May 28, 1968, you have requested an opinion of this office as to whether or not the printing board may legally use the funds appropriated by House File 771, Chapter 71, Acts of the 62nd General Assembly, to lease additional equipment needed to establish new copy-centers in various state office buildings.

In your letter you point out the undeniable advantages of your copy-center service in terms of speed, versatility, convenience and low cost. You also note the internal printing demands of the various departments is increasing rapidly, thus creating an urgent need for additional facilities and equipment. You indicate that the $110,000 apprpriated under H.F. 771 now has an unexpendable balance of $179,220 and that, therefore, ample funds are available in the event that the H.F. 771 appropriation can be used. Under the lease-purchase arrangements you are contemplating, the new copy-centers and related equipment would pay for themselves in three to five years at the end of which time the state would own the equipment outright.

House File 771, Chapter 71, Acts of the 62nd G. A., provides:

"Section 1. There is hereby appropriated from the general fund of the state to the state printing board for the biennium beginning July 1, 1967 and ending June 30, 1969 the sum of one hundred ten thousand (110,000) dollars, or so much thereof as may be necessary, to be used for necessary printing and binding.

"Sec. 2. Funds appropriated for printing and binding by this Act, in the discretion of the printing board, may be used in supplying paper stock, multigraph or mimeograph work, and original payment of printing and binding claims for any of the state departments, bureaus, associations, and institutions. Any sum so used shall be reimbursed to the printing board and returned to the credit of the appropriation made for printing and binding. The payments shall be made to the printing board in the same manner as other claims against such departments are paid."

A prior opinion of this office dated January 5, 1968, and addressed to Stephen C. Robinson, secretary of the executive council, is dispositive of the question you now raise. The question presented in that opinion was whether or not H.F. 771 funds could be used for the purchase of copy-center equipment and in response thereto we said:

"It is to be observed that Sec. 2 of H.F. 771 is quite specific in describing the use to which funds appropriated by such act may be put. The purchase of new presses and printing equipment is not among the permissible uses of these funds and this is true notwithstanding the fact that in the past such funds have been used to purchase new machines."

The only difference between the present proposal and that which prompted our January 5, 1968, opinion is that you now contemplate a lease or lease-purchase arrangement whereas earlier it was proposed to purchase the additional equipment outright. This is a distinction without legal significance.

Accordingly, while we are neither lacking in sympathy nor unmindful of your urgent need for additional equipment, it is our opinion that funds appropriated by H.F. 771 may not be used to lease additional copy-center equipment.

July 16, 1968

STATE AND STATE OFFICES: Water Pollution Control Commission — §455B.28, 1966 Code of Iowa. Responsibility for enforcement of §455B.28 rests with the Water Pollution Control Commission. (F. Hendrickson to Freeman, State Representative. 7/16/68) #68-7-18

Mr. Lester M. Freeman, State Representative: This is in response to the correspondence addressed to you by Mr. Earl Schmidt, Vice-President of the East Okoboji Lakes Improvement Corporation, dated May 31, 1968. Within said letter was the following question:

"I am writing to you as authorized by the East Okoboji Lakes Improvement group to ask you to get a ruling from the State Attorney General whether section 455B.28 of the Iowa Water Pollution Control Law pertains to the dumping of raw sewage or treated sewage into the natural lakes of the State of Iowa. Also we would like to know who has the enforcement of this law. There seems to be some doubt by the local authorities as to whether this law is enforceable."

Section 455B.28 of the 1966 Code of Iowa relates that:

"No sewage, industrial waste or other wastes *whether treated or untreated* shall be discharged *directly into any state-owned natural* or artificial *lake* but this section shall not be construed to prohibit the discharge of adequately treated sewage or industrial wastes into a stream tributary to a lake upon the written permission of the commission." (emphasis added)

Prior to the passage of Chapter 455B, 1966 Code of Iowa, this statute was cited as §135.29 and was first passed by the Iowa Legislature in 1949. See Chapter 79, 53 G. A. Prior to the 61st G. A., 455B.28 read as folows:

"No sewage or any other waste liquid or solid substance of a decomposable, putrescible, oily, chemical, or other character whether treated or untreated shall be discharged directly into any state-owned natural or artificial lake, provided, that this section shall not be construed as to prohibit the discharge of adequately treated sewage or wastes into a stream tributary to a lake upon the written permission of the state department of health and the state conservation commission."

Prior to 1965, the Department of Health and the Conservation Commission had jurisdiction under this statute. Such jurisdiction now, however, rests solely with the Water Pollution Control Commission.

Section 455B.28 is clear and unambiguous in stating that sewage and other wastes, whether treated or not, cannot be discharged directly into a lake such as East Okoboji Lake. There need be no finding of pollution of the waters, as such act is prohibited under this statute. If sewage or other waste is being discharged directly into East Okoboji Lake, the Iowa Water Pollution Control Commission has jurisdiction to seek a court injunction against the owner or party having jurisdiction over the area where the discharge is taking place from continuing such unlawful act. There seems to be no Commission discretion under the first part of the act. The enforcement of this section by the Iowa Water Pollution Control Commission may work a hardship on the Commission's staff as well as the unlawful party, especially where the waste being discharged is treated and not polluting the waters, but until the Legislature changes the statute, the enforcement thereof rests with the Water Pollution Control Commission and the burden of complying with the statute rests with the alleged offender.

July 16, 1968

COUNTIES — Board of Supervisors — §28.7(5). There is no authority to expend county general funds for the promotion of tourism. (Nolan to Pahlas, Clayton County Attorney, 7/16/68) #68-7-19

Mr. Harold H. Pahlas, Clayton County Attorney: This is in answer to your letter of June 10, 1968, which raises the question as to what extent the board of supervisors can use general funds for the promotion of tourism.

At the present time the board of supervisors has no power, express or implied, to use county funds for the promotion of tourism. Historically the theory has prevailed that since tourism does not perform any service nor produce any revenue for the county, county funds should not be expended for this purpose. I find no authority such as given to the Iowa Development Commission under §28.7(5) to encourage the "traveling public to vivisit Iowa, by the disseminating of information as to the natural advantages of the state, its lakes and resorts, and its highways and other facilities for transient travel." You will note also that in Chapter 364 of the Code while the legislature has authorized any city in the state to establish a department under the control of the city council to be known as the department of publicity, development and general welfare, the expenses of such department cannot be defrayed from general taxation nor from special taxes levied for other purposes.

Therefore, in answer to your question, it is the opinion of this office that there is no authority for the use of county general funds for the promotion of tourism.

July 16, 1968

CONSERVATION: Expending moneys — §§111.2 and 111.3, Code of Iowa, 1966. The State Conservation Commission may expend moneys from its engineering fund for preliminary investigative studies and surveys on projects which are formally approved and accepted as State Conservation Commission projects. (F. Hendrickson to Priewert, State Conservation Comm., 7/16/68) #68-7-20

Mr. Fred Priewert, Director, State Conservation Commission: We are in receipt of your letter dated May 15, 1968, in which you present the following question:

"Can the Ctate Conservation Commission expend $17,500 in Commission funds for the purpose of completion of certain surveys and studies made in regard to proposed recreational project known as Little Lake of the Woods State Park?"

You have stated in your correspondence that the expenditure of the aforementioned Conservation Commission funds would be for the purpose of completing surveys and studies on a proposed project to be known as Little Lake of the Woods State Park. You have further stated that certain local citizen groups in the Howard-Winneshiek County region have expended certain funds for engineering and surveys on this project, and that the State funds would be used for completing the surveys and studies and making final payment for the professional services which have already been contracted for.

You have further stated that the funds in question are funds that are made available to the Commission for general engineering services necessary for State projects, and that said funds would be paid over to the engineering firms involved in the surveying and studies. You have also stated that assuming that this project could be brought to a reality, there is little doubt that it would be brought to that point as a project under the direct jurisdiction of the State Conservation Commission.

Since the Commission has taken formal action accepting the Little Lake of the Woods as a State project, your question is answered in the affirmative. Specific statutory authority for the expenditure of such funds is as follows:

§111.2, 1966 Code of Iowa provides:

"The Commission shall investigate places in Iowa rich in natural history, forest preserves, archaeological specimens, and geological deposits; and the means of promoting forestry and maintaining and preserving animal and bird life and the conservation of the natural resources of the state."

§111.3, 1966 Code of Iowa provides:

"It shall be the duty of the Commission, under the supervision and direction of the Executive Council, to establish, maintain, improve, and beautify public parks and preserves upon the shores of lakes, streams, or other waters, or at other places within the state which have become historical or which are of scientific interest, or which by reason of their natural scenic beauty or location are adapted therefor."

July 16, 1968

COUNTIES: Local health fund — Ch. 163, Acts, 62nd G. A.

1. Prior provisions of Ch. 137 and 138 are repealed by Ch. 163, Acts, 62nd G. A.

2. Transfers may be made from general fund to local health fund.

3. Members of local health board are not entitled to compensation or expenses under the new Act.

4. Funds may be expended for carrying out the purposes of the board. (Nolan to Blum, Franklin County Attorney, 7/16/68) #68-7-21

Mr. Lee B. Blum, Franklin County Attorney: This is in reply to your letter of June 7, 1968, requesting construction of Chapter 163 of the Acts

of the 62nd General Assembly, which provides for the establishment of local boards of health. Under this Act a county board of health is empowered to act as a local board. Your letter stated that expenses had been incurred by the county board of health appointed last fall in Franklin County for renting a hall for a public meeting, for postage and stationery, and for travel to Des Moines by board members to meet with the state board of health in connection with a contaminated water problem in the county. Specifically you asked:

"1. May the County Board of Supervisors appropriate funds from the county general fund under Section 137.20 and transfer the same to a county health fund for the purpose of providing money for the immediate payment of the above described bills on appropriate order of the local board, in spite of the fact that no funds were budgeted for the county health fund for 1968?

"2. May the County Board of Supervisors pay the aforesaid expenses directly from the general fund upon duly verified claims being filed with the approval of the chairman of the County Board of Health?

"3. a. Assuming sufficient funds to be on hand and legally appropriated from the county general fund to the county helth fund per Section 137.20 Iowa Code, may the members of the County Board of Health be paid any compensation whatsoever for meetings or services?

"b. May the County Board of Health members be paid mileage and other proper expenses for travel in performance of their duties?

"c. May funds be expended for rental of a meeting place for public meeting of the County Health Board?"

In answer to your first question Sec. 20 of Chapter 163 of the Acts of the 62nd General Assembly provides:

"All monies received for local health purposes from federal appropriations, from local taxation, from licenses, from fees for personal services, or from gifts, grants, bequests, or other sources shall be deposited in the local health fund. Expenditures shall be made from the fund on order of the local board for the purpose of carrying out its duties."

If the fund does not contain sufficient monies to cover the expenses incurred by the local board, the county board of supervisors may appropriate "from the county general fund . . . for the purpose of providing local health services. Such appropriation shall not exceed the statutory limitations found in chapters four hundred four (404) and four hundred forty-four (444) of the Code. Monies appropriated for this purpose shall be deposited in the local health fund as specified in section twenty (20) of this Act." Chapter 163, Sec. 22, 62nd G. A. In the event that transfers are made it would appear that the budget should be amended and Form 653-A may be obtained from the comptroller for this purpose.

In reply to the second question the 62nd General Assembly has provided for the establishment of a local health fund under Sec. 19 of Chapter 163, Acts of the 62nd G. A., therefore, the answer is negative.

In answer to your third question we advise:

a. Negative. Prior provisions for compensation of such board of health members have been repealed by §1 of Chapter 163, Laws of the 62nd G. A.

b. Negative. Only district board members may be reimbursed for their necessary expenses. §14, Chapter 163, 62nd G. A.

c. Affirmative. Funds may be expended for purposes of carrying out the duties of the board. §20, Chapter 163, 62nd G. A.

July 16, 1968

ELECTIONS: Primary Election — §§43.41 and 43.42, Code of Iowa, 1966. Where permanent registration is in force a claimed independent voter may participate in the partisan primary provided for in Chapter 43 and may cast his vote as a member of one of the parties at the polls on primary election day. Change of party affiliation is accomplished under the provisions of §43.41 by filing a written declaration with the county auditor or by effecting such change on primary election day. (Strauss to Synhorst, 7/16/68) #68-7-22

The Hon. Melvin D. Synhorst, Secretary of State: Reference is made to your letter of July 10, 1968, in which you requested an opinion on the following questions raised by Mr. A. E. Minner, Marshalltown City Auditor and Clerk:

"We would like to know the correct procedure in following the changing of party affiliations in cities with permanent voter registration.

"We would like to know if in cities, with permanent registration, where the voter originally declared as an Independent wants to declare a party, must he or she appear in person, or by written request, to the County Auditor to request declaring affiliation with a party, or can this be sent to the City Clerk for declaring of the party affiliation.

"We would also like to know if there is any difference in procedure in handling the change of party affiliation when the registered voter is already declared as a member of one party and wishes to change to the other."

1. Insofar as an independent voter who desires to become a member of a party and vote at a primary election is concerned §43.42, Code of Iowa, 1966, provides the following:

"Any elector whose party affiliation has not, for any reason, been registered, or any elector who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state, shall be entitled to vote at any primary election by declaring his party affiliation at the time of voting."

This is spelled out in a brochure which is issued by the Institute of Public Affairs of The University of Iowa and designated "Voting in Iowa" as follows:

"Suppose you've never voted in a primary before. But you are a qualified voter; you've passed all the tests the law requires. That is, you're a citizen of the U. S.; you're over twenty-one; you've lived in the state at least six months and in the county at least sixty days. And, if you live in one of the places that have voter registration, you are properly registered.

"Now the state's primary election comes along. The primary is held on the first Tuesday after the first Monday in September in even-numbered years; the polls open and close at the same time as for general elections.

"So you go to the polling place in your precinct. First the election officials have to check to make sure you are a legally qualified voter. Then they will ask you which party ballot you want.

"You can only vote for one party's candidates; you can't ask for both ballots. All the Democratic candidates are printed on one ballot; all the Republicans on a separate ballot. You tell the election officials which ballot you want.

"In permanent registration precincts, there is a blank on the little slip of paper you have to sign for you to tell which party ballot you want. Where it says 'party affiliation' you just write in 'Republican' or 'Democrat.'

"And so you get a printed ballot, or you use a voting machine, and vote for the nominees of your party. This makes you a member of the party whose ballot you voted.

"Your party affiliation is recorded, either in the poll book or on your registration card. You are a member of that party until you change your party affiliation."

2. As far as changing a party affiliation from one party to another is concerned, §43.41 provides the following:

"Any elector, who, having declared his party affiliation, desires to change the same, may, not less than ten days prior to the date of any primary election, file a written declaration with the county auditor stating his change of party affiliation, and the auditor shall enter a record of such change on the pollbooks of the last preceding primary election in the proper column opposite the voter's name and on the voting list."

This is stated in the brochure designated "Voting in Iowa" as follows:

"Suppose you are already a member of one party and you want to change your party affiliation. You can do this in two ways:

"1. You can file a written statement with the county auditor of your county. You can go to his office in person, send the declaration with someone else, or mail it to him.

On this statement give your name, address, precinct, the name of the party you are now affiliated with, and the name of the party to which you want to belong.

"You can file this statement any time except during the ten days just before a primary election.

"2. Or you can change your affiliation at the polls on election day. When you ask for your ballot, tell the election officials that you want to change your affiliation from the.....party to the..... party. They may ask you to take this oath:

"You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of the .....party.

"After you've taken the oath, you will be given the ballot of your new party and your new affiliation will be put on the records.

"Of course, if you have moved since the last time you voted in a primary, there isn't any record of your party affiliation in your new precinct. In this case all you have to do is tell the election judge what your party affiliation is."

July 16, 1968

BANKING — §528.51, 1966 Code of Iowa. Drive up windows constructed approximately 700 feet from an established parking lot office and not physically connected thereto constitute a second parking lot office within the meaning of §528.51, Code of Iowa, 1966, as amended. (Nolan to Chrystal, Supt., Dept. of Banking, 7/16/68) #68-7-23

Mr. John Chrystal, Superintendent, Department of Banking: This refers to the request for an opinion as to whether drive-up windows if constructed approximately 700 feet from a previously established bank parking lot office located at the Lindale Plaza Shopping Center would constitute a second bank parking lot office of the City National Bank of Cedar Rapids for the purposes of determining the eligibility of the bank to establish another bank parking lot office within the corporate limits of the city of Cedar Rapids at a place other than the Lindale Plaza Shopping Center.

At the meeting of the State Board on June 20, 1968, Mr. E. J. Buresh, President of the City National Bank of Cedar Rapids indicated that the drive up facility would be under the management of the bank's parking lot office but that there would be no physical connection between them. Deposits would be taken to the main bank daily.

The applicable part of §528.51, Code of Iowa, 1966, as amended by Chapter 376, Laws of the 62nd G. A., which is the controlling statute, provides:

"However, in addition to any privileges granted and subject to all restrictions set forth in this section, any bank, for the convenience of its customers, and upon approval by the state banking board and subject to that board's rules and regulations governing the operation of bank offices, may establish two (2) parking lot offices for servicing accounts, for receiving and paying out deposits; issuing and cashing checks, drafts, money orders and traveler's checks, for the storage of supplies and noncurrent bank records, for safety deposits of customers and for the performance of such other clerical and routine duties not inconsistent with this section. The parking lot office shall be located within the corporate limits of the city or town where the bank is located, shall have an adequate off-street parking area as determined by the superintendent and may be for the service of both drive-up and pedestrian customers. Such a facility located in the proximity of the bank may be found by the superintendent to be an integral part of the main bank operation so as to permit the approval of two (2) parking lot offices elsewhere. The bank may supervise the operation of the parking lot office but the executive and official business of the bank shall not be transacted at such an office; no current records of the bank shall be located at a parking lot office, and all transactions of the parking lot business shall be immediately transmitted to the bank. Nothing in this section shall prohibit national banks the privilege of this section whenever they may be so authorized by federal law."

While the statute does permit the superintendent to find that a drive up facility located in the proximity of the bank is an integral part of the main bank operation, there is no provision for such a finding with respect to a separate drive up facility being an integral part of a parking lot office "so as to permit the approval of two parking lot offices elsewhere." In such cases the rule of statutory construction is expressio uniusest exclusio alterius.

July 17, 1968

COUNTIES: Sheltered Workshop — §§28E.4 and 230.24, Code of Iowa, 1966. Counties may enter contract with a non-profit corporation under §28E.4 for rehabilitation of physically and mentally handicapped persons. (Nolan to Bruner, Carroll County Attorney, 7/17/68) #68-7-24

Mr. Robert S. Bruner, Carroll County Attorney: On May 13, 1968, you requested an opinion as to whether or not Carroll County might contrib-

ute an amount of money to the West Central Iowa Sheltered Workshop, Inc. which has been organized as a non-profit corporation in Crawford County and corporates a seven county area for the purpose of assisting handicapped residents of the counties within the area. The program is set up in conjunction with a grant from the Office of Economic Opportunity and the seven county area is to furnish 25% of the cost, the federal government providing the other 75%.

It is the opinion of this office that the county is authorized under §28E.4, Code of Iowa, 1966, to enter into a contract with such an agency should the board of supervisors decide to do so. If the amount necessary for contribution to the program plus any additional amount required for the enrollment of any number of individuals exceeding that covered by the contribution as provided in the contract has not been included in the county budget, it would be necessary to obtain the budget form number 653-A for an amendment of the current budget. The fund to be amended by appropriate budget amendment proceedings would be the county mental health fund under §230.24, Code of Iowa, 1966.

July 24, 1968

LIQUOR, BEER AND CIGARETTES — Reports required, constitutional law — Senate File 111, Chapter 159, Acts of the 62nd G. A., 5th and 14th Amendments to the United States Constitution. Senate File 111, an Act "relating to the disclosure of payments by companies selling alcoholic liquor or beer to the Iowa Liquor Control Commission and to aid in the prevention of illegal payments" contravenes the federal constitutional guarantees against self-incrimination, is unenforceable in its entirety and a challenge to any attempt to enforce such Act would result in its being declared unconstitutional. (Turner to Reppert, State Senator, 7/24/68) #S68-7-4

The Hon. Howard C. Reppert, State Senator: In your letter of March 22, 1968, you suggest that recent decisions of the United States Supreme Court may have shed new light on the questions of the legality of Senate File 111, Chapter 159, Acts of the 62nd G. A., hereinafter referred to as the "Act." You have requested that I "re-examine §2 and other portions of the Act," not previously thought to be unconstitutional as expressed in an opinion contained in my letter to State Representative Dan Johnston and yourself on July 20, 1967.

In my earlier letter to which you refer, I stated that in my opinion subsection 7 of §2 and all of §8 of the Act are unenforceable. The reasons for that opinion did not include a discussion of the impact of the 5th and 14th Amendments to the Constitution of the United States on the validity of the Act, but several decisions of the United States Supreme Court were mentioned which, although not controlling, were in my opinion significant to delineate a trend indicative of how the problem may be affected by the 5th and 14th Amendments. Further discussion of the questions surrounding the legality of §§2(7) and 8 of the Act is unnecessary at this point, except to say that more recent decisions of the court, decided since my opinion, fortify the conclusions stated in my opinion of July 27, 1967. These later decisions are important also with respect to the remaining sections of the Act. I adhere to the earlier opinion with respect to §§2(7) and 8. The legality of §2 and other directly related provisions of the Act will be re-examined as you have requested.

§2 of the Act requires reporting by the company (assuming that all liquor companies are corporations). The required report must state a great variety of information which may or may not relate to the business of the manufacture or sale of beer or intoxicating liquor. What is significant is that the "company" must report:

"1. Each payment made directly or indirectly by the company *or by any person on behalf of the company or by any person controlling, controlled by, or under common control with the company.* . . ."

The italicized provisions relate to payments made by persons *other than the company.* Aside from some specific payments to be reported for representation or contacts with the commission, detailed reports are required of any payments "for any services rendered wholly or partly in Iowa or to or for the benefit of any individual resident of Iowa. . . ." Consequently, the report must cover myriad payments which may or may not be related directly or indirectly to the liquor business or entirely unrelated thereto.

In several recent cases disclosure of information by its employees has been attempted by federal, state and local governments and by governmental corporations and agencies. Where such information relates to the qualifications of the officer or employee or to his ability to discharge the duties of the office or his employment no constitutional problem arises. But where the information required is pointed to a disclosure of misfeasance or malfeasance for which criminal prosecutions may result, it cannot be compelled by any device which requires the person to choose between a disclosure or suffering the imposition of a substantial penalty for a refusal to disclose. The discussions in the decisions have dealt with various methods of compulsion.

In *Marchetti v. United States* (Jan. 1968), 390 U. S. 39, 88 S. Ct. 679, 19 L. Ed. 889, the court held unenforceable against the claim of privilege or immunity a federal statute which required persons engaged in wagering to register and pay an occupation tax. *Grosso v. United States,* (Jan. 1968) 390 U. S. 62, 88 S. Ct. 709, 19 L. Ed. 906 involved a prosecution of a gambler who failed to pay the tax. The court held that failing to register and failing to pay the tax were inseparable and both statutes invaded the defendant's constitutional privilege against self-incrimination. *Haynes v. United States,* (Jan. 1968) 390 U. S. 85, 88 S. Ct. 772, 19 L. Ed. 2d 923 involved possession of a firearm without its registration as required by federal law. The Supreme Court held that because the registration requirement was directed at persons inherently suspected of criminal activity it resulted in exposure to a real hazard of self-incrimination and was therefore unenforceable against the claim of privilege. Consequently, possession without registration could not be separately prosecuted. In *Spevack v. Klien,* (1967) 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574, the Supreme Court prohibited the courts of New York from compelling production of a lawyer's books, records and papers of his office in an action in which he was sought to be disbarred.

The Fourteenth Amendment prevents a state or any of its agencies from exacting inculpatory statements from persons employed in various city, school or state services. No valid distinction can be made between

state and federal action. In *Gardner v. Broderick*, (June, 1968), 88 S. Ct. 1913, a New York city policeman was threatened with discharge and discharged for refusing to testify before a grand jury charged with investigation of frauds in the police department. The Supreme Court ordered the city to reinstate him with back pay saying that the threat of discharge was an invasion of his constitutional privilege against self- incrimination. In *Uniformed Sanitation Association v. Commissioner*, (June, 1968), 88 S. Ct. 1917, a commission in New York City began investigation of misuse of public property and money. A group of twelve employees each refused to testify with respect to his official conduct and was discharged. The Supreme Court held that the discharge was wrongful because it imposed a penalty for exercise of a constitutional right. *Garrity v. New Jersey* (1917), 385 U. S. 493, 87 S. Ct. 616, 17 L. Ed 2d 562 involved a group of New Jersey policemen who were required to answer questions in an investigation of irregularities in handling cases in municipal courts on the threat of loss of their jobs. The evidence thus obtained was later sought to be used in a criminal prosecution against them. The court said:

"The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option is to lose their means of livelihood or to pay the penalty of self-incrimination is the antithisis of free choice to speak out or to remain silent. That practice like interrogation practices we reviewed in Miranda v. State of Arizona * * * is likely to exert such pressure upon an individual as to disable him from making a free and rational choice. We think the statements were infected by the coercion inherent in the scheme of questioning and cannot be sustained as voluntary under our prior decisions."

There can be little doubt that §2 of the Act is designed to seek incriminatory information from the employees, officers and agents of the company. The information is to be made a public record, §9, and as such is an unrestricted source of public information, while the officials designated to receive it are directed to determine whether any law of this state has been infringed. Laws relating to bribery, corruption, etc. come at once to mind as possible areas of suspicion.

What the Act seeks is to accomplish indirectly through the corporation selling liquor in Iowa what cannot be done directly by requiring disclosure from the person suspected of guilt. It attempts to require the corporation by a threat of prosecution to elicit from its employees and others and report information the state acting directly cannot elicit under like compulsion.

It is not necessary to speculate on the extent of the pressure which may be exerted by the corporation or the pressures directed by Iowa officials through it on its employees or the purpose of obtaining information which the company is required to report under §2 of the Act. Except as to that information of which the company itself has a record, the required information must necessarily be gathered by the company from its employees or persons controlling, controlled by or under common control with it. None of these persons so categorized can be required or compelled to divulge the information because it is explicitly intended to be passed on to the State of Iowa for use in ferreting out suspected corruption. Whether the company many choose to penalize the recalcitrant employee or not is beside the point, for such information, if coerced, can-

not be used. Whether the person or agency who wields the bludgeon is a public official or private person, the resulting evidence thereby obtained is none the more voluntary in one case than another. But here such coercion by the company is obviously for the benefit of the state which takes the coerced information freighted with the same infirmities as if directly obtained by the state itself.

The rules discussed have generally been held not to apply to an artificial person. The rights guaranteed by the constitution against self-incrimination have been limited to natural individuals but doubt has arisen recently in this respect from a decision in *George Campbell Painting Corp v. Reid* (June 1968), 88 S. Ct. 1978. The State of New York requires that all public contracts must provide that upon refusal of "a person" summoned to testify before a grand jury to answer any relevant question or waive immunity from subsequent prosecution "such person" and any firm or corporation of which he is an officer shall be blacklisted for five years and the existing contract cancelled. One of the officers refused to testify, but resigned his corporate office. The claim was made by the corporation that the cancellation of its contract and blacklisting of the company was illegal. The officer who was, of course, a "person" claimed no constitutional privilege. Since the only entity claiming the privilege was the corporation the court did not reach the constitutional question.

In predicting what the court may do in the future, however, some consideration might well be given to the dissenting opinion of Justice Douglas and Black. In the view of these justices it is not so much who invokes the claim, but who is to suffer a penalty if the privilege is claimed. The dissenting opinion says:

"Appellant corporation has been disqualified as a contractor with the State of New York because its president, George Cempbell, Jr., who was also a director and an owner of 10% of its stock, invoked the protection of the Self-Incrimination Clause of the Fifth Amendment when summoned before the grand jury * * * and the controlling stockholders of this closely held corporation appeared and indicated a willingness to sign waivers of immunity * * *. The president, who invoked the Self-Incrimination Clause, resigned as officer and director and agreed to sell his 10% stock interest, though so far as appears the contract of sale has not been consummated.

"In the old days when a culprit, unpopular person, or suspect was punished by a bill of attainder, the penalty imposed often reached not only his own property, but also interests of his family. When the present law blacklists this family corporation, it has a like impact.

"I fail to see how any penalty — direct or collateral — can be imposed on anyone for invoking a constitutional guarantee. A corporation, to be sure, is not a beneficiary of the Self-Incrimination Clause, in the sense that it may invoke it. United States v. White, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542. Yet placing this family corporation on the blacklist and disqualifying it from doing business with the State of New York is one way of reaching the economic interest of the recalcitrant president. If, as I felt in Spevack v. Klein, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574, placing the penalty of disbarment on a lawyer for invoking the Self-Incrimination Clause is unconstitutional, so is placing a monetary penalty on a businessman for doing the same. Reducing the value of appellant corporation by putting it on the State's blacklist is a penalty which every stockholder suffers. If New York provided that where a

one more member, thereafter making two who are residents of Sioux City, and in compliance with Section 39.19?

"2. If not, how many?

"3. If not, and Sioux City should be permitted more than two, how should Woodbury County proceed? There are no Code provisions. The Supreme Court did not decide how many and how. The Supreme Court is giving the legislature a chance to correct the section.

"4. Presuming that Sioux City is entitled to a maximum of two, under the present law, where does the elimination of Sioux City candidates take place, in the primaries or in the general election? Who has authority to eliminate?

"5. If the six candidates with the highest vote are all from Sioux City, more than one must be eliminated, because under the present law only one man can be elected. You should also bear in mind that there will be one candidate for each party and each supervisor seat. Again bearing in mind the term of one commences 1/1/69; the term of the second commences 1/1/69; and the term of the third commences 1/1/70."

§39.19 Code of Iowa, 1966, provides:

"No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:

"1. A member-elect may be a resident of the same township as a member he is elected to succeed.

"2. In counties having five or seven supervisors two members may be residents of a township which embraces a city of thirty-five thousand population."

In answer to your first question, it is our opinion that under the rule in *Mandicino v. Kelly*, 158 N. W. 2d 754 (May 7, 1968), until the present §39.19 is changed by appropriate legislation as required by the Court only one more resident of Sioux City can be elected to the board of supervisors. As far as the 1968 elections are concerned, it is immaterial that §39.19 will in all probability be amended by the next session of the General Assembly before June 1, 1969.

Your second and third questions are answered by our reply to the first.

In answer to the fourth question we advise, inasmuch as only one candidate from Sioux City can be elected to the board of supervisors this year there being a holdover from the same township (§39.19), the candidate from Sioux City in each party who receives the highest number of votes in the primary election is the one to be nominated as the candidate of his party for one of the terms commencing in 1969. §43.53. In such circumstances, the law appears to preclude the election of a Sioux City resident for the term commencing in 1970. However, if no Sioux City resident received the highest vote for the 1969 term, then it would be possible to elect a Sioux City resident to the 1970 term. This will assure, at least until the returns are canvassed at the general election, that the provisions of §39.19 are complied with. After the general election, if the highest number of votes are received by the two persons residing in Sioux City and only one can be declared elected, then the elimination must be made again by the board of canvassers (§50.24) on the basis of the

businessman invokes the Self-Incrimination Clause of the Fifth Amendment he shall forfeit, say, $10,000, the law would plainly be unconstitutional as exacting a penalty for asserting a constitutional privilege. What New York could not do directly, it may not do indirectly. Yet penalizing this man's family corporation for his assertion of immunity has precisely that effect.

"The Supremacy Clause of the Constitution (Art. VI, cl. 3) gives the Fifth Amendment, now applicable to the States by reason of the Fourteenth, controlling authority over New York's law."

But however indirectly the threat was imposed in that case, the penalty here is more than blacklisting the company, which it does only for failing to file a timely report. The report must be executed and verified by the president, vice president, secretary or treasurer or by a general partner or individual owner. See §3. Further, if any "person" willfully fails to timely file any required report or misstates *or omits any information* required by the Act which is within his possession or could be readily obtained *by such "person,"* or if he reports falsely, he is to be fined. See §10. Clearly if any of the information required to be reported tended to incriminate the "person" making the report, then he personally is confronted with the choice between punishment or self-incrimination, a choice which all of the decisions have condemned. The fact that the corporation will be blacklisted for late filing or that the corporation may also be punished by a fine will not lessen the compulsion against the individual who makes the report, nor dilute the privilege guaranteed him by the constitution. These penalties are inseparable for the plain reason that the penalties threatened against the corporation are also threatened against the "individuals" who must execute the report. See §1.

While I am in full agreement with the dissenting opinion of Mr. Justice Stewart in Marchetti and Grosso wherein he states that the Supreme Court has unfortunately lost sight of the fact that "the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding," and while I further believe that the purpose of the Fifth Amendment was simply to prevent torture, I must follow the Court's decisions regardless of my own beliefs on this subject. The decisions and constitutional reasons above discussed, nearly all of which have been rendered since my previous opinion, compel the conclusion that the Act is unenforceable in its entirety and, in my opinion, any attempt to enforce it would result in costly litigation followed by a Supreme Court decision holding the statute unconstitutional.

July 25, 1968

COUNTIES: Board of Supervisors §39.19. Where statute prohibits membership on board of supervisors by more than two residents of the same township determination of candidates may be made on basis of highest vote received in primary election. (Nolan to Samore, Woodbury County Attorney, 7/25/68) #68-7-25

Mr. Edward F. Samore, Woodbury County Attorney: This replies to your letter of June 6, 1968 in which you submitted the following questions concerning apportionment of the Woodbury County Board of Supervisors for an opinion from this office:

"1. Presuming Section 39.19 is still in effect, and in view of the recent Supreme Court decision, will Sioux City be permitted the election of only

highest vote unless there is a tie in which case determination is made by lot. §50.44.

In answer to the fifth question we advise, should a candidate from Sioux City be elected for the term commencing January 2, 1969, no other Sioux City resident can be elected for the term commencing January 2, 1970, if the term of the present holdover supervisor from Sioux City has not expired by that date.

July 26, 1968

HIGHWAY COMMISSION — There is no power or authority in the Iowa Highway Commission to fix, without legislative authority, minimum wage scale in state contracts involving non-federal funds. (Turner to Fischer, State Representative, 7/26/68) #S68-7-5

The Hon. Harold O. Fischer, State Representative: Reference is made to your letter of May 20, 1968, in which you state:

"According to a press report by Harrison Weber attributed to Bob Beck, Republican gubernatorial candidate, the State Highway Commission has taken administrative action to require an increase in the minimum wage scale on non-federal participation primary highway construction projects. Candidate Beck indicates that it is his observation that this action was contrary to legislative intent.

"I have checked the wording and content of the Iowa Highway Commission Specification #630 to be effective May 28, 1968, on ALL PRIMARY PROJECTS. It is my conclusion that the Highway Commission is acting illegally and contrary to the intention of the 62nd General Assembly when the Legislature, in effect, refused and failed to enact H.F. 85 and S.F. 140. It appears that if this specification is permitted to become operative that it would definitely increase the cost of construction on non-federal participation projects and could have a profound effect on future secondary and municipal projects.

"It is requested that I be furnished an official legal opinion from your office indicating whether or not the administrative action by the State Highway Commission violates legislative intent as indicated in the preceeding paragraph."

If I understand your question correctly what you are suggesting is that where, as here, the general assembly defeated a bill which would have required the payment of minimum wage scales on public construction projects, this failure to enact somehow amounts to a legislative mandate which would prohibit the highway commission from inserting a provision in its construction contracts to require the payment of certain minimum wages. While this proposition has a certain appeal as a matter of logic, it is not supportable as a matter of law. The legislature makes the policy of the state by the statutes it enacts not by those it fails or refuses to pass. Thus, if existing laws are sufficient to vest administrative discretion in the highway commission to require the payment of certain minimum wages as part of highway construction contracts, the commission is free to insert such a provision in its contracts regardless of the fact that H.F. 85 failed of enactment in the 62nd General Assembly.

However, essentially this same question was previously considered by the attorney general and an opinion rendered. 36 OAG 549. As stated in prior opinion:

"It seems clear that the agencies, boards, commissions and officials of

the State of Iowa are in regard to public contracts in the same position the Federal Government was before the passage of the Walsh-Healey Act, and that the various agencies, officials and commissions of the State of Iowa do not have the power without state legislative authority to prescribe any wage scale in state contracts either 'prevailing' or 'minimum.' The Iowa Legislature, with the exception hereafter noted, has not given state agencies, officials or commissions the power to prescribe or specify either 'prevailing' or minimum wage scales in state contracts let by them. A good many of the states including neighboring states, have enacted what is known as 'prevailing wage' statutes in regard to public contracts in order to deal with the situation. This lack of legislation in Iowa results in continued appeals, demands and pressure upon state boards, commissions and state officials to indirectly assume powers in that regard not granted them by the Legislature and which belong exclusively to the Legislature.

"The State Highway Commission has a very limited right in regard to putting in minimum wage scales in its contracts involving Federal funds, by virtue of Section 4755-b1 of the 1935 Code of Iowa which provides in part as follows:

" 'The State Highway Commission is empowered on behalf of the state to enter into any arrangement or contract with and *required* by the duly constituted federal authorities, in order to secure the full co-operation of the government of the United States, and the benefit of all present and future federal allotments in aid of highway construction, improvement or maintenance.'

"Under this section in contracts involving Federal funds the Highway Commission is authorized to do what is 'required' by the Federal Government, and not what the Federal Government will merely approve. The only requirements made by the Federal Government as yet, in regard to these contracts, is a 'minimum' scale on certain projects. The State Highway Commission would not and does not have any authority to require contractors to pay a prevailing wage scale until it becomes a requirement of the Federal Government in regard to such contracts, which the Federal Government has not as yet done, and until it does so require, the Highway Commission's authority is limited to complying with the Federal minimum wage standards.

"The authority given the State Highway Commission by Section 4775-b1 above set forth is thus so limited in the matter of minimum wage scales on Federal Aid projects as to leave the Highway Commission in the rather difficult position of not being able to require minimums above those required by the Federal Government, even though under the circumstances, the Highway Commission feels that the Federal Government's required minimums are inadequate, and unless more general legislation is intended on the entire subject, it might be considered to amend that section to give the Highway Commission power to fix minimum wage scales above those 'required' by the Federal Government.

"In regard to other State Highway contracts not involving Federal funds, the Highway Commission is as helpless as are the other state agencies in attempting to demand or require a 'prevailing wage' scale or any wage scale."

The foregoing prior opinion appears to be soundly reasoned and we see no reason to depart therefrom at the present time. Accordingly, it is my opinion that the highway commission has no authority to require the payment of the prescribed minimum wage scale on non-federal participation highway construction projects.

July 26, 1968

TAXATION: Sales and Use Taxes — Bowling alleys. §422.43, Code of Iowa, 1966. §§24, 25, 35 of Chapter 348, Acts of 62nd General Assem-

bly. The imposition of Iowa sales or use tax on the rental of automatic pin setters by bowling alley operators and the imposition of the sales tax on all receipts from the operation of bowling alleys is proper under the Iowa tax laws and does not constitute illegal double taxation. (Griger to H. O. Fischer, State Representative, 7/26/68) #68-7-26.

Hon. Harold O. Fischer, State Representative: This will acknowledge receipt of your letter of July 3, 1968, in which you have requested an opinion of the Attorney General as follows:

"It has been brought to my attention that automatic pin setters in bowling alleys are rented to the operators. The State charges a service tax on the rental of the machines to the alley operators and then again charges a service tax from the user or consumer. This raises a very interesting point and it is requested that you furnish me with a legal opinion on whether this double tax collection covering the rental and use of equipment is legal under the present tax laws of the State of Iowa.

"It is understandable that machine rental in an office or the renting of other equipment by a consumer should be taxed under the law. However, the matter of double taxation for the same use is, in my mind, extremely questionable and not within the scope of 'legislative intent.' "

§25 of Chapter 348, Acts of 62nd General Assembly (1967) amends §422.43, Code of Iowa, 1966, by extending the Iowa retail sales tax to a variety of services, one of which is "equipment rental." This amendment provides in part:

"Section four hundred twenty-two point forty-three (422.43), Code of Iowa, is amended by adding thereto the following:

"The following enumerated services shall be subject to the tax herein imposefd on gross taxable services:

* * *

"equipment rental except that which was contracted for prior to June 15, 1967, but in no case beyond June 15, 1968 . . ."

§35 of Chapter 348 amends §423.2, Code of Iowa, 1966, to impose the Iowa use tax on the services enumerated in §25 of the new tax law.

Webster's Seventh New Collegiate Dictionary (1967) defines "equipment" in part as follows:

"2a. The set of articles or physical resources serving to equip a person or thing: as (1). The implements used in an operation or activity: Apparatus (2). All the fixed assets other than land and buildings of a business enterprise."

Clearly, as a factual matter, automatic pin setters constitute equipment and the renting of automatic pin setters to bowling alley operators would constitute the taxable service of equipment rental. Pursuant to §§20 and 35 of Chapter 348, the rate of tax is 3% of the gross receipts derived from such rentals.

§422.43, Code of Iowa, 1966, also imposes the retail sales tax on the gross receipts from the operation of bowling alleys. The pertinent language of that statute provides that "The tax thus imposed shall cover all receipts from the operation of . . . bowling alleys. . . ."

You will note that the tax is imposed on two different transactions, namely, on the renting of automatic pin setters and on the charge exacted from patrons who use the facilities of bowling alleys. In the former situation, the taxable transaction occurs between the lessor and lessee of the automatic pin setters. In the latter situation, sales tax is imposed on transactions involving the bowling alley operator and his patrons. In regard to double taxation, the following statement appears in 53 C.J.S. *Licenses*, §24(1) at p. 551:

"It has also been held that double taxation in the prohibited sense does not result from the levy of two or more excise, occupation, or license taxes for different purposes, or pursuant to two different powers of government or where both exactions amount to one excise or license tax, as where the second tax merely effects an increase in the tax on a particular item. *Other instances which do not involve prohibited double taxation occur where the excise or license tax or taxes are paid by different persons or in connection with different transactions.*" (Emphasis supplied)

In *Ryder Truck Rental, Inc. vs. Bryant*, Fla., 170 So. 2d 822 (1964), the Florida Supreme Court held that imposition of the sales tax on a sale of a motor vehicle and again on the rental of the same vehicle was not objectionable as double taxation since each taxable transaction was separate and distinct from the other. In *Central Marine Service, Inc. vs. Collector of Revenue*, La. App., 162 So. 2d 81 (1964), the Court held that the imposition of the sales tax on the rental of barges from the owners thereof and again on the subleasing by the lessee to the ultimate users of said barges did not constitute illegal double taxation.

It is our opinion that the imposition of the sales or use tax on the rental of automatic pin setters by bowling alley operators and the imposition of the sales tax on all receipts from the operation of bowling alleys is proper under the Iowa tax laws and does not constitute illegal double taxation.

July 26, 1968

CITIES AND TOWNS: Airport commission. Const. Iowa, Art. 3, §1 (Legislative Department); §§330.1, 330.7, 330.12, 330.16, 330.17, 330.18, 330.19, 330.20, 330.21, 330.23, 407.2, Code of Iowa, 1966. The definition of airport under §330.1 encompasses the entire 1,440 acres upon which is situated the municipal airport of the city of Ottumwa. Authority to manage this airport and the industrial area which is located upon airport grounds is in the airport commission. Proceeds from the sale of airport property are under the absolute control of the airport commission. The city council has the power to reduce or alter the budget of the airport commission upon certification to the council. The airport commission does not have the power to issue general obligation bonds under §§330.7 and 330.16, without the concurrence of the city council. (Martin to Erhardt, Wapello County Attorney, 7/26/68) #68-7-27

Mr. Samuel O. Erhardt, Wapello County Attorney: I have received your letter of June 18, 1968, in which you ask for an opinion of the Attorney General on the following questions:

1. Does the definition of airport under §330.1, Code of Iowa, 1966, encompasses the entire fourteen hundred forty (1440) acres upon which is situated the municipal airport of the City of Ottumwa?

2. Does §330.21, Code of Iowa, 1966, give the airport commission authority to manage an industrial area on airport grounds?

3. When airport land is sold by the airport commission with the ap-

proval of the City Council, are the proceeds from such sale to be paid to the city's general fund or are such proceeds under the absolute control of the airport commission under §330.21 or any other provision of Chapter 330?

4. In view of the language of §330.21, does the City Council have the power to reduce or in any other way alter the budget of the airport commission once it is certified to the Council?

5. Does the airport commission have power to issue general obligation bonds under §§330.7 and 330.16 without the concurrence of the City Council?

A recent Preliminary General Plan of the Ottumwa Industrial Airport prepared by Leo A. Daly Company, a planning, architecture and engineering company of Omaha, Nebraska, and an opinion of the Attorney General in 1948 OAG 38, concerning the Ottumwa Airport, generally appear to establish the following history of the Ottumwa facility.

" 'On March 30, 1928, a group of Ottumwa citizens affiliated themselves as the Ottumwa Legion Airport Company, rented a major portion of the present field, constructed a hangar and other inconsequental outbuildings, graded runways, and in all, spent approximately $12,486.66. This money was largely private capital obtained by donations from interested parties. During the depression years, first under the Civil Works Administration, and later, the Emergency Relief Administration, approximately $50,000.00 fences, improving buildings, etc. [sic] I do not have all the data before me as to the exact amount spent but the above is a rough estimate thereof.

" 'On September 19, 1936, the land which heretofore had been leased was transferred to the City of Ottumwa by proper deed, recorded in book 148, page 244, records of Wapello County, Iowa, subject to a purchase money mortgage of $15,000.00; and at or about that time, the City of Ottumwa entered into a contract with the Ottumwa Legion Airport Company to purchase the existing hangar for $5,425.00.

" 'The matter rode along until 1939 at which time the National Youth Administration set up a training and construction project at the airport and as a result thereof, a second hangar was built, using NYA labor, and materials provided largely by monies raised by the Ottumwa Chamber of Commerce and interested citizens. This building was completed except for the cement floor about December 10, 1940.

" 'At the regular November election, held November 5, 1940, the city voted a special one-fourth mill levy for airport property. Subsequently to that time, in January, 1941, a three-man airport commission was appointed. Apparently this was done without any enabling statute by the state legislature. About that time, the state legislature passed our present airport commission act, which airport commission plan for administration was duly approved by the voters in the election held March 31, 1941, and at that time our present five-man commission was appointed to act, as provided by state law. In the interim WPA funds in some small amount may have been spent at the airport but these figures are not available to me at this time.' " (1948 OAG 38)

The Preliminary General Plan states as follows:

"During the war, the United States Navy was investigating possible sites for training stations. These sites were to be dispersed around the country in order to be reasonably secure from enemy attack. At that time, many Ottumwans visited Washington and eventually pursuaded federal officials to visit Ottumwa. As a result of this visit, a site north of the city was found desirable. The city then offered to buy the land and turn it over without charge to the Navy. The Navy accepted the

offer, and Ottumwa incurred a debt of $292,901.00 in order to purchase the necessary acreage. The exchange of property included one important stipulation in the agreement: should the Navy or other federal agencies at a later date conclude that the land was no longer needed, it would revert to the City of Ottumwa.

"During the second World War many men took primary flight training at the Ottumwa Naval Air Station. The base handled more than 4,000 persons during its period of peak activity. After the war, the federal government retained ownership of the property until 1964. During this period, the city was permitted to use the runways and airport buildings.

"The federal government finally relinquished completely ownership of the airport. Soon after, the City of Ottumwa required the land and purchased all buildings and improvements."

The original airport site, Legion Field, was sold a number of years ago to private interests. The present airport is a direct result of the purchase referred to in the Preliminary General Plan, and the entire fourteen hundred forty (1,440) acres, were purchased at the same time.

In answer to your first question, §330.1, Code of Iowa, 1966, provides as follows:

"The word 'airport' as used in this chapter, shall include landing field, airdrome, aviation field, or other similar term used in connection with aerial traffic."

What you refer to as an industrial area is located on municipal airport property and at the time of the proposed general plan for the Ottumwa facility consisted of approximately 12.39 acres. This property is leased under the provision of §330.12, Code of Iowa, 1966, which provides in part as follows:

"Any such city or town may from time to time fix, establish, and collect a schedule of charges for the use of such property or any part thereof, which charges shall be used in connection with the maintenance and operation of such airport. When the public needs will not be injured thereby, any such city or town may lease all or any portion of such property, for a period of years not exceeding fifty. . . ."

This power is actually exercised by the airport commission, however, under the provision §330.21, Code of Iowa, 1966, which provides in pertinent part as follows:

"Said commission shall have and exercise all of the powers granted to cities and towns under this chapter, except powers to sell said airport or airports."

An examination of a plat of the airport property prepared by Howard R. Green Company for the Ottumwa Industrial Airport Commission, reveals that the fourteen hundred forty (1,440) acres, comprising the airport property, is basically square in shape. The two runways of the facility, proceed from the northeast and northwest corners of the property, to the southwest and southeast corners, respectively. Such a design is common for multi-runway airports, due to the need of aviation to accommodate air traffic patterns to changes in wind direction.

The original purchase of the property appears to have been authorized and the purchase of fourteen hundred forty (1,440) acres was not a purchase of land in excess of existing authority, or requirements. The need to be able to control surrounding land, with particular attention to heighth of surrounding structures, is obvious. Likewise, the noise, vibra-

tion and dust, attendant modern aviation, particularly as products of the operation of jet aircraft which after current runway expansion Ottumwa will experience, necessitate large expanses of property. Complaints from, and even possible damage to, the property owners located close to airports, create circumstances which would justify an airport commission in extricating itself from some of this possible liability through the purchase of larger amounts of land than are physically occupied by runways, terminals, and hangars.

As the Iowa court said in *Brown v. Sioux City*, 242 Iowa 1196, 49 N. W. 2d 853 (1952) at page 857:

"The record shows the necessity for acquiring farm land surrounding the runways is to provide a safe approach zone free from the obstructions of high wires and buildings. Then too, since this is an area of low altitude flying, the city would be required to take that area of land where necessary low level flight would interfere with a private owner's then existing use or be dangerous to persons or property lawfully on the land. 2 C.J.S., Aerial Navigation, §§4 and 5; Delta Air Corporation v. Kersey, 193 Ga. 862, 20 S. E. 2d 245, 140 A.L.R. 1352. It is the air space and not the earth in the approach zone that is used for the purpose of an airport."

We would, therefore, answer your first question in the affirmative: The need to control land areas adjacent to runways would authorize the purchase of more land than is physically necessary to locate hangars, runways, and terminals. The entire fourteen hundred forty (1,440) acres would thus appear to meet the definition of airport contained in §330.1, above set out.

All airport property, upon the establishment of the airport commission, is subject to the management and control of said commission.

Section 330.2, Code of Iowa, 1966, in providing that cities and towns have the right to maintain and operate airports, provides as follows:

"Cities and towns shall have the right to acquire, establish, improve, maintain and operate airports, either within or without their corporate limits, and either within or without the territorial limits of this state."

Section 330.21, above set out, gives the exercise of this power to airport commissions upon their establishment.

Further evidence of the commission's management authority may be found in the provisions of §330.23, Code of Iowa, 1966, which delegates to airport commissions, the power to make and enforce rules and regulations concerning airport activity.

The form of the ballot to establish an airport commission, while not fully controlling, is also indicative of delegated control. Section 330.19, Code of Iowa, 1966, provides as follows:

"The question to be submitted shall be in the following form:

" 'Shall the city (or town) of . . . place (or continue) the *management and control* of its airport (or airports) in an airport commission.' " (emphasis added)

The leasing of portions of ground to private industry, does not change the character of the land involved from an airport to something else.

The above recited need for control of the height of structures as well as problems created through the noise and vibration of jet engines, supports the inclusion of such land within the umbra of the airport commission.

Funds derived from the sale of airport property are the exclusive property of the airport commission. Section 330.21, Code of Iowa, 1966, provides in pertinent part as follows:

"All funds derived from taxation or otherwise for airport purposes shall be under the full and absolute control of said commission for the purposes prescribed by law. . . ."

The entire fourteen hundred forty (1,440) acres were originally acquired for airport purposes. A subsidiary justification for acquiring this amount of land, is the economic support which it furnishes to aeronautics activities. The construction of a facility such as an airport draws to it other economic interests. This activity increases the value of the surrounding land. It is not unauthorized for a city to take advantage of this potentiality if the other justifications for the original acquisition are present.

The Iowa Court in *Brown v. Sioux City*, 242 Iowa 1196, 49 N. W. 2d 853 (1952) stated with relation to a city's holding of such land, at page 857 of the Northwest Reports:

"The city could rent this land, derive revenue therefrom, and thereby cut the deficit for the operation of the airport with the resulting lessening of the tax burden. . . ."

This language appears to recognize airport lands of the type involved in this case as being an economic unit. Management of the property, whether resulting in sale, lease or other gains are to be attributed to the unit and therefore the "airport purposes" test contained in §330.21 appears to be met. Under such circumstances $330.21 directs that these funds are the funds of the commission and not the funds of the city.

We now come to your fourth and fifth questions concerning the relationship between the airport commission and the city council on the issue of taxation and bonding authority.

The argument has been advanced that the city council is a mere transmitter of airport commission levies to the county auditor. This argument is based upon the provisions of §330.21, Code of Iowa, 1966, which provides in pertinent part as follows:

"The commission shall annually certify the amount of tax within the limitations of this chapter to be levied for airport purposes, and upon such certification the city council *shall* include said amount in its budget." (emphasis added)

This argument urges that the italicized word in §330.21 is to be read in a mandatory fashion, with no discretion existing in the city council to control the levy for ordinary annual operation and maintenance expenses.

We need not decide whether the word "shall" as used in the above set out statute is permissive or mandatory. *Gibson v. Winterset Community School District*, 258 Iowa 440, 138 N. W. 2d 112 (1965). As the Iowa

Court stated in *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N. W. 2d 355, cert. den. 87 S. Ct. 79, 358 U. S. 851, 17 L. Ed. 2d 80, at page 362 at the Northwest Reports:

"It is a fundamental rule of statutory construction that where a statute is fairly open to two constructions, one of which will render it constitutional or of doubtful constitutionality, the construction by which it may be upheld will be adopted. Town of Mechanicsville v. State Appeal Board, 253 Iowa 517, 527, 111 N. W. 2d 317, 323, and citations; Jacobs v. Miller, 253 Iowa 213, 218, 111 N. W. 2d 673, 676; Kerr v. Chilton, 249 Iowa 1159, 1166, 91 N. W. 2d 579, 584, and citations; 16 C.J.S. Constitutional Law, §98B, pages 375, 376."

If the word "shall" in the above set out statute was determined to be mandatory, that section would be of doubtful constitutionality. *State ex rel Howe v. Mayor etc. of City of Des Moines et al*, 103 Iowa 76, 72 N. W. 639 (1897). We therefore adopt that construction of section 330.21, which will uphold the statute: The ultimate determination of the amount of the levy to be made for the ordinary operation and maintenance expenses of an airport is lodged in the discretion of the city council.

It is argued that the first sentence of §330.21 gives the city council's power to issue general obligation bonds for airport purposes under §§330.7 and 330.16 to the airport commission. Section 330.21 provides in pertinent part as follows:

"Said commission shall have and exercise all of the powers granted the cities and towns under this chapter, . . ."

The city council, it is argued, has no voice in the issuance of these bonds.

Section 330.17, Code of Iowa, 1966, provides as follows:

"The council of any city or town which owns or otherwise acquires an airport or airports may, and upon petition of ten percent of the number of qualified electors who voted at the last city election shall, at any city election if one is to be held within sixty days from the filing of said petition, or special election called for that purpose, submit to the voters the question as to whether the *management and control* of such airport, or airports, shall be placed in an airport commission.

"Whenever an airport, or airports, of any city or town has been placed under the *management and control* of an airport commission, upon petition of ten percent of the number of qualified electors who voted at the last city election the council of any such city or town shall, at a city election if one is to be held within sixty days from the filing of said petition or at a special election called for such purpose, submit to the voters the question as to whether the *management and control* of such airport, or airports, shall be continued in the airport commission, and if a majority of the votes cast upon said proposition at the election shall be against the continuance of such airport commission, said commission shall stand abolished sixty days from and after the date of such election, and the power to maintain and operate such airport, or airports, as provided in this chapter, shall revert to such city or town." (emphasis added)

Section 330.19, Code of Iowa, 1966, provides as follows:

"The question to be submitted shall be in the following form:

" 'Shall the City (or Town) of.....place (or continue) the *management and control* of its airport (or airports) in an Airport Commission?' " (emphasis added)

Section 330.20, Code of Iowa, 1966, provides in pertinent part as follows:

"When a majority of the voters cast upon said proposition at such election shall have declared in favor of the proposition of airport *control and management* by a commission, the mayor shall, within ten days thereafter, appoint an airport commission. . . ." (emphasis added)

The foregoing statutory provisions set forth the purpose which airport commissions are to fulfill in municipal government. This function is the narrow one of management and control. This purpose, in our opinion is not broad enough to include the far reaching power to issue bonds.

Furthermore, section 407.2, Code of Iowa, 1966, provides as follows:

"No county, or other political or municipal corporation, shall become indebted in any manner, or for any purpose to an amount, in the aggregate, exceeding five percent of the actual value of the property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness."

This limitation is also recognized within the airport bonding sections themselves. Section 330.7 provides that ". . . [N]o city or town shall become indebted in excess of five percent of the actual value of the taxable property within said city or town, . . ." Section 330.16 contains identical language. The number and clarity of these provisions make obvious that aspect of our law which limits the cities and towns in their debt incurring capacities. To adopt the view that the airport commission, by virtue of the provisions of §330.21, may exercise every power of the chapter granted to cities and towns with respect to airport matters, is to urge that an airport commission may issue bonds up to five percent of the actual value of the taxable property within the corporation. Under such an argument, the airport commission could draw upon the entire five percent debt capacity of the city, and leave the city no bonding capacity with which to finance other generally needed municipal projects. Such a construction is untenable.

It is therefore the opinion of this office that the airport commission may not issue bonds under the provisions of §§330.7 or 330.16, without the concurrence of the city council.

July 26, 1968

CITIES AND TOWNS: Joint County Director of Civil Defense and Emergency Planning — §29C.7, Code of Iowa, 1966. The consent of cities, towns and school boards is not required when boards of supervisors of adjacent counties act to apoint a joint County Director of Civil Defense and Emergency Planning. (Martin to Story, Jones County Attorney, 7/26/68) #68-7-28.

Mr. Robert H. Story, Jones County Attorney: I have received your letter of July 1, 1968, in which you request an opinion of the Attorney General as follows:

Are the boards of supervisors of two or more adjacent counties empowered to appoint a civil defense director under the provisions of 29C.7, Code of Iowa, 1966, without first obtaining the consent of the cities, towns and school boards within each county?

Section 29C.7, Code of Iowa, 1966, provides in pertinent part as follows:

"The county boards of supervisors in any two or more adjacent counties, may by mutual agreement act as a joint board to appoint one director who shall be the official director of civil defense and emergency planning for each of the counties, shall work with any joint county-municipal defense and emergency planning administration which may have been formed within any of the counties, and who shall provide such services as may be carried on jointly to the mutual benefit of all counties involved."

The plain words of the statute indicate that county boards of supervisors are the appointing authority. The statute does not require the consent of cities, towns or school boards within the respective counties, and such a requirement may not be read into the statute.

July 26, 1968

ELECTIONS — Representative Districts. The establishment of an additional voting precinct may be necessary to implement the decision of *Kruidenier v. McCulloch*, 158 N. W. 2d 170 in Johnson County. (Nolan to Jansen, Johnson County Attorney, 7/26/68) #68-7-29

Mr. Robert W. Jansen, Johnson County Attorney: This refers to your letter of July 19, 1968 concerning the following:

"As you are aware, the decision of the Iowa Supreme Court in *Kruidenier v. McCulloch*, 158 N. W. 2d 170, (April 9, 1968) realigned the legislative districts in Johnson County.

"The Court used Township and City Corporation limits as they existed in 1960.

"Unfortunately, the result here in Johnson County is that the Second Precinct of the Second Ward in Iowa City was, on the basis of the 1960 boundaries, located partially in East Lucas Township and partially within the City of Iowa City.

"Because of the intervening growth in population and the accompanying extension of the City's limits, Precinct Two of Ward Two is now, except for the Court's decision, contained entirely within the City of Iowa City.

"I hereby request an Opinion as to these questions:

"(1) Should those voters affected vote in East Lucas Township, where the 1960 boundaries would put them, or should they vote at a separate polling place to be established within the present Ward Two, Precinct Two boundaries?

"(2) Should the City of Iowa City make up a separate poll book for those voters who, on the basis of the 1960 boundaries, were in East Lucas Township?"

The location of the polling place is in my opinion, secondary to the object of assuring that the people of Johnson County have the representation demanded in *Kruidenier v. McCulloch*, supra, where, quoting from the original *Kruidenier* opinion the court restated the basic concept of constitutional apportionment of legislative districts that there must be a "faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." 158 N. W. 2d 170, 173. It seems to me that this can be achieved either by having a separate polling place within the present Second Ward, Second Precinct, or by having the voters involved cast their votes at the polling place for East Lucas Township. It is my under standing that if the

former is selected, separate ballots must be printed for the voters who reside in the area annexed to Iowa City after 1960 which was formerly East Lucas Township, since, by virtue of the decision cited above they are placed in representative subdistrict 1; whereas other voters of the Second Ward, Second Precinct are in representative subdistrict II.

But, separate ballots would be required in either case because voters residing in the area annexed to the city from East Lucas Township are no longer entitled to vote for East Lucas Township officers. §359.3, §49.30, Code of Iowa, 1966.

In either case it appears necessary that separate poll books be prepared to contain the names of those voters living within the present boundaries of the Second Ward Second Precinct who are to vote for the subdistrict one representative to assure that the proper ballots are distributed to them. For this reason the best and most direct method may be to establish a new precinct encompassing that part of the present Second Ward Second Precinct, which was annexed to the city after 1960. This can be done by the City Council pursuant to §49.5 Code of Iowa, which provides:

"The council of a city may, from time to time, by ordinance definitely fixing the boundaries, divide the city into such number of election precincts as will best serve the convenience of the voters."

July 26, 1968

SCHOOL DISTRICTS — School Board Directors — Payment of Expenses — §279.29, Code of Iowa, 1966. Expenses of Directors in conducting official business may not be paid by school district. (Ivie to Van Gilst, State Senator, 7/26/68) #68-7-30

The Hon. Bass Van Gilst, State Senator: You have requested an opinion on the following question:

"May a board of directors of a school corporation pay the expenses of a director or directors resulting from official services by said directors?"

In this connection, §279.29, Code of Iowa, 1966, is the controlling statute. This section reads as follows:

"The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official services except that in school townships, rural or village independent districts, and in consolidated districts that contain a city or town having a population less than 1,000 the board may pay a legally qualified school treasurer a reasonable compensation."

There are several Attorney General Opinions, dealing with specific expenses of school boards and members, which serve as some criteria in answering your question.

In 30 O.A.G. 187 it was held that no mileage could be paid board members in traveling to and from regular board meetings. In 32 O.A.G. 43 it was ruled that a school board itself could not be a dues paying member of any association, holding that the powers of such boards are limited specifically by statute. The same opinion also held that expenses of members attending meetings of such an association could not be authorized and paid by a board since the members could not be official delegates to

such meeting. The same opinion, however, did hold that expenses of members, superintendent or other employees to interview applicants for vacancies or to visit other school systems to secure information of value to the school corporation were proper expenditures.

In 36 O.A.G. 381 it was held that expenses of board members in attending conferences called by the Superintendent of Public Instruction could be properly paid from funds of the district.

On June 27, 1949, in an advisory letter to C. B. Akers, Auditor of State, it was ruled that membership in associations was a matter within the discretion of the various school boards and that, on determination that the board members and the board would receive benefits and valuable services therefrom, dues in a reasonable amount would be a valid expenditure from the school general fund.

As you can see from the progression of these rulings, there is a tendency toward a more liberal interpretation of the powers, rights and duties of school boards. The 1932 opinion limited the powers and rights of school boards to expressly granted powers. In the case of *Silver Lake Consol. School Dist. v. Parker*, 238 Iowa 984; 29 N. W. 2d 214 (1947), the Court reiterated the generally accepted rule that:

"The only powers of the school district are those expressly granted it *or necessarily implied* from the statutes by which it is governed and restrained. . . ." (Emphasis supplied)

As can be seen from the wording of §279.29, supra, there is a clear prohibition against payment of *compensation* to any member of the board. Nothing is said in the section with reference to payment of or reimbursement of expenses incurred by board members in the performance of their official duties.

Two questions are raised by the statutory language of §279.29:

(1) Does the term "compensation" include "expenses"?

(2) Can the authority for payment of "compensation" or "expenses" be implied in the absence of statutory authorization?

In the case of *Gallarno v. Long*, 214 Iowa 805; 243 N. W. 719, the court was faced with the question as to whether or not an enactment by the General Assembly granting the members thereof reimbursement of living expenses at the seat of government while in session contravened that portion of Article III, Section 25 of the Constitution of Iowa which reads as follows:

". . . but no General Assembly shall have power to increase the *compensation* of its own members." (Emphasis supplied)

The court distinguished between "personal" expense and "legislative or governmental" expense and held that payemnts of "personal" expense as authorized by the act in question did amount to an unconstitutional increase in *compensation*. In so holding the court states, on page 721 of 243 N.W.:

"Personal expenses are for the comfort and convenience of the state official or employee, while at his official residence or abode, and those expenses have nothing to do with the performance of his duty as a state official or employee."

On page 722 of 243 N. W., the court also states:

"The history of government indicates that it was not contemplated that an officer or employee should pay expenses generally known as legislative or governmental. . . . The great weight of authority in America, as indicated by the following cases is to the effect that there is a distinction between legislative, or governmental, and personal expenses."

The language of the court as quoted above is clear authority for the proposition that "compensation" does not include reimbursement of "governmental" expense.

The Gallarno case, supra, also is some authority with reference to implied authority to pay "governmental expense," as defined in that case. On page 721 of 243 N. W., the court states:

"Hence, if the state expects such officer or employee to go on state business from his official home or abode to another place or other places, the expense of traveling there and returning therefrom, his board and lodging while on the trip may, *when properly authorized by the legislature*, be charged to the state *in addition to the salary or compensation of such individual.*" (Emphasis supplied.)

It is apparent from the wording of §279.29, 1966 Code, and other pertinent sections, that the legislature has not authorized the payment of expenses to school board members. Members of school boards are public offices of a definite public trust and their services donated to promote public interest. See 40 O.A.G. 105. Historically, there has been no statutory authority to pay "compensation" or expenses to school board directors. See 1897 Code of Iowa, §2780. This concept is in keeping with the concept expressed in 40 O.A.G. 105, and, further, is consistent with the minimal expense requirements of school board directors when first enacted into law.

But, with the geographical size of school districts constantly increasing, and with the ever increasing economic and technical educational problems facing the various school districts today, there is an inevitable need for board members, through conventions, association meetings and visitations to other school districts to seek information of value in management of their districts. It is anomalous that the law has not followed the obvious trend in this area, but an examination of other Iowa statutes dealing with the payment of expenses to officers and employees of other entities of state and local government is also persuasive that payment of expenses to school board directors is not intended.

Section 279.29, while not unique in denying "compensation" to school board directors, is nearly unique in failing to express the authority to pay expenses to those directors. Almost every section of the code dealing with such matters expressly states the authority to pay expenses.

I therefore conclude that there is no authority, express or implied, under Iowa law for the payment of expenses to a school board director for services performed by said director. To the extent this opinion conflicts with those former opinions referred to herein, said former opinions are hereby withdrawn.

July 26, 1968

VACANCY: Board of Supervisors. §43.59, §43.106. 1. Duty of the County officials to fill the vacancy in the Board of Supervisors as soon as pos-

sible. 2. Where there is a vacancy in a county office after filing the nomination papers and after the holding of the convention, but before the primary, the County Central Committee should name the candidate for such vacancy whose name should appear on the primary ballot. (Strauss to Pahlas, Clayton County Attorney, 7/26/68) #68-7-31

Mr. Harold H. Pahlas, Clayton County Attorney: Reference is made to yours of the 24th inst. in which you submitted the following:

"At noon on July 23, 1968, a member of the Board of Supervisors of Clayton County, Iowa, died.

"Under 69.8(5) the Clerk of the District Court, the County Auditor and the County Recorder are the persons authorized to fill the vacancy. 69.11 sets the term for which the appointee serves. 69.13 provides that such a vacancy shall be filled at the next general election. 43.81 provides that the nomination shall be filled by the party's central committee serving the County, if the Convention has been held.

"There is also an Attorney General's opinion dated June 7, 1966, which is found on page 200 of the 1966 report of the Attorney General.

"43.59 provides for the replacement of a deceased candidate between the date for the filing of nomination papers and the holding of the primary election. The same section also provides for substitutions after the primary election.

"43.106 is also not quite clear for the reason that there is an Attorney General's opinion which holds that if the party is not on the Primary Ballot, he can not be put on the general election ballot.

"The main questions are:

"A. Must the proper officials appoint a new supervisor or can they leave the office open until the general election?

"B. Should any proposed candidate be listed on the Primary Ballot or can the auditor just put them on the general election ballot?"

(1) As far as your question "A" is concerned, I am of the opinion that the proper officials should proceed to appoint a new supervisor promptly and not to leave the office open until the general election. With respect to this power of duty, it is said in 67 CJS, pg. 212, titled "Officers," that:

"When an office has become vacant, generally the authority having power of appointment may fill it; the policy is to fill vacancies as soon as practicable."

The public policy of the state is evidenced by the constitutional Article IV, Section 10, investing the Governor with power to fill vacancies in offices where neither the law or the constitution made provisions for filling such office. With respect to such constitutional provision, it is said in 42 American Jurisprudence, §141, pg. 982, titled "Public Officers":

"In the main it may be said that the executive's power of provisional appointment is given for the purpose of providing against the temporary lapse of a governmental function as a result of there being in office no legal incumbent to exercise that function. It would seem, therefore, that whenever possible, the statutory and constitutional provisions should be so construed as to diminish rather than increase the possibility of official vacancies."

(2) In answer to your question B, I am of the opinion that this situation is controlled by §43.59 §§1, providing as follows:

"1. When any primary candidate dies or resigns between the date for filing nomination papers and the holding of the primary election, the appropriate county or state central committee or district convention may place one additional name on the ballot."

In view thereof the nomination made by the county central committee should appear on the primary ballot. It would appear that §43.106 is operative only in the event of failure to use the authority contained in said §43.59 §§1.

August 5, 1968

DEPARTMENT OF SOCIAL SERVICES: Group Homes — Chapter 237, 1966 Code of Iowa, as amended; Department of Public Safety Rules and Regulations: The rules and regulations of the Department of Public Safety concerning fire safety standards for rooming or lodging houses do not apply to group homes managed by the Department of Social Services. (Seckington to Brown, Admin. Ass't., Dept. of Social Services, 8/5/68) #68-8-1

Mr. M. J. Brown, Adiministrative Assistant, Department of Social Services: Receipt of your letter dated June 12, 1968, is hereby acknowledged. In that letter you requested an Attorney General's Opinion on the following question:

"Do group homes . . . come within the lodging or rooming house sections of the fire safety rules and regulations printed in the Iowa Departmental rules . . .?"

Further conversations with your department has clarified the factual situation, which is as follows:

Many minor children are placed in foster or group homes by the Department of Social Services, the reasons for said placement being immaterial for our purposes. These children live as a family with their foster parents, who are hired by the Department of Social Services. These parents are responsible for raising the children as though they were the natural parents. Some of these children have jobs, and as in many families, they are asked to contribute a certain amount of their wage earnings for the support of the family.

The fire marshall has inspected these homes and has concluded that they fail to meet the standards for rooming or lodging houses.

The Department of Public Safety has promulgated rules and regulations covering fire safety standards for rooming or lodging houses as follows:

"This shall include buildings or groups of buildings, under the same management, in which separate sleeping rooms are rented providing sleeping accommodations for a total of more than four persons who are nonrelated. Accommodations may be for either transients or permanent guests, with or without meals, but without separate cooking facilities for individual occupants."

The above quoted rule does not apply to the situation under consideration for a number of reasons.

The words rooming or lodging houses indicate a commercial establishment open to the public. Group homes of the Department of Social Serv-

ices are not commercial establishments nor are their services available to the public.

The rule presently under consideration also includes the phrase, ". . . transient or permanent guests. . . ." The children who are placed in these homes cannot be classified as guests, for this indicates freedom to come and go at will, a freedom these children do not enjoy. Nor can they be classified as transient, for they do not move about periodically. They are not permanent, for they are in the home for a term of years.

For all the above reasons it is the opinion of this office that group homes do not fall within the terms of the rule of the Department of Public Safety.

The above conclusion is substantiated by the Polk County District Court decision in the case of *Robert Jorgenson and Pauline Jorgenson vs. Bd. of Adjustment of the City of Des Moines and Fred Heyer, Sup't. Building Inspection Services of the City of Des Moines, Iowa* (1963).

In the above case the court was faced with the question of whether a foster home was a boarding house within the Des Moines zoning ordinance. The court defined boarding house as ". . . a quasi public house where boarders are generally and habitually kept and which place is held out as being one where the business of keeping boarders generally is carried on." The only distinction to be drawn between "rooming and lodging houses" and "boarding houses" is that rooming or lodging houses generally do not provide for meals, and boarding houses usually do provide meals. The definition of rooming or lodging houses in the rules of the Department of Public Safety does not make the above distinction, and seems to be very similar to the case law definition of "boarding house."

The court, in the above cited case, found ". . . that although the foster parents receive compensation for taking care of the children, the foster homes are not commercial institutions in the same sense as a boarding house; a boarding house provides meals and lodging and provides no family training or supervision, whereas a foster home in addition to furnishing meals and lodging, serves the further purpose of providing a normal home life to the children living in such a home."

The court then found that the operation of the foster home was not a violation of the Des Moines ordinance.

Chapter 237, 1966 Code of Iowa, as amended, provides that when any person or agency receives one or more children for care and custody, who is not to be adopted and who is unrelated, that person or agency shall be deemed to be maintaining a children's boarding home. A major exception is provided in Section 1 of Chapter 237, by excluding from the above any institution under the management of the Department of Social Services. This then, excludes group homes run by the Department of Social Services.

I believe the logic of the above cited case is sound, and that it is applicable to the set of facts presently under consideration.

It is therefore the opinion of this office that the rules of the Department of Public Safety, as set out above, do not apply to group homes

managed by the Department of Social Services. This is not saying, however, that the Department of Social Services does not have an obligation to provide adequate safeguards against all hazards of home living, including fire hazards.

August 6, 1968

SCHOOLS: School census — §291.9. The longstanding practice of counting college students under the age of twenty-one in the districts where their parents reside is correct and proper. (Nolan to Edgren, Assistant Sup't., Administration, Dept. of Public Instruction, 8/6/68) #68-8-2.

Mr. W. T. Edgren, Assistant Superintendent, Administration, Department of Public Instruction: This replies to your letter of June 20, 1968, requesting an opinion on the question of whether college and university students who have not attained the age of twenty-one should be counted in the district where their parents reside or in the district where the college or university is located for purposes of the school census taken under §291.9, Code of Iowa, 1966.

It is the opinion of this office that the long standing practice of counting college students under the age of twenty-one in the districts where their parents reside is correct and proper under §291.9.

Under §291.9 the secretary of a school district is required to enter into a book prepared by the superintendent of public instruction for that purpose the school census taken as of June 1:

"1. The name and post-office address of parents and guardians in his district with the name, sex, and age of all children or wards residing in the district who are between five and twenty-one years of age.

"2. The name, age, and post-office address of every person resident of the district without regard to age so blind as to be unable to acquire an education in the common schools.

"3. The name, age, and post-office address of every person between the ages of five and thirty-five whose faculties with respect to speech and hearing are so deficient as to prevent him from obtaining an education in the common schools.

"4. The name, sex, age, and disability of every physically handicapped or feeble-minded person of school age, with the name and post-office address of the parent or guardian."

While it may be possible for some persons under the age of twenty-one to establish a residence independent of parent or guardian it would then be doubtful that such persons could be counted as "children or wards."

The provisions of Chapter 26 of the Code of Iowa, 1966, relating to the use of the federal census "whenever the population of any county, township, city, or town is referred to in any law of this state . . . unless otherwise provided" is not applicable in this instance because a school district is not a county, township, city or town. Expressio unius est exclusio alterius. Further, if the census is to be used as the basis for determining the apportionment of state aid, under §13 of Chapter 356, Laws of the 62nd G. A. relating to tax equalization and school aid it is specifically provided:

"The average daily membership for each public high school district shall be determined by dividing the aggregate sum of the pupil member-

ship in all schools of the district for each day school was in session throughout a school year by the number of days school was in session during that school year.

"The school census for each public High School district shall be determined as specified in subsection one (1) of section two hundred seventy-nine point twenty-two (279.22), Code of Iowa."

It should be noted here that the former provisions of §279.22, which specifically authorized each subdirector of a school district to prepare the school census of his district had been repealed as "obsolete" by §3 of Chapter 239, Acts of the 62nd General Assembly prior to the enactment of Chapter 356.

Article IX, Division 2, §7 of the Constitution of the State of Iowa provides:

"The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the General Assembly."

In the 1873 Code of Iowa, Chapter 9 is devoted to the system of common schools and §1727 provides:

"In each sub-district there shall be taught one or more schools for the instruction of youth between the ages of five and twenty-one years, for at least twenty-four weeks, of five school days each, in each year, unless the county superintendent shall be satisfied there is good and sufficient cause for failure to do so. . . ."

In the 1897 Code of Iowa at §2764 the provision making it a duty of the Secretary of a school district to keep a register of persons of school ages appears for the first time:

"He shall between the first day of September and the third Monday in September of each year enter in a book made for that purpose, the name, sex and age of every person between five and twenty-one residing in the corporation, together with the name of the parent or guardian."

The purpose of such enumeration obviously is to determine the number of children who will be attending public school in the district so that the school board at its regular meeting on the third Monday of September (§279.1) can determine the number of schools to be taught and which schools such children shall attend (§279.11).

August 6, 1968

CORPORATIONS: Voluntary dissolution — §496A.101. Deposit held in custody of the treasurer can be returned to stockholder claimants upon written verified proof of ownership. Board of Directors may furnish complete list of stockholders entitled thereto and certify that no others or creditors are entitled to any portion of such fund. (Nolan to Franzenburg, State Treasurer, 8/6/68) #68-8-4

The Hon. Paul Franzenburg, Treasurer of State: This replies to your letter of June 3, 1968, in which you requested advice as to the manner of procedure for making refunds of moneys deposited with your office upon the dissolution of the Jamaica Mutual Telephone Company. A review of the correspondence included with your letter indicates that a claim to the money is made by the board of directors of the corporation, pursuant to §496A.102, 1966 Code of Iowa, which proposes to distribute the money to the shareholders of the corporation.

Inasmuch as such funds were deposited with the treasurer pursuant to §496A.101, 1966 Code of Iowa, the persons formerly responsible for the distribution and liquidation of the corporation's assets are released and discharged from further liability with respect to such funds. There now is no legal basis for making a refund to the board of directors, or to any stockholder as a claimant unless the provisions of :496A.101(2) are complied with.

§496A.101(2) provides:

"On receipt of satisfactory written and verified proof of ownership of or right to such fund within twenty years from the date such fund was so deposited, the state treasurer shall certify such fact to the state comptroller, who shall issue proper warrant therefor drawn on the state treasurer in favor of the person or persons then entitled thereto. If no claimant has made satisfactory proof of right to such fund within twenty years from the time of such deposit, the state treasurer shall then cause to be published in one issue of a newspaper of general circulation in the county of the last registered office of the corporation, as shown by the records of the secretary of state, a notice of the proposed escheat of such fund, giving the name of the creditor or shareholder apparently entitled thereto, his last known address, if any, the amount of the fund so deposited, and the name of the dissolved corporation from whose assets such fund was derived. If no claimant makes satisfactory proof of right to such fund within two months from the time of such publication, the fund so unclaimed shall thereupon automatically escheat to and become the property of the general fund of the state."

It is my view that the twenty year period of time provided under §496A.101(2) during which a claimant may prove his right to funds held in the custody of the treasurer of state is not limited by any statute of limitation contained in §496A.102. However, at any time during that period the money may be turned over to the rightful owner upon "written and verified proof of ownership of or right to such fund." The treasurer must be satisfied that the person making the claim is "then entitled thereto."

It is my view that when a Board of Directors acting pursuant to §496A.102 submits the names of all stockholders entitled to the refund of the deposit and certified that such list is complete and that there are no creditors or unknown shareholders entitled to any portion of the assets in the custody of the treasurer, the treasurer should then certify such fact to the comptroller for issuance of the proper refund warrants.

August 7, 1968

SCHOOLS: Exemption from standards — Ch. 248, Acts, 62nd G. A. Applicant is not required to specifically set forth principles or tenents which conflict with minimum standards but must furnish proof of the existence of such conflicting principles or tenents. (Nolan to Johnston, Sup't., Dept. of Public Instr., 8/7/68) #68-8-3

Mr. Paul F. Johnston, State Superintendent of Public Instruction: By your letter of May 28, 1968, you refer to this office for opinion an application for exemption from compliance with educational standards and the compulsory school laws under Chapter 248 of the Acts of the 62nd General Assembly and an affidavit relating thereto submitted by members of the Friendship School. Your specific request for an opinion being:

". . . whether said 'affidavit' furnishes sufficient 'proof,' within the meaning of S.F. 785, 62nd G. A. to legally justify the state superintendent and board of public instruction in granting the exemption thus sought."

Chapter 248 (S.F. 785) of the laws of the 62nd General Assembly provides:

"When members or representatives of a local congregation of a recognized church or religious denomination established for ten (10) years or more within the state of Iowa prior to July 1, 1967, which professes principles or tenents that differ substantially from the objectives, goals, and philosophy of education embodied in standards set forth in section two hundred fifty-seven point twenty-five (257.25) of the Code, and rules adopted in implementation thereof, *file with the state superintendent of public instruction proof of the existence of such conflicting tenents or principles,* together with a list of the names, ages, and post office addresses of all persons of compulsory school age desiring to be exempted from the compulsory education law and the educational standards law, whose parents or guardians are members of the congregation or religious denomination, the state superintendent, subject to the approval of the state board of public instruction may exempt the members of the congregation or religious denomination from compliance with any or all requirements of the compulsory education law and the educational standards law for two (2) school years. When the exemption has once been granted, renewal of such exemptions for each succeeding school year may be conditioned by the state superintendent, with the approval of the board, upon proof of achievement in the basic skills of arithmetic, the communicative arts of reading, writing, grammar, and spelling, and an understanding of United States history, history of Iowa, and the principles of American government, by persons of compulsory school age exempted in the preceding year, which shall be determined on the basis of tests or other means of evaluation selected by the state superintendent with the approval of the board. The testing or evaluation, if required, shall be accomplished prior to submission of the request for renewal of the exemption. Renewal requests shall be filed with the state superintendent on or before April 15 of the school year preceding the school year for which the applicants desire exemption. [emphasis added]

Proof is the amount of evidence sufficient to persuade a reasonable mind that the fact contended for is more probably true than not. *Swain v. Neeld,* 145 A. 2d 320, 322, 28 N. J. 60. "Proof" is merely that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact. *Missouri, K & T Trust Company v. McLachlan,* 59 Minnesota 468, 61 N. W. 560, 562. While the terms "evidence" and "proof" are frequently used interchangeably, "proof" is not evidenced but is the effect of evidence. *State v. Crutcher,* 231 Iowa 418, 1 N. W. 2d 195. As a general rule, in litigation self serving declarations are not admissible. *Seevers v. Cleveland Coal Company,* 158 Iowa 574, 138 N. W. 793. However, evidence abstractly inadmissible is competent when it tends to explain pertinent facts. *State v. Lynn,* 10 Iowa 340. It is a matter of discretion whether an affiant should be required to appear for cross examination in litigation. *Cogley v. HyVee Food Stores, Inc.,* 257 Iowa 1381, 137 N. W. 2d 310.

In view of the precedents set out above and also in view of the fact that a similar application for exemption has been granted for another Amish school, it would seem that the Friendship School application should be accorded the same treatment.

I note from your letter of April 23, 1968 that the applicants for the

Friendship School exemption are requested to file evidence of "the specific principles or tenents of the Amish Church from which the Friendship School is made up which differ substantially from the objectives and philosophy of education as set forth in §257.25, Code of Iowa." From the language of Chapter 248, supra, it appears that an applicant is required merely to submit proof of the "existence of such conflicting tenents or principles," and is not required to specifically set forth such principles or tenents. Consequently, the statement contained in paragraph 5 of the "Affidavit" would in my view substantially comply both with the requirements of the statute and your letter. Such compliance would legally justify the State Superintendent and the Board of Public Instruction granting the exemption sought.

August 7, 1968

HIGHWAYS: Over-width vehicles and loads — §321.298, Code of Iowa, 1966. When meeting other vehicles the holder of an over-width permit must yield one-half the travelled portion of the highway. (Merillat to Burdette, Decatur County Attorney, 8/7/68) #68-8-11

Mr. Robert W. Burdette, Decatur County Attorney: You have requested an opinion of the Attorney General as follows:

Does an over-width permit allow the holder thereof to use more than one-half of the travelled portion of the highway when meeting other vehicles?

Section 321.298, 1966 Code of Iowa, provides:

"Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway shall give one-half of the traveled way thereof by turning to the right."

The case of *Worthington v. McDonald*, 246 Iowa 466, 68 N. W. 2d 89, involved a question similar to the one you propound in that the subject matter of this litigation was a collision between two oncoming vehicles, one of which was an over-width vehicle. The Iowa Court in determining the rules of civil liability held that violation of Section 321.298 is prima facie evidence of negligence and that such violation may be justified by evidence that the motorist was in the exercise of reasonable care under the circumstances, notwithstanding such violation. (See discussion on Pages 472-474 of 246 Iowa, and Pages 93-94 of 68 N. W. 2d.)

The *Worthington* case, supra, further makes the distinction between Section 321.298 and the remaining portions of Chapter 321 by stating at Page 472 of 246 Iowa and at Page 93 of 68 N. W. 2d as follows:

"* * * Kisling v. Thierman, 214 Iowa 911, 914, 243 N. W. 552 which holds the violation of statutory rules of the road *other than what is now 321.298* is negligence as a matter of law unless a legal excuse for such violation is shown." (Emphasis supplied)

On the basis of the discussion and holdings in the above cases and subsequent holdings of the Iowa Supreme Court involving construction of Section 321.298, the operator of a vehicle that is over-width must exercise reasonable care in the operation of the vehicle and that his failure to comply with Section 321.298 may be excused under the factual circumstances of the transaction. Section 321.482 states:

"It is a misdemeanor for any person to do any act or to fail to perform any act required by any of the provisions of this chapter unless . . ."

Insofar as your inquiry is directed to the aspect of criminal responsibility, Section 321.298, created by operation of Section 321.482, 1966 Code of Iowa, complies with the definition of a crime as set out in *State v. Paul*, ...Iowa...., 48 N. W. 2d 309, and *State v. Coppes*, 247 Iowa 1057, 78 N. W. 2d 10, in that said section "informs the citizens with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid."

Therefore, it is our opinion that the answer to your question is that an over-width permit does not allow the holder thereof to use more than one-half of the traveled way when meeting other vehicles.

August 9, 1968

COUNTIES: Cost of Foster Care — Veteran's Children — H.F. 152, 62nd G. A.; §244.3, 1966 Code of Iowa. H.F. 152 contains sufficient language to constitute an appropriation for payment of claims thereunder. The appropriation is to the Treasurer and is limited to the amount in the general fund not otherwise appropriated. (Turner to R. Peterson, Black Hawk County Attny. — Marvin Selden, Jr., State Comptroller, 8/9/68) #S-68-8-1. (NOTE — The opinion dated December 12, 1967, Strauss to Selden, State Comptroller, is hereby withdrawn)

Mr. Roger F. Peterson, Black Hawk County Attorney. The Hon. Marvin Selden, Jr., State Comptroller: Reference is herein made to Mr. Peterson's letter of February 14, 1968, in which he submitted the following:

"The Black Hawk County Department of Social Welfare has requested that I review your opinion of December 12, 1967 regarding House File 152 of the Acts of the Sixty-Second General Assembly.

"It is my understanding that you have held this particular act as contrary to Article 3, Section 29 of the Iowa Constitution. I believe that you have so held because the title of the Act refers to certain children of veterans and the body of the Act you feel is effective with respect to all children.

"I believe that the body of the Act applies only to children of veterans who would be eligible for admission to the Annie Wittenmyer Home but for the fact that there is no room for them at that particular home. I believe the body of the Act embodies this restriction pertaining only to children of veterans by making reference to Section 242.3, Sub-paragraph 1 of the 1966 Code. I believe that the body of the Act applies only to those particular children of veterans and is not effective to all children. For this reason, I believe that this particular Act is not contrary to the Constitution as you have indicated.

"I would also like to indicate to you quotations from the State of Iowa vs. Social Hygiene, Inc., a decision of the Iowa Supreme Court filed February 6 of this year. The Court on page 4 indicates that 'an act of the legislature will be declared unconstitutional by the courts only when it is clearly, plainly and palpably so, and it is the duty of the courts to give such a construction to an act, if possible, as will avoid this necessity and uphold the law.' They further indicate on page 5 of the opinion that 'It is sufficient if all the provisions relate to the one subject indicated in the title and are parts of it or incidental to it or reasonably connected with it or in some reasonable sense auxiliary to the subject of the statute.'

"It is my opinion that the title of the Act pertains only to certain

children of veterans and the Act itself, by making reference to the Code Section in question, pertains only to certain children of veterans and I believe is constitutional. I would greatly appreciate it if you would review your opinion in this regard."

The Comptroller, Marvin R. Selden, Jr., has also directed certain questions in the event the opinion of December 12, 1967, is withdrawn:

"1. Does House File 152, Acts of the 62nd G. A., make an appropriation?

"2. If your answer to one (1) above is in the affirmative, to whom is the appropriation made?

"3. If your answer to one (1) above is in the affirmative, is the amount of appropriation limited?"

On reconsideration of the opinion of December 12, 1967, I have determined that the constitutional objection raised therein is not a proper objection. The title, as pointed out, does relate to "certain children of veterans." While §244.3(1) is somewhat ambiguous when read by itself, that ambiguity no longer exists when read with §244.3(3). The title and subject matter are not therefore in conflict.

H.F. 152, Acts of the 62nd G. A., does constitute an appropriation. As in *Graham v. Worthington*, 259 Iowa 845, 146 N. W. 2d 626, 637, the court, in construing §25A.11, 1966 Code of Iowa, which called for payment from "appropriations, if any, otherwise to be paid out of any money in the state treasury not otherwise appropriated," said:

"Plaintiffs claim we should find the subject legislative enactment unconstitutional because no definite amount is appropriated out of some specific fund.

"This contention might have some merit if directed to the consideration of those state constitutions which require a specification of amounts and funds.

"The constitutional provisions here concerned simply require appropriation by the legislature, not necessarily a sum certain out of some 'earmarked' fund. See Article III, Sec. 24 and 31, Constitution of Iowa."

H.F. 152 allows a county to "recover the cost of such care from the general fund of the state. . . ." To distinguish this from the general language of §25A.11 as being less appropriative would ignore the liberal interpretation of the language of the Supreme Court in the *Graham Case*, supra.

As further authority, *Prime v. McCarthy*, 92 Iowa 569, 61 N. W. 220, relied upon greatly in the *Graham Case*, contains the following quote:

"It seems to us reasonably clear that if it was not intended that the expenses incurred for the several purposes . . . necessary and lawful expenses not otherwise provided for, were to be paid under authority of that section, the general assembly would surely have made appropriation therefor."

The question with reference to whom the appropriation is made is not raised in the *Graham Case*, supra. *Prime v. McCarthy*, supra, does establish, as one criterion of an appropriation, that there be authority to an officer to apply sums of money to specified objects. However, a comparison of the appropriation under Chapter 25A, held to be valid in the

Graham Case, supra, with the wording of H.F. 152, 62nd G. A. shows that, in each case, there is simply a board, on the one hand, and an officer, on the other, authorized to approve or disallow claims filed pursuant to each act of the general assembly.

In H.F. 152, I find the appropriation and direction to pay are to the treasurer, who should formally approve claims prior to issuance of warrant by the comptroller.

The amount of the appropriation is limited only as follows:

(1) The amount of claims approved by the treasurer.

(2) The amount available in the general fund at the time of approval not already appropriated for other purposes.

The language of the *Graham Case*, supra, cited with respect to question 1 herein, is authority for this.

August 9, 1968

TAXATION: Public Bidders Statute — Sale of Encumbered realty by Board of Supervisors — §§569.8, 391.35, Code of Iowa, 1966, Chapter 357, Acts of 62nd General Assembly. (1) Board of Supervisors is not bound to accept any bid made at public auction for sale of realty. (2) In notice of Sale by Board, right to reject any or all bids is prerogative of Board in exercise of sound discretion. (3) Board can include in notice of sale by public auction that the right to reject any and all bids is reserved by Board. (4) Where sale by Board is for less than total amount stated in tax sale certificate, the sale must be approved by the tax-levying and tax-certifying bodies having majority interest in said taxes. (5) Where a public auction sale of encumbered realty by Board has not been completed, Board can reject any bid taken and hold another sale by public auction. (Griger to Fenton, Polk County Attorney, 8/9/68) #68-8-5

Mr. Ray A. Fenton, Polk County Attorney: This will acknowledge receipt of your letters of January 26, 1968, and May 23, 1968, in which you have requested an opinion of the Attorney General with respect to certain effects of §§5 and 6 of Chapter 357, Acts of 62nd General Assembly (1967). You state that your questions concern the situation whereby a public auction is conducted by the Board of Supervisors for the sale of realty acquired by the county by virtue of a tax deed and that the highest bid at the auction is less than the accumulated taxes, interests and costs, but that said taxes, interests and costs exceed $250.00.

Your questions are as follows:

1. Is a county bound to accept such bid?

2. What is the effect of a public auction conducted under the provisions of §569.8, Code of Iowa, 1966, as amended by §5 of Chapter 357, Acts of 62nd General Assembly and do County Boards of Supervisors have the legal authority to reject any and all bids and readvertise for new bids or is the Board bound to accept the highest bid made at the public auction?

3. Should the notice of public bidders sale include a statement that the County reserves the right to reject any and all bids or should the County reserve the right to reject all bids which do not equal or exceed the amount stated in the tax certificate plus all subsequent general taxes, interests and costs?

4. Does the amendment to §569.8 of the Code by §5 of Chapter 347, Acts of 62nd General Assembly, eliminate the requirement that if the property is sold by the Board for less than the total amount stated in the tax sale certificate, the sale must be approved by the tax-levying and tax-certifying bodies having a majority interest in said taxes?

5. If, after the property has been sold by the Board, but before the issuance of a deed to the highest bidder, another bidder offers a higher amount, can the Board accept such later offer, subject to notice to the first bidder and the sale to the first bidder rescinded unless he meets the higher bid?

6. §6 of Chapter 357, Acts of 62nd General Assembly amends §391.35, Code of Iowa, 1966, by inserting after the word "liens" in line nine thereof, the words "shall have equal precedence with ordinary taxes and." Does that mean that special taxes shall be included in the amount due as well as general taxes mentioned in §569.8 of the Code?

§569.8, Code of Iowa, 1966, provides as follows:

"569.8 Title under tax deed—sale—apportionment of proceeds. When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed, and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests, and costs, without the written approval of the tax-levying and tax-certifying bodies having a majority interest in said general taxes. However, where the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests, and costs does not exceed two hundred fifty dollars, such real estate may be sold by the board of supervisors without the written approval of any of the tax-levying and tax-certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

This Code section was amended by §5 of Chapter 357, Acts of 62nd General Assembly by adding at the end thereof the following:

"Real property sold under this section shall be sold at public auction and not by use of sealed bids, but only after notice thereof has been published once in a newspaper of general circulation in the county wherein the property is located, stating the description of the property to be sold and the date, place and time of such sale, at least ten (10) days, but not more than fifteen (15) days prior to the date of such sale."

An opinion of the Attorney General, found in 1938 O.A.G. 622, bears some light on your questions. This opinion states that the Board of Supervisors has the authority and duty to exercise its sound discretion in matters pertaining to §569.8 of the Iowa Code. The Attorney General stated at 1938 O.A.G. 624:

"It is therefore the opinion of this department that the interested taxing bodies in consenting to take a portion of the taxes due cannot make said consent contingent upon the sale to a designated individual; that it is the duty of the Board to obtain the highest possible price for the property; that the Board shall not sell the property for a fraction of the taxes merely because interested taxing bodies have indicated a willingness to

accept the same, unless it is the best price that can be obtained; that when an offer of a portion of the taxes is made to the Board they should, before accepting the same, give some form of notice to the public, and give others an opportunity to make a better offer." See also 1942 O.A.G. 113; 1942 O.A.G. 22.

The above reasoning is, in our opinion, logically and legally valid.

The primary motivation of the Board of Supervisors, in matters involving the sale of encumbered realty, should be to secure the most substantial price, for in so doing the interests of the entire public are protected. Though the procedure by which Boards of Supervisors may convey such encumbered realty has been amended by §5 of Chapter 357, Acts of 62nd General Assembly, to require such conveyances by means of public auction and not by use of sealed bids, the discretion to be exercised by the Board has in no way been altered by this legislation. With the above views in mind, we now proceed to answer your questions.

1. A bid at an auction sale is only an offer for the property and is in no way binding. 7 C.J.S. *Auctions and Auctioneers*, §7e(1) (1937). This being true, the answer to your initial question is in the negative. However, where the interested taxing bodies, as provided in §569.8 of the Code, acquiesce to the bid though it is less than the accumulated taxes, interests, and costs, and such bid is the best price that can be obtained by the Board of Supervisors for the property, the Board may, in its discretion, accept the same.

2. In regard to your second question, public auction is merely a procedure by which such realty is offered for sale. It is within the authority of the Board of Supervisors to reject any bid, particularly if less than the accrued taxes, interests, and costs. Where the Board rejects any and all bids made at the public auction, it would be necessary to offer the realty for sale at another public auction pursuant to the procedure set forth in §5 of Chapter 357, Acts of 62nd General Assembly.

3. Your third question is answered above. In addition, it should be pointed out that at a public auction, any formal written terms or conditions of sale incorporated into the notices of such sale may be modified or added to by the auctioneer at the beginning of the sale. *Kennell vs. Boyer*, 144 Iowa 303, 122 N. W. 941 (1909).

4. In regard to your fourth inquiry, you state in your letter of May 23, 1968, that it is your opinion that the general rule regarding auction sales is that a sale by auction is completed when the auctioneer acknowledges its completion by the fall of the hammer or in the customary manner. As authority for your opinion, you cite *Stanhope State Bank vs. Peterson*, 205 Iowa 578, 218 N. W. 262 (1928). We agree that, ordinarily, the above is the general rule.

However, the Attorney General has stated in previous opinions interpreting what is now §569.8 of the Code that the Board of Supervisors, when making a sale of realty acquired by virtue of a tax deed, must obtain the approval of the tax-levying and tax-certifying bodies having a majority interest in the taxes where the amount bid is less than the total amount stated on the tax sale certificate, including subsequent taxes, interests and costs. 1938 O.A.G. 153; 1938 O.A.G. 753; 1940 O.A.G. 206; 1942 O.A.G. 113.

§5 of Chapter 357 sets forth the procedure for a sale by the Board pursuant to §569.8 of the Code, but does not purport to repeal the requirement that where such total amount of taxes stated in the tax sale certificate, including subsequent general taxes, interests and costs, is greater than the amount bid and exceeds $250.00, approval of the tax-levying and tax-certifying bodies having a majority interest in said taxes must be obtained. Repeal of provisions of statutes by implication is not favored by the courts and will not be upheld unless the intent to repeal clearly and unmistakably appears from the language used, and such a holding by the courts is absolutely necessary, particularly where important public statutes of long standing are involved. *Yarn vs. City of Des Moines*, 243 Iowa 991, 54 N. W. 2d 439 (1952); *Smaha vs. Simmons*, 245 Iowa 163, 60 N. W. 2d 100 (1953). Therefore, we are of the opinion that, despite the general rule of completion of an auction sale as announced in *Stanhope State Bank vs. Peterson*, supra, such sales described in your fourth question cannot be considered completed until the approval of the requisite tax-levying and tax-certifying bodies has been obtained pursuant to §569.8 of the Code. The bidder at a public auction sale is bound to take notice of the conditions necessary for a completed auction sale, whether he actually knew them or not. *Kennell vs. Boyer*, supra. One of those conditions, in the factual situation you present, is approval by the tax-levying and tax-certifying bodies having a majority interest in said accrued taxes, interests and costs. Thus, your fourth question is answered in the negative.

5. Where realty is sold by the Board at public auction and the amount bid and accepted is less than the total amount, which exceeds $250.00, stated in the tax sale certificate, including subsequent general taxes, interests and costs, the sale is completed if the approval of the tax-levying and tax-certifying bodies having a majority interest in the taxes is obtained. The sale being thus completed, it could not be rescinded in the event another bidder subsequently offers a higher amount.

However, where the Board sells the realty at public auction for an amount that is less than the total amount, which exceeds $250.00, stated in the tax sale certificate, including subsequent general taxes, interests and costs, and the approval of the tax-levying and tax-certifying bodies having a majority interest in the taxes has not been obtained, the sale has not been completed. In that event, the Board may properly rescind the first auction sale and hold another public auction provided the Board reasonably believes that the other bidder who offered a higher amount after the first sale will make that offer at another public auction. This procedure may seem cumbersome, but §5 of Chapter 357, clearly states that the realty must be sold at public auction and not by use of sealed bids. To allow the Board to accept bids when not made at public auction would render superfluous §5 of Chapter 357. Statutes should be construed so that no part will be rendered superfluous and effect should ordinarily be given to all provisions thereof. *Board of Directors of Menlo Consol. School Dist. of Menlo vs. Blakesley*, 240 Iowa 910, 36 N. W. 2d 751 (1949). Consequently, the Board cannot accept any bids except those made at public auction pursuant to §569.8, as amended by §5 of Chapter 357, Acts of 62nd General Assembly.

6. Your final question is now under consideration by this office and

will be answered in a forthcoming opinion to Mr. George J. Knoke, Pottawattamie County Attorney, a copy of which will be sent to you.

August 9, 1968

TAXATION: Relief Agencies, Sales Tax. §422.47, Code of Iowa, 1966, Ch. 348, Acts of 62nd G. A. No sales tax on the services of repairs and remodeling of existing buildings and of new construction is owed where the construction contract for such services was executed prior to October 1, 1967. A nonprofit noneducational relief agency is not entitled to a refund of sales tax paid by a contractor for building materials used in the repairs, remodeling, and new construction. A Relief Agency is entitled to a refund of sales tax paid by it as a result of the demolition of buildings. (Griger to Knoke, Pottawattamie County Attorney, 8/9/68) #68-8-6

Mr. George J. Knoke, Pottawattamie County Attorney: This will acknowledge receipt of your letters of May 28, 1968, and June 28, 1968, in which you have requested an opinion of the Attorney General based on the following factual situation.

The Christian Home Society is a nonprofit noneducational charitable organization which operates a home for orphaned, dependent and neglected children. Prior to October 1, 1967, the Christian Home Society entered into a construction contract for the erection of new housing units and for the repair and remodeling of other facilities. On December 12, 1967, the Society entered into a contract with a wrecking contractor for the demolition of two buildings as a result of the new construction previously contracted for. You state in your letter of June 28, 1968, that the Christian Home Society does obtain sales tax refunds as a relief agency pursuant to §422.47, Code of Iowa, 1966, as amended by §26 of Chapter 348, Acts of 62nd General Assembly (1967), because of food purchases. Department of Revenue personnel have informed this office that the Society, is, in fact, a relief agency pursuant to §422.47 of the Code.

Based upon the above factual situation, your questions are as follows:

1. Must the Christian Home Society pay sales tax on the services of repairs, remodeling and new construction as a result of the construction contract executed prior to October 1, 1967?

2. Is the Christian Home Society entitled to a refund of sales tax paid by the contractor for materials used in the repairs, remodeling and new construction?

3. Is the Christian Home Society entitled to a refund of sales tax paid by it as a result of the demolition of two buildings?

Your first question is expressly answered by §20 of Chapter 348, Acts of 62nd General Assembly, which provides in part:

"The rate of tax on services used in the performance of a building or construction contract executed prior to October 1, 1967 shall be zero (0) percent."

Since the contract for the repairs and remodeling of existing facilities and for new construction was executed prior to October 1, 1967, the Christian Home Society is clearly exempt from payment of sales tax on these services.

In regard to your second question, §422.45(7), Code of Iowa, 1966, as amended by §22 of Chapter 348, Acts of 62nd General Assembly provides in part for a refund of sales tax as follows:

"7. Any private nonprofit educational institution in this state or any tax-certifying or tax-levying body of the state of Iowa or governmental subdivision thereof, including the state board of regents, board of control of state institutions, state highway commission, and all divisions, boards, commissions, agencies or instrumentalities of state, federal, county or municipal government which derive disbursable funds from appropriations or allotments of funds raised by the levying and collection of taxes may make application to the department for the refund of any sales or use tax upon the gross receipts of all sales of goods, wares or merchandise or from services rendered, furnished, or performed and to any contractor, used in the fulfillment of any written contract with the state of Iowa or any political subdivision thereof, or any private nonprofit educational institution in this state which property becomes an integral part of the project under contract and at the completion thereof becomes public property, or is devoted to educational uses as specified in this subsection except goods, wares or merchandies or from services rendered, furnished, or performed used in the performance of any contract in connection with the operation of any municipal utility engaged in selling gas, electricity, or heat to the general public; and excepting such goods, wares or merchandise used in the performance of any contract for a 'project' under chapter 419 as defined therein other than goods, wares or merchandise used in the performance of any contract for any 'project' under said chapter 419 for which a bond issue was or will have been approved by a municipality prior to July 1, 1968."

You will note that the legislature has expressly enumerated who would be entitled to a refund of sales tax paid by a contractor. The Christian Home Society is a noneducational institution and is a private corporation. An examination of the above statute clearly discloses that nonprofit noneducational charitable organizations are not mentioned as being entitled to a sales tax refuud for sales tax paid by a contractor. In construing a statute, the express mention of one thing implies the exclusion of others not mentioned. *Dotson vs. City of Ames,* 251 Iowa 467, 101 N. W. 2d 711 (1960). Consequently, it is our opinion that the Christian Home Society is not entitled to a refund of sales tax paid by the contractor for materials used in repairs and remodeling of existing structures and in new construction. The materials were sold to the contractor who has paid the sales tax pursuant to §422.42(10), Code of Iowa, 1966.

In answer to your third question, §25 of Chapter 348, Acts of 62nd General Assembly imposes the sales tax on wrecking service as follows:

"Section four hundred twenty-two point forty-three (422.43), Code of Iowa, is amended by adding thereto the following:

"The following enumerated services shall be subject to the tax herein imposed on gross taxable services:

* * *

". . . Wrecking service . . ."

The Iowa Department of Revenue has promulgated the following Rule 5.58 (Ch. 348 62 G. A.) *Wrecking Service:*

"Persons engaged in the business of wrecking, tearing down, defacing, or demolishing, tangible personal or real property, or any parts thereof, are rendering, furnishing, or performing a service the gross receipts from which are subject to tax."

This rule is identical to the one which was promulgated by the now defunct Iowa State Tax Commission and which was approved by the Attorney General in O.A.G. Turner to Burrows, September 27, 1967. Thus, there is no question but that the demolition of buildings is a taxable service.

However, you state in your letter that the Christian Home Society is a "relief agency," and has obtained refunds of sales tax paid on purchases of food. §422.47 of the Iowa Code, as amended, provides in part:

"422.47 Credit to relief agencies.

"1. A relief agency may apply to the director for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, merchandise, or services rendered, furnished, or performed used for free distribution to the poor and needy.

"2. Such refunds may be obtained only in the following amounts and manner and only under the following conditions:

"a. On forms furnished by the department, and filed within such time as the director shall provide by regulation, the relief agency shall report to the department the total amount or amounts, valued in money, expended directly or indirectly for goods, wares, merchandise, or services rendered, furnished, or performed used for free distribution to the poor and needy. . . ."

Department of Revenue personnel agree that this Society distributes goods, wares and merchandise for free to the poor and needy. There is also no dispute that the Society expends directly or *indirectly* money for goods, wares, merchandise, or services rendered, furnished, or performed used for free distribution to the poor and needy.

The demolition of the two buildings pursuant to the contract executed on December 12, 1967, is so related to the construction of new facilities as to be of obvious benefit to the orphaned, dependent and neglected children who are obtaining the benefit of the new facilities free of charge. In fact, the demolition of the buildings is a part of the overall new construction and is indirectly related to the overall functions of the relief agency. Therefore, we are of the opinion that the Christian Home Society is entitled to a refund of sales tax paid by it as a result of the demolition of the two buildings since the Society has expended money for a service rendered to it which indirectly is related to the overall functions of a relief agency and which the children will benefit from for free.

August 14, 1968

CITIES AND TOWNS: Article VII, Constitution of Iowa, §452.10, Code of Iowa, 1966 as amended by Chapter 359, Acts of the 62nd G. A. — Townships are prohibited from holding common stock in private corporations. (Cullison to Goeldner, Keokuk County Attorney, 8/14/68) #68-8-7

Mr. Albert F. Goeldner, Keokuk County Attorney: You requested the opinion of the Attorney General as to whether or not the township trustees of Benton Township, Keokuk County, must divest themselves of two hundred fifty (250) shares of common stock in a holding company known as Western Holding Corporation. It is my understanding that the township had purchased property insurance from a mutual insurance company, Western Mutual Insurance Company, and that this insurance

company subsequently was merged and acquired by Western Holding Corporation. It is further my understanding that profits of Western Mutual Insurance Company which would have otherwise been distributed to its policy holders, including Benton Township, was not so distributed upon the reorganization but, instead, common stock in the new corporation was distributed to the policy holders.

It is our opinion that Benton Township must divest itself of this stock for the reason that it represents an investment not authorized by law.

Section 452.10, Code of Iowa, 1966, as amended by Chapter 359, Laws of the 62nd General Assembly, sets forth the general authority of the state and political subdivisions to invest and deposit public funds. It states as follows:

"The state treasurer and the treasurer of each political subdivision shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depository for such funds. However, the treasurer of the state and the treasurer of each political subdivision shall invest, unless otherwise provided, any of the public funds not currently needed for operating expenses in bonds or other evidences of indebtedness which are obligations of or guaranteed by the United States of America; or make time deposits of such funds in banks as provided in Chapter 453 and receive time certificates of deposit therefore."

Nowhere does the Constitution of laws of Iowa authorize the investment of public funds in a private corporation. On the contrary, Article VII, section 3 of the Iowa Constitution states:

"The state shall not become a stockholder in any corporation. . . ."

The state cannot delegate to its political sub-divisions authority to do what it is itself prohibited from doing.

It is, therefore, our opinion that the trustees of Benton Township should divest themselves of the common stock mentioned above.

August 14, 1968

SCHOOLS: Retirement plans at area community colleges — §§97B.41(3), 97B.42, 294.16, 280A.16 and 280A.23, Code of Iowa, 1966 — §403b, Federal Internal Revenue Code. There is no provision for Eastern Iowa Community College to offer a pension plan other than IPERS. (Nolan to Holden, State Representative, 8/14/68) #68-8-8

The Hon. Edgar H. Holden, State Representative: This is in answer to your request for an attorney general's opinion in regard to a pension plan for Eastern Iowa Community College other than the Iowa Public Employment Retirement System (IPERS) and the availability of individual annuity contracts under §403b of the Federal Internal Revenue Code and amendments thereto. Your letter stated a number of specific questions which are set out as follows:

"1. Are the Area Community Colleges required to participate in the Iowa Public Employment Retirement System?

"2. If Eastern Iowa Community College can legally offer a pension plan other than IPERS, is there a limit to the amount that the College, as employer, could contribute to such a plan?

"3. Can such a pension plan be funded under Section 403b of the Federal Internal Revenue Code and amendments thereto?

"4. Can *all* the employees of Eastern Iowa Community College be covered in a pension plan other than IPERS, or *must* each individual employee have the privilege of choosing to be in IPERS, if so desired?

"5. Can Eastern Iowa Community College have a pension plan supplement to IPERS?

"6. If a pension plan other than IPERS can be offered by Eastern Iowa Community College, and if the staff and employees also have the option to purchase individual annuity contracts under Section 403b, would it be obligatory to use an insurance organization licensed to do business in Iowa, and to purchase the individual annuity contracts through an Iowa licensed insurance agent?

"7. It is my understanding that the University of Iowa has their employees and staff under a pension plan other than IPERS. Could the same authority granted the University of Iowa in this regard be granted Eastern Iowa Community College, thereby allowing the College to offer their staff and employees a pension plan other than IPERS?

"8. What types of organizations in Iowa are permitted to offer the optional purchase of an individual annuity under Section 403b of the Federal Internal Revenue Code?"

In answer to your questions I advise:

1. The area community colleges are required to participate in the Iowa Public Employment Retirement System. §97B.42, Code of Iowa, 1966, makes it mandatory for the public employees to be covered by IPERS. Under §280A.16, Code of Iowa, 1966, a merged area college is a public corporation in the nature of a "body politic" as a school corporation and as such is an employer within the meaning of §97B.41(3).

2. There is no provision in law for the Eastern Iowa Community College to legally offer a pension plan other than IPERS.

3. It is my view that the provisions of §294.16 under which at the request of an employee a school district may purchase individual annuity contracts for such employees from an insurance organization authorized to do business in this state and through an Iowa licensed insurance agent as the employee may select for retirement purposes and to make payroll deductions in accordance with such arrangement to qualify the annuity premiums for the benefit afforded under §403b of the Federal Internal Revenue Code and amendments thereto is not available to the teachers employed by an area community college because the authority of the board of directors of such area schools as enumerated in §280A.23 while delegating to such directors the powers and duties of local school districts provided in Chapter 279 does not contain any reference to Chapter 294 or otherwise provide such power under Chapter 280A. Consequently the rule of expressio uniusest exclusio alterius must be applied.

4. All employees of the Eastern Iowa Community College must be covered by IPERS.

5. The Eastern Iowa Community College cannot have a pension plan to supplement IPERS because there is no provision in the law for such supplement.

6. Your sixth question is answered in the answers given above.

7. The authority for a pension plan similar to that available to the employees of the University of Iowa is not available to the community colleges because the provisions relating to IPERS in Chapter 97B contain a mandatory requirement that all public employees be covered by IPERS after 1953. The TIAA contract which provides an additional pension plan to the employees of the University of Iowa predates by approximately nine years the 1953 cut off date.

8. School districts in Iowa are permitted to obtain tax sheltered annuity contracts for their employees pursuant to §294.16, Code of Iowa, 1966.

August 26, 1968

ELECTIONS: Vacancy in office of State Senator — Constitution of Iowa, Article III, §§4, 5 and 12; §§39.3, 43.73, 43.74, 43.82, 43.88 and 69.14, Code of Iowa, 1966; §§2(3), 3(24) and 3(49) of H. F. 736, Ch. 105, Acts of the 62nd G. A. — A vacancy in office created by the resignation of a State Senator at a time when the General Assembly is not in session nor scheduled to be in session before the next general election, must be filled at the next general election; and the procedure to be followed is that set forth in §§43.82, 43.88, 43.73 and 43.74 of the Code. The documents required by the Governor are a writ of election and a proclamation of election as required respectively by Article III, §12 of the Constitution and §39.3 of the Code. Where legislature has created one senatorial subdistrict with two resident incumbent senators formerly elected at large and one senatorial subdistrict with no incumbent senator, and one of two incumbent senators resigns, the election to fill the unexpired term of the resigning senator may be voted on only by the electors of the senatorial subdistrict which had no resident incumbent senator. In such an election the candidate elected must at the time of his election had an actual prior residence in the subdistrict he is to represent of at least 60 days. (Haesemeyer to Sorg, State Rep., Linn Co./Wade Clarke, Jr., Adm. Ass't., to Governor, 8/26/68) #S-68-8-2

Hon. Nathan F. Sorg, Linn County State Representative. Mr. Wade Clarke, Jr., Adm. Ass't., Office of the Governor: You have each asked certain questions which have arisen by reason of the resignation of former State Senator Tom Riley, and have requested an opinion of the Attorney General with respect thereto.

Because the questions you have raised are so closely related and stem from the same fact situation, we are answering both of your requests in this one reply.

The first of your requests is that of Mr. Clarke dated August 23, 1968, which states in part as follows:

"Would you please advise us of:

"(1) The procedure which must be followed by this office to assure that this vacancy is properly filled;

"(2) The proper legal form of the documents which must be used by this office in complying with our legal responsibilities in this regard."

Thereafter, by his letter of August 26, 1968, Representative Sorg asks certain additional questions, stating:

"It is my understanding that Governor Hughes has requested an opin-

ion on a question which is, in effect: What procedure must be followed to insure that the vacancy is properly filled?

"After a conference with John B. Walters, Linn County Republican chairman we have decided that it would be in the best interest of the citizens of Linn County to have opinions from the Attorney General on the following questions:

"1. Inasmuch as Senator Riley was elected in 1966 from the County at large and his term does not expire until 1971, must his successor be elected from the county at large?

"2. The apportionment law passed by the 1967 legislature provided that senators from multi-district counties who were elected in 1966 to four year terms, would represent the sub-district in which they resided at the time of their election. It now appears that Senator Riley and Senator Ernest Kosek, also elected in 1966, both reside in Senatorial Sub-District 2, even though the legislature intended to put Senator Riley in Sub-District 3. The law also provides that in counties with more than one Senator each Senator shall represent a sub-district.

"Therefore, up to the time of his resignation did Senator Riley represent Sub-District 2 or Sub-District 3?

"3. If, in your opinion, the vacancy must be filled from a senatorial sub-district, what time limits constitute residency in the sub-district for the purposes of filling the vacancy?

"Because the election is only sixty-seven days away, it is imperative that the citizens of Linn County have an immediate answer to these questions."

Before proceeding to answer the several questions you have asked, it is appropriate to summarize the events which have given rise to your queries.

The 62nd General Assembly enacted House File 736, Chapter 105, Acts of the 62nd General Assembly. This was an interim reapportionment measure which was designed to insure that the Senate and House of Representatives comprising the 63rd General Assembly would be apportioned more nearly on a population basis to insure that the one man-one vote principle would be implemented and maintained. Among other things, this Act provides in §2(3):

"All senators elected in 1966 shall in the Sixty-Third (63rd) General Assembly represent the single member senatorial district from which they were elected, or if elected from a county from which more than one (1) senator was elected in 1966, they shall represent a single member senatorial sub-district within the county."

§3(24) constitutes Linn County as the 24th Senatorial District and provides that it is to be sub-divided into three senatorial sub-districts with one senator for each sub-district. We are told that at the time House File 736 was enacted, it was thought that there was then resident in each of the three sub-districts comprising the 24th Senatorial District, one State Senator theretofore elected at large. Thus, §3(49) of the Act provides in pertinent part as follows:

"Those senators elected in 1966 for terms of four (4) years or elected subsequently to fill a vacancy in any such term and who were elected from a senatorial district electing more than one (1) senator shall continue to serve until December 31, 1970 and shall represent that sub-district established by this Act in which they resided at the time of their election. The subdistricts so represented shall be as follows:

* * *

"Twenty-fourth senatorial district, subdistrict Two (2)

"Twenty-fourth senatorial district, subdistrict Three (3)

* * *

"Any vacancy in any senatorial district or subdistrict shall be filled by an election in that district or subdistrict. Any senator elected to fill a vacancy shall at the time of election be a resident of the district or subdistrict, from which elected. In the year 1970, each senator elected shall be nominated and elected from districts as shall be determined by the sixty-third (63) general assembly."

Although, as previously stated, it was thought at the time of the enactment of H.F. 736, that there was then one incumbent senator residing in each of the three sub-districts comprising the 24th senatorial district, in fact there were two state senators, one of whom was Senator Tom Riley, residing in sub-district two and none in sub-district three, although Senator Riley did live directly across the street from the boundary of subdistrict three. Thus, but for the fortuitous, commendable and selfless action of Senator Riley in resigning his seat, we would be faced with a situation which the Act clearly did not contemplate, namely, two senators representing one sub-district and no senator representing another subdistrict.

Turning first to the procedural questions contained in Mr. Clarke's letter we wish to advise as follows:

(1) Inasmuch as Senator Riley's resignation occurred more than sixty days prior to the 1968 general election, at a time when the General Assembly was not in session nor scheduled to be in session prior to such 1968 general election, a special election is not required. §69.14, 1966 Code of Iowa. Instead the vacancy created by Senator Riley's resignation should be filled at the November, 1968 general election.

Nominations of candidates to run in such general election should be made pursuant to §43.82, 1966 Code of Iowa, which provides:

"Nominations occasioned by vacancies in office when such vacancies occur after the holding of the county, district, or state convention, or when they occur before said convention, but too late to be made thereby, shall be made by the party central committee for the county, district, or state, as the case may be, except that when the vacancy is in the office of senator of the United States, and occurs thirty days prior to the holding of the regular November election, nomination shall be made by convention as provided in case of vacancies in nominations for such office."

Nominations made by the county central committees of the various political parties in accordance with such §43.82, will appear upon the general election ballot upon compliance with §43.88, 1966 Code of Iowa, which provides:

"Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and

if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election."

Since the office to be filled is a state office, the Secretary of State is the proper officer to receive the certifications of nominations made pursuant to §43.88. Thereafter, and pursuant to the provisions of §§43.73 and 43.74, it is the duty of the Secretary of State to certify the nominations so made and certified to him to the County Auditor of the county in which the vacancy occurs. The County Auditor is then required to place the names of the persons nominated in accordance with the foregoing procedure upon the November, 1968 election ballot. 46 OAG 204.

(2) The documents required by the Governor in compliance with his responsibility are a writ of election and a proclamation of election. The writ of election is required by the Constitution of Iowa, Article III, Section 12, and the proclamation is required by §39.3, 1966 Code of Iowa. The forms of such writ of election and proclamation submitted by you are approved.

Turning next to the somewhat more difficult questions posed by Representative Sorg, we wish to advise as follows:

(1) In our opinion, the individual elected to serve the balance of Senator Riley's unexpired term at the November, 1968 general election should be elected only by the voters of sub-district three of the 24th senatorial district. A manifest purpose of H.F. 736 was to do away with at large elections of Senators and Representatives and such H.F. 736 created sub-districts for this specific purpose. The mere fact that through inadvertence or legislative oversight, the 62nd General Assembly created one senatorial sub-district in which there were then resident two incumbent Senators and another senatorial sub-district in which there was then no incumbent resident Senator is not sufficient to require an at-large election to fill the vacancy created by Senator Riley's resignation. An at-large election to fill the vacancy would result in palpable unfairness and injustice to the voters of sub-district three since they would be entitled to vote for and be represented by only one State Senator in common with the electors of sub-districts one and two whereas, the voters of such sub-districts one and two would in addition be represented by incumbent or newly elected Senators from each of those two sub-districts. Such a situation can hardly be said to be consistent with either common fairness or the one man-one vote principles enunciated by the United States Supreme Court.

(2) Your second question relates to which of the two State Senators both residing in sub-district two represented such sub-district prior to the resignation of Senator Tom Riley. It is not our practice to furnish opinions with respect to questions which are only moot or academic. Since, with Senator Riley's resignation, there is now only one State Senator residing in sub-district two, we consider it unnecessary to answer your second question. Suffice it to say that but for the resignation of Senator Riley, a situation would have existed which would in all probability, not have been resolved short of a court determination. As it is, Senator Ernest Kosek represents senatorial sub-district two and there is a vacancy in senatorial sub-district three — the balance of the two year term of which must be filled at the November, 1968 election.

(3) Representative Sorg's third question involves an interpretation of §§4 and 5 of Article III of the Constitution of Iowa. §5 provides, among other things, that State Senators shall possess the qualifications of State Representatives as to residency and citizenship. §4 in turn provides in relevant part as follows:

"No person shall be a member of the House of Representatives who shall not . . . have had an actual residence of sixty days in the county or district he may have been chosen to represent."

In an earlier opinion, Turner to John M. Ely, Jr., State Senator, OAG June 13, 1967, we stated that for purposes of the residency requirements of Article III, Sections 4 and 5 of the Constitution of Iowa, the expression "sub-district" as used in House File 736 means the same thing as "district" and that a candidate for the office of State Senator and/or Representative must reside in the "sub-district" he seeks to represent. We also stated in that opinion that the sixty day residency requirement contained in Article III, Section 4, applies only to general elections, and not to primary elections, citing in support thereof the case of *State v. Carrington*, 194 Iowa 785 190 N. W. 390 (1922). Since the November, 1968 election is a general election, the foregoing constitutional provisions control and any person elected at the November, 1968 election to fill the balance of Senator Riley's unexpired term must at the time of such election, have had a prior residence in sub-district three of at least sixty days.

August 27, 1968

COUNTIES: Board of Supervisors, members compensated under §331.22 Code of Iowa may collect full per diem pay for work on committee assignments regardless of time required to do such work. (Nolan to Van Gilst, State Senator, 8/27/68) #68-8-9

Hon. Bass Van Gilst, State Senator: On August 1, 1968 you requested an opinion on the following question:

"If a member of the County Board of Supervisors checks in in the morning for committee work and then leaves for the rest of the day on his own personal business, can he then legally collect his full per diem pay for that day?"

In answer to your question, we advise that in counties where the members of the Board of Supervisors receive compensation under §331.22 of the Code of Iowa in the amount of "seventeen dollars and fifty cents per day for each day actually in session, and fourteen dollars per day exclusive of mileage when not in session but employed on committee service," they are entitled to the full amount as per diem pay in lieu of salary. It has been the well settled rule that whenever a member has been selected work on any committee by resolution of the board with instructions to "visit specific places" or "make specific investigations in matters in which the county is interested," he is entitled to payment of the per diem for that day without regard to the length of time the work takes. See 1916 OAG 218, 1913-14 OAG 89.

It is, of course, necessary for the Board Member to have an actual assignment of committee work to do in order to be compensated. However, there does not appear to be any minimum amount of time that such member must be on the job to collect the full per diem pay. While the term

"per diem" is generally taken to mean pay for a day's personal services, it also has the general connotation of salary, 32 Words and Phrases, 17, 18.

August 28, 1968

TAXATION: Penalties for nonpayment of second half taxes for the year 1963, payable in 1964, by the Chicago North Western Railroad should be computed from October 1, 1964 by virtue of reassessment and statute §439.1, Code of Iowa, 1966. Modifies Attorney General Opinion of 12-2-66 (Scalise to Homer Young). Affirms said opinion on penalty dates for years 1964 and 1965. (Turner to Rowe, Jefferson County Attorney, 8/28/68) #S-68-8-3

Mr. Thomas Rowe, Jefferson County Attorney: We have received your request concerning the collection of penalties due the county from the North Western Railroad Company as a result of the litigation between that railroad and the Iowa Tax Commission for the years 1963, 1964 and 1965. We have also received requests on the same problem from several other counties and the attorneys for the North Western Railroad have requested of the comptroller, which request was forwarded to this office, that the opinion of the former Attorney General dated December 2, 1966, be reconsidered.

The railroad paid their delinquent taxes for all years on January 30, 1967, and along with the checks in payment of the delinquent taxes, the company enclosed a letter stating that the amounts paid were in payment of the taxes *only*, since there was no uniformity among the counties as to the correct date to be used in determining the penalties. They stated they were withholding payment of same until the appropriate rate of the interest-penalty for each of the years involved could be determined. During the month of February, 1967, we received several inquiries by telephone and by mail from various county officers, and, as a result, a bulletin was issued from this office on February 23, 1967, suggesting how these payments should be handled. A copy of said bulletin is enclosed herewith. We were advised that many of the counties followed these instructions and others did not and that the question has not been finally resolved at this date.

We have had several conferences with the attorneys for the North Western Railroad in an attempt to bring about some uniformity concerning this question. The problem is complicated since during the course of the litigation for the years involved, 1963, 1964 and 1965, various injunctions were issued by the court against various officers, namely the tax commissioners, the treasurers, and the auditors, depending upon the stage of the assessing and taxing procedure, that is, either the assessment, the certification, the levy or the collection.

The cases cited in the opinion of December 2, 1966, clearly state the law in Iowa to the effect that when a taxpayer litigates tax liability he does so at his peril and in the event he is unsuccessful in such litigation, he is liable for the statutory penalties for nonpayment of his tax. Therefore, we see no reason to modify the opinion of December 2, 1966 on this issue. Said opinion of December 2nd, in reference to when penalties for the year 1963 should have accrued, stated as follows:

". . . up to the point that the State Tax Commission, pursuant to court

order, reassessed these taxes on November 29, 1965. Subsequently the efforts by the railroad failed. This date the taxes due and owing are those of the assessment of November 29, 1965. Applying the rules of law announced above, it is our opinion that the taxpayer owes penalties from the time that this valid assessment would have been placed on the county roles. Apparently this could have been done by the end of November, so that the penalties would have started accruing to the State of Iowa as of December 1, 1965."

We do not agree that December 1, 1965, is the date that should be used in computing penalties for the 1963 taxes payable in 1964. It is our opinion that the proper date for computing penalty on the delinquent tax for the year 1963 should be October 1, 1964, and said opinion is so modified.

To sustain this conclusion, we think it necessary to refer to the language used by the trial court in its Decree entered on August 5, 1964, after trial on the merits. We must also refer to the language in the decision by the Iowa Supreme Court filed on September 21, 1965, which decision modified and affirmed the Decree entered by the trial court on August 5, 1964.

The original Decree stated in part as follows:

"It is therefore ordered, adjudged and decreed that the 1963 assessment of the property of the North Western by the defendant, Iowa State Tax Commission, be and hereby is determined and declared to be null and void and of no effect.

"It is further ordered, adjudged and decreed that the defendants, Iowa State Tax Commission, . . . shall forthwith *reassess* the property of the plaintiff for 1963, *as provided by section 439.1 (1962 Code)*, . . ." (Emphasis added)

The decision on the appeal was filed by the Iowa Supreme Court on September 21, 1965, and in part, stated as follows:

"The 1963 assessment is void, and the Commission must forthwith *reassess* the North Western's property for 1963. . . ." (Emphasis added)

In response to the mandate to reassess the railroad property for the year 1963, the Iowa State Tax Commission, on November 29, 1965, did so and reduced the valuation from $16,510,417.00 to $14,271,020.00, a reduction of $2,239,397.00; however, on December 1, 1965, on petition of the railroad, the District Court of Polk County issued a Writ of Temporary Injunction against the Iowa State Tax Commission, which stated in part as follows:

"Now, therefore, you, as aforesaid, in the name and by the authority of the State of Iowa, are hereby strictly enjoined and restrained from certifying to the proper county officers the assessed value per mile, as provided by Code of Iowa, section 434.17 (1962), for 1963 taxes payable in 1964 by the Chicago and North Western Railway Company until further order of said court in the premises."

Also on December 1, 1965, in addition to asking for the above mentioned Temporary Injunction, the railroad filed an Application to cite the Commission for contempt in not properly reassessing their property for the year 1963. This issue was argued and on October 19, 1966, the court decided that there were no grounds for contempt since the reassessment

was in excess of $2,000,000.00 less than the original assessment and also dissolved the Temporary Injunction which had restrained the Commission from certifying the assessed value to the counties as provided by §434.17 (Code of Iowa, 1962). This decision, upholding the reassessment of November 29, 1965, was not appealed by the railroad and, therefore, the valuation in the amount of $14,271,020.00 became a *final adjudication* of the value of the railroad property for the taxable year, 1963. Under both the statutory law and the case law in Iowa, we must conclude that the termination of the litigation established the *reassessed* value as the *original* assessment and that for purposes of fixing a date and an amount upon which penalties can be computed, this reassessed value should be treated as though it had been on the tax books from the date of the original assessment, August of 1963. *Des Moines Gas Company v. Saverude,* (1920) 190 Iowa 165, 169; 180 N. W. 193.

It is to be noted that the trial court in its original Decree of August 5, 1964, directed the Commission to reassess the railroad property under the provisions of §439.1 (1962 Code). Said section provides as follows:

"*Reassessment and relevy.* When by reason of nonconformity to any law, or by any omission, informality, or irregularity, or for any other cause, any tax heretofore or hereafter levied and assessed against any person, company, association, or corporation by the state tax commission is invalid or is adjudged illegal, the state tax commission may assess and levy a tax against such person, company, association, or corporation for the year or years for which such tax is invalid or illegal, *or when necessary may assess and certify the same to the proper county officers, who shall levy such tax as by law in such cases made and provided, with the same force and effect as though done at the proper time and under any valid law,* whether in force at the time of said levy and assessment or thereafter enacted." (Emphasis added)

The reassessment procedure has not been before the Iowa Court but it is generally considered to be a legislative prerogative.

51 Am. Jur., Taxation, §790:

" 'Reassessment of taxes,' as the term is used in the present connection, refers to the taking of formal steps to repeat the process of assessing taxes against persons or property where the same tax, or taxes for the same taxable year, have previously been assessed against such persons or property but have subsequently been regarded as illegally or invalidly assessed. Although questions as to the right of taxing authorities to reassess property have occasionally been discussed by the courts without reference to any statutory provisions regulating the reassessment of taxes, it is clear that the procedure in question is generally statutory and strictly regulated by legislative enactments. . . ."

§791:

"The general authority of the legislature to provide a procedure applicable in futuro, for the reassessment of taxes which may be assessed in a manner which, for some reason or reasons, is illegal or invalid appears to be undoubted, the validity of statutes of this kind having been upheld against various specific constitutional objections, such as that they failed to provide the taxpayer with a proper notice or hearing of the reassessment of taxes previously assessed against him, or operated to deprive him of the equal protection of the laws. . . ."

We are advised that the Commission, after the dissolution of the Temporary Injunction on October 19, 1966, followed the correct statutory procedure as outlined in §434.17 and certified the reassessed valuation to

the proper county officers on October 25, 1966. Section 434.17 provides as follows:

"*Certification to county auditors.* On or before the third Monday in August of each year, the state commission shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property."

Upon receipt of the assessed value per mile of the railway, the duty of the county auditor and the board of supervisors is clearly stated in §434.22 as follows:

"*Levy and collection of tax.* At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order stating the length of the main track and the assessed value of each railway lying in each city, town, township or lesser taxing district in its county, through or into which said railway extends, as fixed by the state tax commission, which shall constitute the taxable value of said property, for taxing purposes; and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council or trustees of the city, town or township."

When we refer to §439.1, it is obvious that there is no time limitation contained therein which would prevent the county officers from performing their statutory duty at any time after the certification is received from the Tax Commission. In fact, it is quite clear, that when the order is entered by the board of supervisors, it is made "with the same force and effect as though done at the proper time and under any valid law" and thus becomes a proper assessment and levy. In other words, the levy also "relates back."

The reassessment procedure of §439.1 is in harmony with the "relation back" doctrine as stated in *Des Moines Gas Company v. Saverude*, (1920) 190 Iowa 165, 169; 180 N. W. 193:

"It seems quite clear that the parties did not contemplate that the assessed valuation of this property should be placed at $2,593,500 when they had stipulated in writing that it should be $2,005,000, *and the judgment of the court fixed it at that amount.* The only question before any of these tribunals was as to the proper valuation of this property. That was the question in the first instance before the assessor, at the time the assessment was made, which we understood, was to have been as of January 1, 1917. At any rate, the time of such assessment was necessarily prior to April 1, 1917. The sole question in the district court was the fair valuation of the property at the time of the original assessment. It may be true that, under some circumstances, and for some purposes, the amount fixed by the board of review would be presumed to be correct until reversed on appeal. But the case was pending on appeal, and liable to be reduced, and it was so reduced on final hearing. Necessarily, the valuation of the property, could not be determined until the appeal was disposed of, and that when that was done, and the valuation finally fixed, such valuation could only be the valuation which should have been placed upon the property by the assessor in the first instance. *In short, the valuation, as finally fixed, would relate back to the time of the original assessment.* Had the case been tried in the district court, instead of being disposed of under the stipulation, the court would have simply found the value of the property, without taking into consideration any reduction ordered by the state board." (Empasis added)

This case was approved and followed in *Utica Realty Company v. Board of Review* (1941) 231 Iowa 380; 1 N. W. 2d 213.

We might also note here that the order referred to in §434.22 whenever entered by the board of supervisors becomes the basis for the levy.

The S. C. & St. P. R. Company v. The County of Osceola (1876) 45 Iowa 168, 176:

"As to the road taxes it is claimed by appellant that no means are provided by which the assessment of railroad property is placed upon the assessment book of the township: that the assessment book of the township as returned by the township assessor is made the basis of the levy of the road tax, that the levy is made upon the role as the assessor returns it, and not upon any other property or other amount, and hence can not be made upon railroad property which never appears upon the assessor's book. If these positions be correct, the results will be startling in the extreme. They will operate to defeat not only road taxes, but all other taxes as well upon railroad property, for there is no provision in chapter 26, Laws of 1872, (now §434.22) under which this tax was levied, for placing the assessment of railroad property upon the assessor's books. This chapter provides that the census board shall assess railroad property, and to transmit to the board of supervisors of each county through which the road runs a statement showing the assessed value per mile and the length of main track of road in the county. It is the duty of the board of supervisors to make and enter in the proper record an order, declaring the length of the main track and the assessed value of the road lying within each city, town, township and lesser taxing district in the county, and to transmit a copy of the order to the city council or trustees of each city or incorporated town or township. *This order, so transmitted, becomes the basis for the levy of taxes upon railroad property.*" (Emphasis added)

It is our conclusion, as stated above, that the date for computing penalties on delinquent taxes for the second half of the taxable year 1963, must be October 1, 1964. Since the value certified to the auditors on October 25, 1966, as a result of the reassessment order of November 29, 1965, was substantially lower than the original assessment, the interest-penalties must be computed on the lower valuation. We have checked with several of the counties concerned and find that many have correctly computed the penalties and have taken the necessary statutory steps as outlined in §434.22. Some of the counties have not done so but should do so immediately in order to have a proper foundation upon which to base their demand for payment of penalties.

For the years 1964 and 1965, we are in accord with the dates stated in the prior Attorney General Opinion of December 2, 1966, namely, the 1964 taxes were delinquent April 1, 1965 for the first half, and October 1, 1965 for the second half. The same statutory penalty dates would apply to the 1965 taxes also.

In our several conferences with the attorneys for the North Western Railroad they have furnished us with citations to the effect that a penalty may not be charged against a delinquent tax absent a levy. They have also furnished us with an opinion by the Attorney General of the State of Missouri, citing Missouri cases, which have so held. We do not think the Missouri Attorney General's opinion is in point since there was no indication that Missouri has a reassessment statute similar to the Iowa statute, Chapter 439, Code of Iowa, 1966.

Our attention was also called to the recent case of *Laubersheimer v. Huiskamp* (1967) .....Iowa....., 152 N. W. 2d 625, wherein the Iowa court stated that:

"Unless there is a valid assessment there can be no valid tax or obligation from the taxpayer."

In our research on this question, we have also reviewed the case of *Isbell v. Board of Supervisors Woodbury County* (1952) 243 Iowa 941, 946; 54 N. W. 2d 519, and the cases cited therein. We do not consider these cases controlling since the *Laubersheimer* case was concerned with the assessment of omitted monies and credits by the treasurer and specific statutory procedures are outlined for accomplishing this, which the court found were not followed. In the *Isbell* case the court was concerned with a levy made by a board of supervisors on town property over which they had no jurisdiction and hence any levy made on said property was illegal and void. In the years at question herein the proper officials made the assessment and the levies were made pursuant to specific statutes.

It has been the contention of the North Western attorneys that the Tax Commission, the county auditors and the county treasurers in the affected counties were unable to perform their statutory duties in reference to assessment, certification, levy and collection because they were enjoined at various times from performing their necessary duties in relation to the mechanics of the assessments for the years 1963, 1964 and 1965 and hence, there was no valuation on the tax books and no levy until after the injunctions were dissolved on October 19, 1966. Our prior comments concerning the reassessment for the taxable year 1963 disposes of their argument for that year.

Concerning the taxable year 1964, it seems to be the position of the North Western attorneys that because of an Injunction entered on September 22, 1964 by Judge George O. Van Allen, temporarily assigned to the Polk County District Court, the 1964 taxes were not "levied." A review of the record for this taxable year does not so show.

On August 24, 1964, the Commission, pursuant to §434.17, "certified" the assessed value per track mile to the respective county auditors in the counties affected. On August 26, 1964, two days later, the North Western filed its Petition contesting said valuation and in Division I thereof, in part, prayed as follows:

"That the court immediately fix a time and place for hearing upon a Temporary Injunction and prescribe the Notice therefore and that on such hearing, *the court forthwith enjoin and restrain defendant county auditors from certifying the 1964 taxes* collectable in 1965 against the property of plaintiff until after a final hearing and determination of the issues in this case." (Emphasis added)

As mentioned above, on September 22, 1964, Judge Van Allen issued the Writ of Temporary Injunction as prayed by the railroad and did enjoin the affected county auditors from "certifying the 1964 taxes collectable in 1965 against the property of the plaintiff until after final hearing and determination of the issues in the case." It is difficult to determine the effect of this Injunction. Reference to §434.17, cited above, clearly states that the "certification" is to be made by the Tax Commission and

not by the auditors. It is to be noted that the Tax Commission was *not* enjoined from certifying the taxable value. As is pointed out in the *S. C. & St. P. R. Company v. The County of Osceola*, supra, the statutory procedure for the assessment certification and levy of railroad property taxes differ from the ordinary assessment certification and levy of ad valorem taxes on other real property. When we refer to the provisions of §434.22 it is apparent that the auditor's duty is ministerial in nature since he is only required to deliver the valuation certified to him by the Tax Commission to his respective board of supervisors, which board is then charged with the duty of making the *levy* pursuant to §434.22. Once again, we have checked several of the affected counties and find that the certification and levying procedures for the taxable year 1964 were routinely followed as far as the necessary record entries are concerned and, therefore, we must conclude that the proper levy was in fact made contrary to the contention of the North Western attorneys. The argument that no levy could be made until after October 19, 1966, when the purported Injunction was dissolved, is for these reasons without merit.

Moreover, even if the Injunction had been timely obtained against the proper officers, and was valid until dissolved, the relevy made after dissolution of the Injunction would nevertheless relate back to the "proper time" when a legal levy should have been made. §439.1, supra.

We are also satisfied that the proper procedures were followed in the assessment, certification and levy of the 1965 taxes collectible in 1966, and we concur with the holding of the prior Attorney General's Opinion of December 2, 1966 in that respect.

We are not unaware that in *Randolph Foods v. State Tax Commission* (1965) 258 Iowa 13, 17; 137 N. W. 2d 307, 309, the Supreme Court said:

"We have often said that taxing statutes should be strictly construed against the taxing body and liberally in favor of the taxpayer."

And also, in *Miller Oil Company v. Treasurer of State* (1961) 254 Iowa 1058, 1064; 109 N. W. 2d 910, the court stated:

". . . It is true penalty sections are strictly construed against the taxing authority. . . ."

However, we think the language from the *Cedar Rapids and Missouri Railroad Company and Iowa Railroad Land Company v. Carroll County* (1875) 41 Iowa 153, quoted in the Attorney General's Opinion of December 2, 1966, is most appropriate in this case, to wit:

"It is urged that the penalties are onerous, inequitable and oppressive, that they accrued while plaintiffs were, in good faith contesting the rights of defendant to enforce them. . . . That plaintiffs will suffer a hardship in the payment of these heavy penalties is very apparent; . . . but these things give us no authority to annul a statute and remit a penalty inclusively provided for, and in which defendant has a vested right. . . ."

It must be remembered that in all of the cases the basic issue was whether or not the property of the North Western was "over valued." The issues were never that the North Western did not owe tax. For example, in the 1963 case the railroad argued that a reasonable valuation

would be approximately $10,000,000 instead of the $16,500,000 plus fixed by the Commission. When the Commission reassessed and finally determined the taxable value to be slightly in excess of $14,000,000, the railroad terminated the litigation and accepted this figure. From this we must conclude that the railroad was aware, throughout the litigation, that it owed some taxes but by choice, argued that it would suffer a hardship by paying their taxes in the approximately fifty-five (55) counties through which they operated, since, if they paid more than their just share, they would be faced with a multiplicity of lawsuits in recovering back the excess tax paid. The court agreed with this argument and therefore the various injunctions issued and the practical result of these injunctions against the timely collection of these taxes meant that during the years 1963, 1964, and 1965 the various counties were forced to forego approximately in excess of $2,100,000 which the railroad eventually paid. It is quite obvious that the railroad had the use of this money during these several years and we assume that it was not lying idle. For a discussion of why taxes should be timely paid see *Power v. City of Detroit* (1905) 139 Mich. 30, 102 N. W. 288, which cites *C. R. & M. R. R. v. Carroll County*, supra.

CONCLUSION

We reaffirm the prior Attorney General's Opinion of December 2, 1966, with the exception that the proper date for computing penalties on the reassessed value for the 1963 taxes payable in 1964, should be from October 1, 1964 instead of from December 1, 1966.

August 29, 1968

STATE DEPARTMENTS: §8.38, Code of Iowa, 1966. Group Life Insurance. Contributions to group life insurance premiums may be made by the state from funds appropriated to the departments to the extent authorized by Chapter 8, Code of Iowa, 1966. (Nolan to Worthington, Chm., State Insurance Comm., 8/29/68) #68-8-10

Mr. Lorne R. Worthington, Chairman, State Insurance Committee, Insurance Department of Iowa: This is in reply to your letter dated February 6, 1968, in which you stated that the State Insurance Committee, at the request of the Executive Council, has been exploring the possibility of procuring life insurance for state employees, and must determine if it is possible for the state to participate in contributing a portion of the cost, much the same as is presently done for the health insurance program. Your letter then requests an opinion on the following questions:

"If state funds may be used, can they be allocated from existing departmental budgets or will legislative action be required?

"If a department does not have adequate funds available for this purpose, may funds be made available from other sources and, if so, from what source and by what manner?"

The authority for the executive council to procure group life insurance for state employees is found in §509.15, Code of Iowa, 1966, which provides:

"The governing body of the state, county, school district, city, town or any institution supported in whole or in part by public funds may establish plans for and procure group insurance, health or medical service for

the employees of the state, county, school district, city, town or tax-supported institution."

State funds may be used as a contribution to the cost of group life insurance for state employees as they are presently used for the group health and medical service plans. Such contributions are authorized under §509.16:

"The funds for such plans shall be created from the following sources:

* * *

"3. Solely from the contributions of employees, . . . or from contributions wholly or in part by the governing body."

A review of the appropriations for 1967-1969 discloses that for each department amounts are appropriated for (1) salaries, (2) support, maintenance and miscellaneous purposes. The budget includes the state's share of retirement and insurance in the support and maintenance request. It is our view that the executive council may rely on the same authority for the procurement of a group life insurance contract for state employees as it has for health and medical services. The provisions of Chapter 8 of the Code of Iowa must be adhered to. §8.38 provides:

"No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, nor expend funds for any purpose other than that for which the money was appropriated, except as otherwise provided by law. . . ."

Construing these statutes in answer to your questions, we advise that should the executive council decide to enter into a contract on behalf of the state employees to provide group life insurance coverage, funds appropriated to the various departments for this biennium may be used to the extent authorized by Chapter 8. However, while the contribution to a group life insurance plan might well be a legitimate expense of any department, should such department lack sufficient funds in its appropriations for salaries and support and maintenance, it is our view that any transfer of funds from the appropriations of another department would be improper and a violation of Article III, §24 of the Constitution of Iowa which provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

A statutory authorization to transfer is not an appropriation. *State ex rel Parker v. Youngquist*, 11 N. W. 2d 84, 86, 69 S. D. 423. See also 1958 OAG 6.3.

September 2, 1968

STATE OFFICERS AND DEPARTMENTS: Law Enforcement Academy Council, transfer of funds — Art. III, §24, Constitution of Iowa; §8.39, Code of Iowa, 1966; Chapter 112, §14, Acts of the 62nd G. A. The law enforcement academy council, with the prior approval of the governor and comptroller, may transfer from a portion of an anticipated excess of funds from its operating costs appropriation to its appropriation to capital expenditures under the authority of §8.39. (Turner to Kruck, State Senator, 9/2/68) #S68-9-1

The Hon. Warren Kruck, State Senator: As Vice Chairman of the Law

Enforcement Academy Council, you have by your letter of August 20, 1968, requested an opinion of the Attorney General with reference to the apparent insufficiency of an appropriation for capital expenditures for remodeling and converting existing structures to classrooms and dormitory space at Camp Dodge for the Law Enforcement Officers' Training Academy, and for the use of land for the site of an administration building.

As I understand the problem §14 of Chapter 112, Acts of the 62nd General Assembly, specifically appropriated $150,000 for said capital expenditures, as well as another $158,000 for each year of the biennium, July 1, 1967 to June 30, 1969 "or so much thereof as may be necessary," for general operating costs to carry out the purposes of the Act, and that there is a present balance of $244,160.57 of the operational appropriation of $316,000 for that biennium. You also tell me projected operating expenses to June 30, 1969 are estimated at $171,000 and that you anticipate an excess of operational funds available in the sum of $73,160.

I am also informed that the total of the low bids for general, mechanical and electrical work, submitted by various companies for construction of the administration building (not including any remodeling or conversion of existing structures) were in the sum of $200,701, over $50,000 more than the appropriation.

Said low bids were not received until August 6, 1968 because federal land use restrictions applicable to the construction site required modification by Act of Congress, which Act did not become law until July 30, 1968. You contend that you and your legislative colleagues did not anticipate either the delay in removal of the land use restrictions or the "drastic increase in construction costs" from the time of the appropriation until the restrictions were removed. In support of your contention, you submit the building cost index by Boech Cost Index Company relecting a 4.8% increase in building costs per each six months over the past 18 months and which costs are currently rising at the rate of an additional 3.1% each six months.

Your question is whether, under these circumstances, the anticipated excess of the general operating costs appropriation may be used to supplement the $150,000 appropriation for construction of the administration building under authority and subject to the limitations of §8.39, Code of Iowa, 1966. You indicate that unless accepted the present bids expire on September 4, 1968, and that because of rising costs a new letting would necessarily result in higher bids.

It further appears from §14 of Chapter 112, Acts of the 62nd General Assembly, that any "unencumbered balance of the funds appropriated by this Act remaining as of January 31, 1969 shall revert to the general fund of the state as of that date." The 63rd General Assembly will convene in January, 1969 and presumably could make other arrangements to take effect either on, before or after that date. Moreover, I can't help but wonder whether less than $150,000 would have been expended had costs declined during the delay, or whether, in any event, an adequate building could be constructed within the specific appropriation by eliminating certain specifications which may not be necessary. In this latter

regard, I have been assured by my own designated representative to the council that all present specifications are necessary to construct an administration building which will be barely adequate for the purposes of the Act.

Article III, §24, Constitution of Iowa provides:

"No money shall be drawn from the treasury but in consequence of appropriations made by law."

Since only the legislature can make law, an appropriation required to be made by law is strictly a legislative function and may not be delegated. While you do not suggest expending money which has not been appropriated, you ask whether an appropriation for one purpose (operating costs) may be expended for another (construction costs). Obviously, any proposal to expend money specifically appropriated by law for one purpose, for another purpose for which it was apparently not appropriated, requires the most careful scrutiny. Otherwise, not only the law making the appropriation, but the constitution (Art. III, §24) could be evaded or violated.

The first paragraph of §8.39, here under consideration, provides:

"*Use of appropriations — transfer.* No appropriation nor any part thereof shall be used for any other purpose than that for which it was made except as otherwise provided by law; provided that the governing board or head of any state department, institution, or agency may, with the written consent and approval of the governor and state comptroller first obtain, at any time during the biennial fiscal term, partially or wholly use its unexpended appropriations for purposes within the scope of such department, institution, or agency."

This provision, on its face, appears to allow the law enforcement academy council, "with the written consent and approval of governor and state comptroller first obtained," to "partially or wholly use its unexpended appropriations for purposes within the scope" thereof, and thereby to authorize the transfer you propose. While the law enforcement academy's appropriations for operating costs and capital expenditures are both for a specific amount and are contained in the same section of the same Act, both contribute to the attainment of the same general purpose — the establishment and operation of a law enforcement academy at Camp Dodge. Considering this manifest overall purpose of Chapter 112, it cannot be gainsaid that construction and remodeling of academy buildings are, as required by §8.39, "purposes within the scope of" the law enforcement academy.

The purpose of Chapter 112, as derived from the title, is to "provide for the creation of a law-enforcement officers' training academy and a council to assist in formulating policies for the direction of the activities of the academy; and to make appropriations . . . for the general operating costs in carrying out the purposes of the Act." Because it is also apparent from §4 that the construction you contemplate is a principal purpose of the Act, it might well be argued that the $158,000 appropriated by §14 for "general operating costs *to carry out the purposes of this Act*" is itself sufficient to allow use of the anticipated excess of operating costs for supplementing the construction appropriation even without resort to §8.39.

Nevertheless, with respect to similar questions which arose prior to enactment of §8.39, there is authority for holding against such use or transfer of funds. See 1902 O.A.G. 64 and 20 O.A.G. 129. But in 1932 O.A.G. 155, under authority of §61, Ch. 257, Acts, 44th G. A., which is now the first paragraph of §8.39, the attorney general said it was proper for the Board of Control to use part of an appropriation for construction of water facilities at an institution under the board's control to supplement an appropriation for water facilities at another institution under its control.

While §8.39 has not been considered by the Iowa Supreme Court, similar statutes granting executive control of allotment and distribution of appropriations have been questioned throughout the history of Iowa. See *Prime v. McCarthy*, 1894, 92 Iowa 569, 61 N. W. 220 and *14 Iowa Law Review 369*. At 370 of 14 I.L.R., it is stated:

"The legislature cannot delegate legislative power, but it can grant fact-finding and administrative authority to boards and commissions, and make the operation of statutes conditional upon the findings of these bodies. If the appropriations made by the legislature are not absolute, the power of redistribution given to the council and budget director is akin to the power of appropriation itself; but if the appropriation of the legislature is absolute subject to be used only upon the council's and budget director's determination of the existence of a necessity, then it may be said that only ministerial power has been delegated and the power placed in the Executive Council and budget director is entirely proper. As it is obvious that a deficiency cannot be foreseen, and that when it arises legislative action is likely to be impossible, it seems entirely proper that some agency should be provided to remedy the situation. One of the primary functions of the Executive Council being the conduct of the affairs during the adjournment of the legislature, the delegation of the power to it seems entirely appropriate unless other constitutional restrictions intervene."

And at 371 of 14 I.L.R.:

"If the executive council and budget director can be given authority to determine the amount of funds to be used by a department, they have in effect the power to make appropriations or at least to amend or in effect to repeal the action of the legislature in making appropriations. The power of appropriation, however, is a legislative power and constitutionally should be exercised only by the General Assembly."

§8.39 is, of course, presumed to be constitutional and in my opinion the first paragraph thereof would be upheld by the Supreme Court both as a proper delegation of fact-finding power and against any attack that it allows an appropriation to be made by executive power rather than by law. Once, as here, separate specific appropriations have been made to the same department or agency but for the same over-all general purpose, that agency, with the approval of the governor and comptroller, may properly find as a matter of fact that it is necessary to use funds appropriated for one specific purpose to supplement funds appropriated for the other specific purpose in order to achieve the over-all general purpose.

§8.39 does not, by its terms, limit the use or transfer as between operating funds or as between capital expenditure funds. In other words, it does not prohibit the transfer of one such type of appropriation to the other. Indeed, the distinction between operating and capital expenditures is often difficult and the subject of dispute among accountants, particu-

larly where a new agency is created with authority to use existing facilities. And while the public has a substantial interest in where and how its funds are expended, the final determination as to details must always necessarily be left to the discretion of the administrative agency. If it is determined to be necessary to expend most of the total of the specific appropriations to that agency, no more public funds are used as a consequence of expending more for capital improvements if operating costs are equally reduced. Moreover, such a narrow construction of the first paragraph of §8.39 as would preclude a use or transfer of an operating fund appropriation to or for a capital fund appropriation, or vice versa, would render that paragraph practically meaningless. Specific appropriations to an agency are already so broad in their terms that ordinarily there are no other classifications.

It should also be noted that it is not uncommon for the legislature to specifically prevent the application of §8.39. For example §39, Ch. 1, 62nd General Assembly, says ". . . including *not more than* one hundred fifty thousand dollars ($150,000.00) for the replacement of one aircraft which *shall be the only aircraft* to be assigned to the military department for the support of administrative flights of the governor . . ." (Emphasis supplied). Such words of limitation were not included in Ch. 112, 62nd G. A.

The attorney general has issued a number of opinions with respect to the use of the general contingent fund established by §5, Ch. 77, Acts of the 62nd G. A. See O.A.G.s, October 12, 1967, October 13, 1967, January 16, 1968, January 29, 1968, February 9, 1968, February 12, 1968 and April 8, 1968. All of those opinions involved the question of whether some portion of the $1,700,000 appropriated to the executive council for use in contingencies could be used either to supplement other legislative appropriations or for a purpose for which no appropriation had been made. In such cases, it was our opinion that the contingent fund could be used only for what the executive council determined, in the sound exercise of its discretion, constituted a contingency. A contingency arises out of an event which must be to some degree unforseen. The use or transfer you recommend does not involve the contingent fund and those opinions have little or no application to your proposal. §8.39 was not under consideration in any of them. Here we have a proposed transfer under §8.39 within the same agency, under the same section of the same Act which created that agency, with the amount available to be transferred limited to the excess available to the operating costs appropriation, and subject to the approval of the governor and the comptroller. In my opinion, such a transfer is not prohibited.

§4 of Ch. 112 requires the law enforcement academy council to enter an agreement with the adjutant general to provide for the use of existing "facilities at Camp Dodge, for remodeling and conversion of existing structures to classrooms and dormitory space, and for the use of land for the site of an administration building." §14 appropriates $150,000 "for the construction of an administration building and remodeling of existing structures at Camp Dodge to carry out the purposes of this Act." These provisions vest said law enforcement academy council with broad discretion as to what is necessary and adequate within the limits of the appropriation. Presumably the council directed the architect to draw plans and

specifications for said improvements with those limits in mind and now finds from the bids and other sources that because of the increased construction costs occasioned by the aforementioned delay, $150,000 is not sufficient to construct an adequate building as contemplated by the legislature when the Act was passed. If this is true, §8.39 authorizes use of the excess of the operating costs appropriation for said construction to carry out the general purpose of the Act, provided the governor and comptroller consent and approve in writing.

September 3, 1968

TAXATION: Real Property Tax. Current Market Value of Agricultural Property — Chapter 354, Acts of 62nd General Assembly (1967). The words "current market value of agricultural property as reflected by its current use" within §1(1) of Chapter 354, Acts of 62nd General Assembly, mean that agricultural property is not to be assessed according to its value as potential nonagricultural property, but is to be valued according to its use as agricultural property which can be determined from its sales price for such use or sales prices of comparable property for such use in normal transactions reflecting market value, all of which must be fair and reasonable, taking into account the availability or unavailability of persons interested in purchasing the property. In the event market value of agricultural property cannot be determined in this manner by the assessor, he may consider the factors enumerated in the statute as well as all others which would assist in determining fair and reasonable market value, but no one factor alone is sufficient to determine market value and special or use value to the present owner shall not be considered at all. (Turner to Forst, Director of Revenue, 9/3/68) #S68-9-2

Mr. W. H. Forst, Director of Revenue: By your letter of May 10, 1968, you have requested an opinion of the Attorney General as follows:

"Chapter 354, Section 1(1), of the Acts of the 62nd General Assembly, provides that:

"* * * In assessing and placing a value on agricultural property said value shall be determined on the basis of its current market value *as reflected by its current use.*

"I hereby request a formal opinion on the interpretation of the above underlined phrase 'as reflected by its current use.' "

§441.21, Code of Iowa, 1966, prior to its amendment by Chapter 354, Acts of the 62nd General Assembly (1967) provided in part as follows:

"441.21. Actual, assessed, and taxable value. All property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and shall be assessed at sixty percent of such actual value. Such assessed value shall be taken and considered as the taxable value of such property upon which the levy shall be made. The actual value in such cases shall be one and two-thirds times the assessed value as shown by the assessment rolls and may be so determined and ascertained.

"In arriving at said actual value the assessor shall take into consideration its *productive and earning capacity,* if any, past, present, and *prospective,* its market value, if any, and all other matters that affect the actual value of the property; and the burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate or inequitable. . . ." (Emphasis supplied)

In your letter, you have quoted part of §1(1) of Chapter 354 and you then asked me for my opinion as to the interpretation of the underlined phrase "as reflected by its current use."

§1(1) of Chapter 354 provides as follows:

"SECTION 1. Section four hundred forty-one point twenty-one (441.21), Code 1966, is hereby amended by striking all of lines one (1) through nineteen (19), inclusive, and inserting in lieu thereof the following:

" '1. All real and tangible personal property subject to taxation shall be valued at its actual value which shall be entered opposite each item, and shall be assessed at twenty-seven (27) percent of such actual value, and such value so assessed shall be taken and considered as the taxable value of such property upon which the levy shall be made.

" 'The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property. "Market value" is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. Sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at its market value. In assessing and placing a value on agricultural property, said value shall be determined on the basis of its current market value as reflected by its current use.

" 'The market value of an inventory or goods in bulk shall be their market value as such inventory or goods in bulk, not their retail or unit price. Such market value shall be fair and reasonable based on market value of similar classes of property.

" 'In the event market value of the property being assessed cannot be readily established in the foregoing manner, then the assessor may consider its productive and earning capacity if any, industrial conditions, its cost, physical and functional depreciation and obsolescence and replacement cost, and all other factors which would assist in determining the fair and reasonable market value of the property but the actual value shall not be determined by use of only one such factor. The following shall not be taken into consideration: special value or use value of the property to its present owner, and the good will or value of a business which uses the property as distinguished from the value of the property as property. Upon adoption of uniform rules and regulations by the state tax commission or succeeding authority covering assessments and valuations of such properties, said valuation on such properties shall be determined in accordance therewith for assessment purposes to assure uniformity, but such rules and regulations shall not be inconsistent with or change the foregoing means of determining the actual, market, taxable and assessed values.

" ' "Actual value," "taxable value," or "assessed value" as used in other sections of the Code shall mean the valuations as determined by this section; however, other provisions of the Code providing special methods or formulas for assessing or valuing specified property shall remain in effect, but this section shall be applicable to the extent consistent with such provisions.

" 'The burden of proof shall be upon any complainant attacking such valuation as excessive, inadequate, inequitable or capricious; however, in protest or appeal proceedings when the complainant offers competent evidence by at least two (2) disinterested witnesses that the market value of the property is less than the market value determined by the assessor, the burden of proof thereafter shall be upon the officials or persons seeking to uphold such valuation to be assessed.' "

As you will note, under §441.21, Code of Iowa, 1966, the assessor, in arriving at "actual value" was required to consider the productive and

earning capacity of property, if any, past, present and *prospective. Bankers Life Co. vs. Zirbel,* 239 Iowa 275, 31 N. W. 2d 368 (1948). Also, under this statute, market value was only one of the elements to be considered in determining the actual value of property subject to taxation. *James Black Dry Goods Co. vs. Board of Review for City of Waterloo,* ..... Iowa....., 151 N. W. 2d 534 (1967). In view of the fact that the assessor, in arriving at "actual value" was required to consider the past, present, and prospective productive and earning capacity, if any, of property, and since market value was only one criterion to ascertain actual value, the assessor had statutory authority to value all property at its highest and best potential use. Consequently, agricultural property near a residential subdivision or a shopping center could have been assessed, in the judgment of the assessor, at a value higher than its current use as agricultural property.

§1(1) of Chapter 354 changes the meaning of actual value for purposes of property tax assessment. This statute expressly states that the actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property. In *Hetland vs. Belstead,* 140 Iowa 411, 118 N. W. 422 (1908), the Court held that market value is the fair market value of property as between a willing buyer and willing seller, neither being under a compulsion to buy or sell, and each being familiar with the facts relating to the particular property. In *Public Market of Portland vs. City of Portland,* 178 Ore. 367, 170 P. 2d 586 (1946), the Court held that fair market value means neither panic value, auction value, speculative value, nor a value fixed by depressed or inflated prices. The standards of these cases are clearly present in §1(1) of Chapter 354 which defines market value as follows:

" 'Market value' is defined as the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property. Sales prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, shall be taken into consideration in arriving at market value."

The statute then requires that in "assessing and placing a value on agricultural property, said value shall be determined on the basis of its current market value as reflected by its current use."

As we have stated, §441.21, Code of Iowa, 1966, allowed the assessor to consider the prospective productive and earning capacity of property, if any. Furthermore, in 55 C.J.S. *Market* at page 790, one finds the following:

"Market value is the criterion of value of property, taking into consideration the use to which the property is presently devoted, the use to *which it may be applied or converted* and all the uses to which it is adapted." (Emphasis supplied)

We are of the opinion that the use of the words "as reflected by its current use" is an attempt by the legislature to prevent agricultural property so currently used from being assessed at its highest and best use as non-agricultural property prior to actually being converted to that

use and regardless of the fact that it has been sold for, but not yet used, for nonagricultural purposes.

In construing a statute, the previous law and the evils the present law was intended to meet must be considered. *Cosson vs. Bradshaw*, 160 Iowa 296, 141 N. W. 1062 (1913). Under this authority, the proposition that the legislature was attempting to get away from the tax burden imposed on agricultural property when valued as potential developmental property is valid. We view the provision of §1(1) of Chapter 354 quoted in your letter as a "preferential assessment law." See *Opposing Views on Taxation or Land Near Cities*, U. S. Department of Agriculture, Economic Research Service, (June 1968); *Taxation of Farmland on the Rural-Urban Fringe*, Agricultural Economic Report No. 119, Economic Research Service, U. S. Department of Agriculture, September 1967.

In *Tyson vs. Lauier*, Fla., 156 S. 2d 883 (1963), the Supreme Court of Florida had for consideration that state's preferential assessment law. §193.11, Florida Statutes, F.S.A. required that all property be assessed at its full cash value. §193.11(3), Florida Statutes, F.S.A., provided in part:

"All lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development."

The Court stated at 156 S. 2d 837:

"Careful examination of this statute reveals nothing but an effort on the part of the legislature to classify agricultural lands for tax purposes; it defines what constitutes agricultural lands, points out exceptions to them and gives taxing officers other leads to a correct assessment. We find nothing in the Act inconsistent with the requirement of §193.11, Florida Statutes, F.S.A., that all property be assessed at full cash value. Neither do we find anything in the Act that runs counter to the requirement of Section 1, Article IX, Florida Constitution, which requires the legislature to 'provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property.'"

The Court continued:

"The lower court also fell into error in holding that 'full cash value' had reference to value for any and all potential uses. This interpretation ignored the legislative classification of agricultural lands for tax purposes on the basis of actual use which the legislature was authorized to make."

Consequently, where the current use of property is agricultural, such property cannot, under §1(1) of Chapter 354, be assessed on the theory that the property or comparable agricultural property was sold for residential subdivision or for commercial purposes or any other nonagricultural potential use. The fair market value of agricultural property is to be based on its actual use as such so long as it is used for agricultural purposes.

According to §1(1) of Chapter 354, sale prices of the property or comparable property in normal transactions reflecting market value, and the probable availability or unavailability of persons interested in purchasing the property, are to be taken into consideration in arriving at the

"current market value" as reflected by the current use of agricultural property. Only where fair market value of agricultural property cannot be ascertained in the foregoing manner as to current use should the assessor be allowed to value agricultural property using the factors of productive and earning capacity, if any, cost, physical and functional depreciation and obsolescence and replacement cost, and all other factors which would assist in determining the fair and reasonable market value of the property. However, the statute expressly states that the fair and reasonable market value of all property shall not be determined by the use of only one such factor.

We have been pressed with the argument that the phrase "as reflected by its current use" means that the current market value of agricultural property is based solely on the income produced from such property. We reject that argument for several reasons. First, the statute expressly says that certain factors shall not be considered in valuing property, one of which is "special value or use value of the property to its present owner." Statutes should be considered as a whole and effect ordinarily should be given to every provision of a statute. *Board of Directors of Menlo Consol. School District of Menlo vs. Blakesley*, 240 Iowa 910, 36 N. W. 2d 75 (1949). To construe the words "as reflected by its current use" to allow all agricultural property to be valued according to the income producing capabilities of each individual owner thereof would allow such property to be assessed according to the special value or use value to the owner — the very thing forbidden by the statute.

Second, the only time productive and earning capacity as a factor will be considered by the assessor is when the market value of property cannot be established through the use of the sales price of the property or comparable property in normal transactions taking into account the probable availability and unavailability of persons interested in purchasing the property, according to the clear words of the statute. And when it is proper for the assessor to consider productive and earning capacity, the statute expressly forbids him to find market value based *only* on the factor of productive and earning capacity. In this regard, §1(1) of Chapter 354 expressly states:

"In the event market value of the property being assessed cannot be readily established in the foregoing manner, then the assessor may consider its productive and earning capacity, if any, industrial conditions, its cost, physical and functional depreciation and obsolescence and replacement cost, and all other factors which would assist in determining the fair and reasonable market value of the property *but the actual value shall not be determined by use of only one such factor.*" (Emphasis supplied)

Third, the House of Representatives considered several amendments to Chapter 354 (Senate File 772) prior to its enactment. One amendment read:

"In assessing and placing actual value on agricultural real property, said value shall be determined by its current use, productivity, and earning capacity." (H.J. 1702).

Another amendment would have amended the above amendment to read:

"In assessing and placing actual value on agricultural real property,

said value shall be determined by its current use, productivity, earning capacity, and fair market value." (H.J. 1732).

Neither of these amendments were adopted into Chapter 354 as finally enacted. In *Builders Land Co. vs. Martens*, 255 Iowa 231, 122 N. W. 2d 189 (1963), the Supreme Court had for consideration §409.48 of the Iowa Code which provided as follows:

"Assessment of platted lots. When any plat is made, filed and recorded by the proprietor or owners under the provisions of this chapter, the individual lots contained therein shall, until sold, leased, or improved, be assessed for taxation at an amount equal to each individual lot's proportionate share, on an area basis, of the assessed valuation of the entire tract immediately before the platting thereof. When an individual lot has been sold, leased or improved, it shall then be assessed for taxation as provided by Chapters 428 and 441.

"The provisions of this section shall have no effect upon special assessment tax levies."

This statute has been considered as a limited preferential assessment law. *Taxation of Farmland on the Rural-Urban Fringe*, Agricultural Economic Report No. 119, Economic Research Service, U. S. Department of Agriculture (September 1967) at p. 40.

The Court, in the *Builders Land Co.* case held that the history of legislation may properly be considered in case of ambiguity and that resort to legislative journals for the legislative history of a statute of doubtful meaning is proper. The Court noted that the legislature refused to adopt certain amendments to the statute in the enactment thereof. The Court said at 255 Iowa 236:

"The Senate refused to concur in this amendment and the bill passed without it. Thus a proposal to limit improvements to those within the boundries of individual lots was rejected. There is no fair basis for an assumption the language was stricken because it was deemed surplusage.

"Striking the provisions just quoted is an indication the statute should not, in effect, be construed to include it. This circumstance is a significant factor in a proper interpretation of section 409.48 . . ."

The Court stated that rules against reading anything into a statute were particularly applicable to provisions expressly rejected by the legislature. We are also of the opinion that we cannot read into the words "as reflected by its current use," the words "productive and earning capacity" as the *sole* meaning of current use.

It is our opinion that the words "current market value of agricultural property as reflected by its current use" within §1(1) of Chapter 354, Acts of 62nd General Assembly mean that agricultural property is not to be assessed according to its value as potential nonagricultural property, but is to be valued according to its use as agricultural property which can be determined from its sales price for such use or sales prices of comparable property for such use in normal transactions reflecting market value, all of which must be fair and reasonable, taking into account the availability or unavailability of persons interested in purchasing the property. In the event market value of agricultural property cannot be determined in this manner by the assessor, he may consider the factors enumerated in the statute as well as all others which would assist in

determining fair and reasonable market value, but no one factor alone is sufficient to determine market value and special or use value to the present owner shall not be considered at all.

CAVEAT

As previously noted herein the Iowa Supreme Court has held in *Builders Land Co. vs. Martens*, 255 Iowa 231, 122 N. W. 2d 189 (1963) that resort to the legislative journals for the legislative history of a statute of doubtful meaning is proper and that in resolving ambiguities the court in a proper case may consider the fact that the legislature refused to adopt certain amendments to the statute in question in the course of such statute's enactment. While I am bound to follow this decision of the supreme court, and have applied its reasoning in partial support of this opinion, I believe that a rule of statutory construction which takes into consideration action which the legislature refused to take is so fraught with possibilities for abuse that it should be used sparingly, if at all. One difficulty with such a rule is that resourceful legislators might offer an amendment to a bill knowing that such amendments would be defeated and thereby unfairly influence its statutory construction.

September 9, 1968

TAXATION: Sales and Use Tax Status of National Banks — (1) National Banks purchasing tangible personal property are exempt from the payment of Iowa sales and use taxes. (2) National banks are entitled to refunds of Iowa sales and use taxes paid upon which they are exempt from payment, but the Director of Revenue cannot allow such refunds unless refund claims are filed with the Department of Revenue within the limitation periods prescribed by §422.66 of the Code. (3) National banks, and not permit holders or County Treasurers, are the only proper parties to file refund claims for Iowa sales and use taxes paid by such banks which are exempt from such taxation. (Murray to Forst, Dir. of Rev., 9/9/68) #68-9-1

Mr. W. H. Forst, Director of Revenue, Department of Revenue: In your letter of August 5, 1968, you requested an opinion of the Attorney General concerning the effect of the United States Supreme Court's recent decision in *First Agricultural National Bank of Berkshire County vs. Massachusetts State Tax Commission*, 88 S. Ct. 2173 (1968) on the Iowa Retail Sales and Use Tax Laws. In that case, the Supreme Court held that a national bank was exempt from Massachusetts sales and use tax on purchases for its own use of tangible personal property.

Your letter of August 5, 1968, includes a question inquiring whether the legal incidence of the sales and use tax on services under Division VII of Chapter 348, Acts of the Sixty-Second General Assembly (1967), fall upon a national bank as the recipient of the service which is taxed. By your letter of August 30, 1968, you withdrew this question because of pending litigation concerning these taxes on services and therefore this opinion will be confined to the questions relating to sales and use tax on tangible personal property.

Your specific questions are paraphrased as follows:

1. Does the legal incidence of the Iowa sales and use taxes fall upon a national bank which purchases tangible personal property so that the bank is exempt from payment of these taxes?

2. If a national bank is exempt from payment of Iowa sales and use

taxes, is the bank entitled to claim refunds for such taxes previously paid, and if so, is there a limitation time period for payment of such refunds?

3. Where a national bank has paid Iowa sales and use taxes to a County Treasurer or to a sales or use tax permit holder who have remitted such taxes to the Department of Revenue, may a national bank make a claim for refund of such taxes or must refund claims be filed by the County Treasurer or permit holders? If the permit holder is a proper party to claim the refunds, may a national bank, nevertheless, file such claims if waivers are secured from permit holders?

The Supreme Court, in the *First Agricultural National Bank* case, because of congressional legislation contained in 12 U.S.C. §548, found it unnecessary to reach the constitutional issue of whether a national bank should be nontaxable today as a federal instrumentality. 88 S. Ct. 2175. 12 U.S.C. §548 authorizes the states to tax a national bank as follows: (1) Tax the bank's shares. (2) Include dividends derived therefrom in the taxable income of an owner or holder thereof. (3) Tax the bank on its net income. (4) Tax the bank according to or measured by its net income. (5) Tax the bank on its real estate, according to its value, as other real property is taxed. The Supreme Court expressly held that 12 U.S.C. §548 prescribed the only ways in which the states could tax a national bank. 88 S. Ct. 2176, 2177.

Since state sales and use taxes are not one of those five enumerated ways in which Congress has authorized state taxation of a national bank, the Court held that a national bank was not subject to such taxes where the incidence thereof falls on the bank. The Massachusetts use tax was clearly imposed on the purchaser. The Massachusetts sales tax law required a retailer to pass the tax on to the purchaser and prohibited the advertising by any retailer that he would assume or absorb the tax. Based on these provisions of Massachusetts law, the Supreme Court rejected the contention that the sales tax was imposed upon sellers of tangible personal property and held that the legal incidence of such sales and use taxes was imposed on the purchaser, i.e., the national bank. Therefore, a national bank was held to be exempt from payment of these taxes under 12 U.S.C. §548. 88 S. Ct. 2178. With the above discussion of the *First Agricultural National Bank* case in mind, we now proceed to answer your questions.

1. The legal incidence of the Iowa sales and use taxes falls on a national bank which purchases tangible personal property. §422.48, Code of Iowa, 1966, requires a retailer to pass the sales tax on to the purchaser and §422.49 of the Code prohibits a retailer from advertising or holding out that he will assume or absorb the tax. §423.2 of the Iowa Code imposes the use tax upon every person who purchases tangible personal property for use in Iowa and so uses such property. Clearly, there is no difference between the legal incidence of the Massachusetts and Iowa sales and use taxes imposed upon the sale and use of tangible personal property and, consequently, a national bank is exempt from the payment of these Iowa taxes.

2. In regard to your second question, §422.66 of the Iowa Code provides as follows:

"If it shall appear that, as a result of mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions

of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the department. *No claim for refund or credit that has not been filed with the department within five years after the tax payment upon which a refund or credit is claimed became due, or one year after such tax payment was made, whichever time is the latter, shall be allowed by the director.*" (Emphasis supplied)

This statute also applies to use tax by virtue of §423.23 of the Code.

In the *First Agricultural National Bank* case, the Supreme Court noted that a long line of decisions firmly established that the states were without power to tax a national bank unless authorized by Congress. There is no language in this case which would indicate that the Court would only apply it prospectively. Therefore, it is clear that this decision has retroactive effect. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962).

A national bank is entitled to refunds of sales and use taxes paid, notwithstanding payment was of a voluntary nature on the part of the bank. In *Morrison-Knudsen Co. vs. Iowa State Tax Commission*, 242 Iowa 33, 44 N. W. 2d 449 (1951), the Iowa Supreme Court stated at 242 Iowa 43, 44:

"It appears the tax, except on the twenty-two items for which liability is conceded, was paid as a result of mistake of the tax commission in interpreting the law. Sections 422.66, 422.67 are mandatory in requiring such a tax to be credited against any tax due or to become due or refunded to the person who made the erroneous payment by certifying the amount of the refund to the comptroller. Here there is no tax due or to become due. The commission's mandatory duty was therefore to refund the tax. Mandamus lies to compel the performance of such duty . . .

"Sections 422.66, 422.67 are much like section 445.60, pertaining to ordinary property taxes . . . Because of this statute we have uniformly held mandamus lies to compel the refund of taxes erroneously or illegally paid even though the payment was voluntary . . ."

However, the second sentence of §422.66 contains limitation periods in which claims for refund of sales and use taxes paid are allowable by the Director of Revenue. Therefore, it is our opinion that no refund claims by a national bank of sales and use taxes paid should be allowed by the Director of Revenue unless such claims are filed with the Department of Revenue within five years after the sales or use tax payment upon which a refund is claimed became due, or one year after such tax payment was made, whichever time is the later.

3. Your third question is basically concerned with who should file refund claims of sales and use taxes paid by a national bank to collecting agents who in turn have remitted the taxes to the Department of Revenue. In 51 Am. Jur. §1175 at page 1010, the general rule is stated:

"Where Tax is Passed Along. — Generally, the proper party to recover a tax illegally exacted, the real party in interest; is the person actually bearing the burden of the tax — the person who, if the tax money is recovered will get it."

This same general rule also appears in 84 C.J.S. §639(d).

In *Twentieth Century Sporting Club vs. United States*, 34 F. Supp. 1021 (Ct. Cl. 1940), the Court held that one who collected taxes on sales of admissions to boxing matches was not entitled to claim a refund of

any excessive taxes collected under a statute which imposed the tax on sales of admissions, said tax to be paid by the person paying the admission price. The Court held that only the purchaser of the admission ticket who paid the tax was entitled to claim the refund.

In *Furman University vs. Livingston*, 244 S. C. 200, 136 S. E. 2d 254 (1954), the University sought a refund of taxes collected by it upon the sale of admissions to its football games. The South Carolina statute imposed a license tax on all paid admissions to places of amusement, exempted from the tax admissions charged by any eleemosynary or nonprofit corporation, and required the tax to be paid by the person paying the admission price and to be collected and remitted to the state tax commission by the person selling admissions. The Court held that the University was merely a collection agent of the tax and, therefore, had no legal standing to claim a refund of taxes erroneously or illegally paid. See also *Shamopin Country Club vs. Heimer*, 2 F. 2d 393 (D.C.W.D. Penn. 1924); *Maynard vs. Thrasher*, 77 Ga. App. 316, 48 S. E. 2d 471 (1948).

In view of the above authorities, §§422.48, 422.49, 423.6, and 423.11, and the Supreme Court's decision in the *First Agricultural National Bank* case, it is clear that the legal incidence of the Iowa sales tax on the sale of tangible personal property and the Iowa use tax on the use of tangible personal property is on the purchaser and that said taxes are not imposed directly on a permit holder or the County Treasurer as collecting agents of these taxes. It is our opinion that a national bank as the purchaser of tangible personal property is the only proper party to claim refunds of sales and use taxes paid thereon. No further response is required to the second part of your third question.

Because of the limitation periods expressed in §422.66 of the Iowa Code, a national bank should file claims for refund of Iowa sales and use taxes paid. However, it is our opinion that the Department of Revenue should defer any action on such claims pending the outcome of *Liberty National Bank vs. Buscaglia*, 21 N. Y. 2d 357 (1968), now on appeal to the United States Supreme Court, which could reach a result contrary to the *First Agricultural National Bank* case.

September 9, 1968

ELECTIONS: Nominations by party county central committee or by reconvened county convention. §43.98, Code of Iowa, 1966. Where no candidate of a political party is listed on the primary election ballot for a county office but there was a write-in candidate of the same party for each office who received less than 10% of the vote cast for governor by such party in such county at the last general election, a nomination for such office may be made either by the party county central committee or by a reconvened county convention. (Haesemeyer to Yoder, State Representative, 9/9/68) #68-9-2

The Hon. Earl Yoder, State Representative: I am writing in reply to your oral request for an opinion of the Attorney General with respect to the following:

In the recent primary election there was no Republican party candidate listed on the ballot for the office of Johnson County Auditor although an individual did receive a number of write-in votes for that office, but less than one-half the number of votes required for nomination

by §43.66. You have asked whether the Johnson County Republican Central Committee can nominate the individual who received the write-in votes as the Republican candidate for County Auditor in the general election or whether the county convention must be re-convened for such purpose.

In our opinion the nomination may be made by either the county central committee or by re-convening the county convention.

Sec. 43.98, Code of Iowa, 1966, provides:

"The county convention, if the convention is held following the primary election, may make nominations for any offices for which no nomination exists due to the failure of any candidate to receive the number of votes required for nomination by section 43.66. If the county convention was held preceding the primary election, the party county central committee may make such nominations or may reconvene the delegates of the last preceding county convention for such purpose."

This statutory provision appears on its face to be clearly dispositive of the question you raise. Moreover, as stated in a prior opinion of the Attorney General in which a similar question was presented:

"A write-in candidate, under Section 43.66, becomes a 'candidate' by the fact that he may receive one write-in vote and thereby a convention may be called as this type of 'candidate' comes under Section 43.98 which specifically mentions Section 43.66, and which contemplates nomination procedures for 'candidates' who do not have enough votes. If there are 'candidates' who do not have enough votes, then a convention may be called under Section 43.98."

A copy of the entire opinion, 66 OAG 197, as well as another opinion, 64 OAG 186, involving an ancillary question are attached hereto and made a part hereof.

September 11, 1968

ELECTIONS: Legislative subdistricts, nomination where no primary candidate receives 35% of the vote. §§43.65 and 43.101, Code of Iowa, 1966. Where no party primary candidate for a seat from a legislative subdistrict receives 35% of the vote cast by his party for such office in the primary election in such subdistrict, a subdistrict convention comprised of the delegates to the party county convention from the precincts comprising the election subdistrict may be convened for the purpose of making the nomination. (Haesemeyer to Robinson, Secretary, Executive Council, 9/11/68) #68-9-3

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is made to your letter of September 10, 1968, in which you state:

"The Executive Council, in meeting held September 9, 1968, directed that I inquire of you whether or not the person receiving the highest number of votes in the subdistrict of the county is required to receive not less than 35% of all the votes cast by the party for such office before he shall be duly and legally nominated as the candidate of the party for such office, as provided in Sec. 43.65 of the Code of Iowa.

"If the Executive Council, acting as a canvassing board finds the foregoing situation to be the case, is this a vacancy such as is described in Sec. 43.87 of the Code of Iowa and what duties, if any, must the canvassing board initiate to properly fill this position on the ballot?"

§43.65, Code of Iowa, 1966, provides:

"43.65 Who nominated. The candidate of each political party for each office to be filled by vote of the people having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five percent of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except as provided in section 43.66."

The foregoing statutory provision plainly requires that to be duly and legally nominated the candidate of a political party for an office to be filled by a vote of the people must have received at least 35% of all the votes cast by the party for such office at the primary election. We have previously ruled in an opinion dated June 13, 1967, to State Senator John M. Ely, Jr. that the term "subdistrict" in H.F. 736, Chapter 105, Acts of the 62nd General Assembly, means "district" within the meaning of sections 4 and 5 of Article III of the Constitution of Iowa and that candidates for the offices of state senator and representative must reside in the "subdistrict" they may seek to represent. And in two opinions to State Senator Lee H. Gaudineer and Secretary of State Melvin D. Synhorst each dated January 8, 1968, we ruled respectively that candidates for office from "subdistricts" are required to obtain the signatures of 2% of the electors of the "subdistrict" from which they are running and that in determining by party the vote cast for governor at the last general election for the purpose of determining the number of signatures required on the nomination papers of candidates running from such subdistricts records in the office of the county auditor of the vote cast in each precinct comprising such subdistrict may be used. Applying the reasoning of the foregoing opinions to the situation you present it is our opinion that a party candidate from a subdistrict of a county in the recent primary election would have to have received not less than 35% of all the votes cast by his party for such office before he could be duly and legally nominated.

Your second question is whether or not there is a vacancy such as is described in §43.87, Code of Iowa, 1966, in the situation where no candidate receives 35% of the vote. §43.87 provides:

"43.87 Vacancies in nominations and in offices for subdivisions of county. Vacancies in nominations made in the primary election, and nominations occasioned by vacancies in offices, when such offices are to be filled by a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision."

In our opinion §43.87 does not apply to situations where there are candidates in the primary election but no candidate receives 35% of the vote cast by his party in such election for the office in question. In an earlier attorney general's opinion it was stated that the only vacancy in office which members of a party central committee may fill under §43.87 is one occasioned by death, resignation or disqualification occurring since the primaries. 30 OAG 363.

The machinery for making party nominations in those situations where no candidate receives the required 35% of the vote is found in §§43.97 and 43.101, Code of Iowa, 1966, which provide in relevant part:

"43.97 The said county convention shall:

1. Make nominations for candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been

nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor if such convention is held following the primary election. If the county convention was held preceding the primary election, the delegates to the last preceding county convention shall be reconvened within five (5) days following the certification of the official election results for the purpose of making such nominations as may be required by this subsection."

"43.101 Each political party shall hold a senatorial, representational or congressional convention in districts composed of more than one county:

1. When no nomination was made in the primary election for the office of senator or representative in the general assembly, or of representative in Congress, as the case may be, because of the failure of any candidate to receive the legally required number of votes cast by his party for such candidates."

It is evident that the foregoing two statutory provisions do not contemplate a situation where a candidate is running for an office to be filled by voters of a subdistrict. Thus, §43.97 is directed to the situation where a county office is to be filled and §43.101 is pointed to the situation where legislative and congressional offices are to be filled by voters of a district greater than a county. Thus, when the legislature enacted the subdistricting law a void was left in the election law. Prior to the enactment of the subdistricting law the smallest legislative district would have been a county and §43.97 would have applied but for the fact that a county has been subdivided to form subdistricts.

However, as noted hereinbefore, when confronted with the analagous situation where the constitution did not contemplate election districts smaller than a county, we were able to conclude that for purposes of the residence requirements of §§4 and 5 of Article III of the Constitution an election district is the same as a subdistrict. Similarly in the two January 8, 1968 opinions hereinbefore referred to we had to deal with a situation where the election law was silent as to the number of signatures required on nomination petitions for candidates for office from a "subdistrict" smaller than a county although there, as in the case of §§43.97 and 43.101, the election law, §43.20, did make provision for election districts equal to or greater than a county. In the January 8, 1969, opinion to Senator Gaudineer we stated:

"Considering §43.20 in its entirety and construing it in pari materia together with this new redistricting law and the other election laws and practices of this state, and under the requirements of the 'one man, one vote' principle required by the United States Supreme Court in *Reynolds v. Sims*, 1964, 377 U. S. 533, 84 S. Ct. 13, 12 L. Ed. 2d 506, it may be necessarily and fairly implied that signatures of electors residing outside of the district (subdistrict) and who do not otherwise participate in the selection of the candidate or vote for him in either the primary or general election, are not requisite to the validity of his nomination papers. While an amendment to §43.20(3) could have better clarified the problem where the district is less than a county, outsiders have never historically participated in the selection of candidates except in their own districts and for whom they are entitled to vote. See OAG 6-13-67, mentioned above, and the cases cited therein. Thus, in a district (subdistrict) smaller than a county, it is not necessary that the number of signers be equal to two percent of the party vote in the whole county but the nomination papers will be sufficient if signed by two percent of the party vote in the district (subdistrict)."

In view of these prior three opinions of the attorney general and to

give effect to the manifest purpose of Chapter 43, it is our opinion that a subdistrict must be equated with a district notwithstanding the fact that it is smaller rather than greater than a county and §43.101 must be applied to the situation you present. Accordingly, a subdistrict convention comprised of the delegates to the county convention from the precincts comprising the subdistrict should be promptly convened for the purpose of making the necessary nomination.

After the appropriate subdistrict convention has been convened pursuant to §43.101 and the necessary nomination made the certification of such nomination should be made by the chairman and secretary of the convention and forwarded forthwith to the proper officer pursuant to §43.88 which provides:

"43.88 Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election."

Thereafter, depending on whether such nominations are received within forty-five days of the general election the secretary of state should take the action described in §43.73 or §43.74. Said §§43.73 and 43.74 provide:

"43.73 Secretary of state to certify nominees. Not less than forty-five days before the general election the secretary of state shall certify to the auditor of each county, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or by a party committee, or by petition, his place of residence, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot."

"43.74 Certificate in case of additional nominations. If, after the foregoing certificate has been forwarded, other authorized nominations are certified to the secretary of state, including nominations to be voted on at any time at a special election, said secretary shall at once, in the form provided in section 43.73, certify said nominations to the county auditors with a statement showing the reason therefor."

The executive council's responsibility in its capacity as a state board of canvassers will be discharged when it has taken the actions prescribed in §§43.69, 43.70 and 43.72.

I trust the foregoing answers the questions you have raised.

September 16, 1968

COUNTIES AND COUNTY OFFICERS: Purchase of real estate; vote required — §345.1, Code of Iowa, 1966. The purchase of a building costing in excess of $20,000 must be submitted to a vote of the people even though no new taxes will be required and ample funds are available from the sale of the county farm. (Haesemeyer to Yenter, Deputy Auditor of State, 9/16/68) #68-9-11

Mr. Ray Yenter, Deputy Auditor, Office of Auditor of State: Reference is made to your letter of July 8, 1968, in which you state:

"Palo Alto County has sold its county farm and the proceeds of the sale are credited to the county general fund.

"The county desires to purchase a building located at Emmetsburg, the county seat of Palo Alto County, to be used for county purposes, including county offices. The purchase price of the building is considerably in excess of twenty thousand dollars — $20,000.00. The proceeds of the sale of the county farm are more than the purchase price of the building the county proposes to buy.

"Your opinion is respectfully requested as to whether or not Palo Alto County may use the money, or a part thereof, realized from the sale of the county farm to purchase such building without first submitting the proposition to a vote of the electorate of the county."

§345.1, Code of Iowa, 1968, provides:

"345.1 Expenditures — when vote necessary. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed ten thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given as in other special elections. Except, however, such proposition need not be submitted to the voters if any such erection, construction, remodeling, reconstruction, or purchase of real estate may be accomplished without the levy of additional taxes and the probable cost will not exceed twenty thousand dollars."

The foregoing statutory provision is clear, plain and unambiguous. The fact that the proceeds of the sale of the county farm considerably exceed the cost of the building proposed to be purchased is irrelevant, and if the purchase price of the new building is in excess of $20,000.00, the proposition must be submitted to a vote of the people. 64 OAG 86, 62 OAG 112.

September 16, 1968

COUNTY CONSERVATION BOARD: Artificial Lakes. Sections 106.31 (1), 106.2(4), 106.17, 1966 Code of Iowa. Opinion dated November 6, 1967, is reaffirmed. The damming up of a nonnavigable stream creates an artificial lake, the boundaries of which extend to the new normal high water mark. Because of its size, §106.31(1) applies to this lake. (Seckington to Faches, Linn County Attorney, 9/16/68) #68-9-4

Mr. William G. Faches, Linn County Attorney: Receipt of your letter dated July 9, 1968, is hereby acknowledged.

In your letter you posed three questions pertaining to approximately thirty-five acres of backed-up water resulting from a dam constructed on Buffalo Creek. The questions you asked will be answered in the order they were posed.

Your first inquiry was whether the thirty-five acres of backed-up water formed an artificial lake.

The word "artificial" is defined as being in opposition to the word "natural." *California Casualty Indemnity Exchange v. Industrial Accident Commission*, Cal. App., 82 P. 2d 1115, 1116.

93 CJS *Waters* §103 — *Natural Lakes and Ponds,* defines a natural lake or pond as:

"A [natural] lake is a large inland body of water having little or no current, which is fed by surface waters or springs, and occupies a natural depression in the earth's surface. A pond is similar thereto, except that it may be artificial or natural and is of relatively smaller size."

It would thus seem that from the above-quoted definition of the words "artificial" and "natural lake" the thirty-five acres of water in question constitutes an artificial lake. The fact that the formation of this body of water was caused by and the result of a man-made structure, namely the construction of the dam on Buffalo Creek, further substantiates the conclusion that this body of water should be termed an "artificial lake."

There is an Attorney General's Opinion to the effect that a dam constructed across a navigable river does not create an artificial lake as defined in §106.31(1), 1966 Code of Iowa, (Opinion of Attorney General, Hendrickson to Faches — November 6, 1967). However, here we are not concerned with a navigable river but rather Buffalo Creek. Also in that opinion the case of *McCauley v. Salmon,* 234 Iowa 1020, 14 N. W. 2d 715, was cited, wherein the court stated that even though a dam raised the level of the river, the character of the portion of the stream affected was not changed and it remains a river.

In answering your question, this office is assuming that the character of Buffalo Creek has changed to such an extent that it does not come within the rule of *McCauley v. Salmon, supra.*

In your second question you inquired whether this artificial lake forms only as far back as the dam creates a new water level at a normal high water mark. This question must be answered in the affirmative.

The term "high water mark" is defined in the case of *State v. Sorensen,* 271 N. W. 234, 237, wherein the court stated:

"The high water mark therefore may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes."

It is a well-settled rule of law that the high water mark of a navigable stream is the dividing line between the bed of a river and the private property adjoining. *Wenig v. City of Cedar Rapids,* 187 Iowa 40. This rule may also be applied to the bed of a lake and the private property adjoining.

Your third and final question concerns §106.31(1) of the 1966 Code of Iowa as to whether this section may be cited when anyone operating an outboard motor is encountered on this "lake" by the proper enforcement officials.

In answering your question it must be kept in mind that the artificial lake in question must be under the "jurisdiction of the commission" as stated in §106.31(1). Waters of this state under the jurisdiction of the state conservation commission is defined in §106.2(4):

"Waters of this state under the jurisdiction of the state conservation commission means any navigable waters within the territorial limits of

this state, and the marginal river areas adjacent to this state, exempting only farm ponds, privately owned lakes and waters specifically delegated to local authorities."

Thus, if the artificial lake in question is a body of water under the jurisdiction of the state conservation commission, there are two sources of authority for the regulation of outboard motors on this lake. Section 106.17 gives local authorities the power to adopt any ordinance or local law relating to the equipment of vessels.

"The provisions of this chapter and other applicable laws of this state shall govern the operation, equipment, numbering and all other matters relating thereto of any vessel whenever such vessel is operated or maintained on the waters of this state under the jurisdiction of the commission, but nothing in this chapter shall be construed to prevent the adoption of any ordinance or local law relating to the operation of equipment of vessels. Such ordinances or local law shall be operative only so long as they are not inconsistent with the provisions of this chapter or the rules and regulations adopted by the commission."

Section 106.31(1) is the second authority, and probably the strongest for the regulation or prohibition of outboard motorboats on artificial lakes under the jurisdiction of the commission.

"No motorboats with inboard motors; motorboats of plane or gliding type, including combination plane and displacement types, propelled by an outboard motor; rowboats of displacement type with outboard motor, shall be permitted on any artificial lake under the jurisdiction of the commission except that rowboats or motorboats equipped with an outboard motor, not to exceed six horsepower shall be permitted upon any artificial lake of one hundred acres or more in size."

Since the body of water in question is less than one hundred acres, it comes within the complete prohibition of §106.31(1), *supra.*

Thus, it is the conclusion of this office that:

1. The thirty-five acres of water in question is an artificial lake.

2. The artificial lake forms as far back as the ordinary high water mark.

3. Section 106.31(1) is authority for prohibiting outboard motorboats on this artificial lake.

September 16, 1968

COUNTIES AND COUNTY OFFICERS — Graves of deceased servicemen — §§250.17 and 250.18, 1966 Code of Iowa. Charge for care and maintenance of servicemen's graves not otherwise provided for should be the same as the charge made to individuals for the care of burial lots of similar size in the cemetery. The municipality is not entitled to reimbursement from county where perpetual care is inadequate to maintain the grave and a municipal tax levy is made for such care and maintenance by a municipality. (Nolan to Wood, Hamilton County Attorney, 9/16/68) #68-9-6

Mr. Carroll Wood, Hamilton County Attorney: This replies to your request for an opinion concerning the interpretations of §250.17 and §250.18 of 1966 Code of Iowa in reference to the care and maintenance of graves of deceased servicemen and women of the United States. In your letter you stated that the city of Webster City has owned and operated a municipal cemetery for which a municipal tax is levied. The City has for

many years billed Hamilton County for the care and maintenance of the lots on which deceased servicemen or women are buried for the actual cost of maintenance based on the per lot cost in the entire cemetery. You then asked the following specific questions:

1. Do the Code sections referring to maintenance include all of the graves or grave sites in the cemetery lots whether or not said gravesites are occupied and regardless of the number of gravesites in the lot?

2. Is the municipality having control of the cemetery entitled to payment from the County for the full amount of the care and maintenance of the lots of deceased servicemen and women as defined by the Code, based on a per lot apportionment of the total care and maintenance of all of the lots in the cemetery?

3. Is the municipal tax levy such a provision for such care so that maintenance expense out of the general fund of the County as provided in Section 250.17 does not apply?

4. In the event that a burial lot has been purchased either by the County or by the survivors of the deceased, and such cost included perpetual care, is the municipality entitled to reimbursement for care and maintenance provided to the servicemen's grave where price paid for such perpetual care is inadequate to maintain the grave and a municipal tax levy is made for such care and maintenance by the municipality?

I am enclosing herewith a number of opinions issued by previous Attorneys General in response to similar questions. Based on these it is my view that your questions must be answered as follows:

1. No. 1966 OAG 5.65, 1926 OAG 373.

2. The charge for the care and maintenance of servicemen's graves not otherwise provided for should be the same as the charge made to individuals for the care of any other burial lots of similar size in the cemetery. 1944 OAG 73.

3. No. 1944 OAG 73.

4. No. 1934 OAG 510.

September 16, 1968

WORKMEN'S COMPENSATION: Reciprocity agreement with another state — §85.3(2), Code of Iowa, 1966. There is no authority under which Iowa could enter into reciprocal agreements with other states whereby the employers and workmen of each of the respective contracting states would be entitled only to the benefits provided by the workmen's compensation laws of their own states even though they might be conducting operations or performing services in other states. (Haesemeyer to Dahl, Industrial Commissioner, 9/16/68) #68-9-7

Mr. Harry W. Dahl, Industrial Commissioner, Iowa Industrial Commissioner: Reference is made to your letter of May 8, 1968 in which you state:

"Enclosed please find a document entitled 'Extraterritorial Reciprocity Agreement Between the Workmen's Compensation Bureau of the State of North Dakota and the Workmen's Compensation Service of the State of Iowa,' along with a copy of a cover letter received by this department from the Chairman of the North Dakota Bureau.

"We would appreciate it if you would examine these and render an opinion as to whether or not the Iowa Industrial Commissioner has the authority to enter such and if not, what changes would be necessary in order to comply with the Iowa Code."

Unfortunately, there is no provision in the Iowa Code similar to §65-08-02 of the North Dakota Century Code which authorizes the North Dakota Workmen's Compensation Bureau to enter into reciprocal agreements with other states whereby the employers and workmen of each of the respective contracting states can continue to be entitled to the protection of the benefits provided by the Workmen's Compensation laws of their own states, even though they might be conducting operations or performing services in the other states. Moreover, the provisions of the reciprocity agreement to the effect that the compensation law of North Dakota is the exclusive remedy available to employees of a North Dakota employer who may be injured in the course of employment while working temporarily in the state of Iowa, would appear to be in conflict with §85.3(2), 1966 Code of Iowa, which provides:

"Any employer who is a nonresident of the state, for whom services are performed within the state by employees entitled to rights under this or chapter 85A by virtue of having such services performed shall be deemed:

"a. To agree that such employer and employees shall be subject to the jurisdiction of the industrial commissioner and to all of the provisions of this chapter, chapters 85A, 86, and 87, as to any and all personal injuries sustained by an employee arising out of and in the course of such employment within this state.

"b. To appoint the secretary of state of this state as its lawful attorney upon whom may be served any and all notices authorized or required by the provisions of this chapter, Chapters 85A, 86, and 87 and to agree that any and all such services of notice on the secretary of state shall be of the same legal force and validity as if personally served upon such nonresident employer in this state."

Clearly the Commissioner has no power to eliminate by contract, rule, regulation or otherwise a remedy available to employees of non-resident employers working within the state of Iowa such as that which is afforded by §85.3(2). To accomplish such a result a legislative amendment of the Iowa Workmen's Compensation law would be required.

Thus, in answer to your question, it is our opinion that the Iowa Industrial Commissioner has no authority to enter into an agreement such as that attached to your letter of May 8, 1968, and if such authority is deemed desirable, it would be necessary for the General Assembly to adopt a statutory provision similar to that contained in §65-08-02 of the North Dakota Century Code.

September 16, 1968

COUNTIES AND COUNTY OFFICERS: Title to county hospital real estate — §§347A.1 and 347A.8, Code of Iowa, 1966. Title to the real estate of hospitals organized under Chapter 347A should be in the name of the county rather than the hospital trustees. (Haesemeyer to Lynch, Winneshiek County Attorney, 9/16/68) #68-9-9

Mr. Thomas C. Lynch, Winneshiek County Attorney: Reference is made to your letter of April 8, 1968 in which you state:

"Your opinion is requested as to whether your ruling of November 18, 1967, relating to title to county hospital real estate applies also to county hospitals organized under Chapter 347A of the Iowa Code?"

Our opinion of November 18, 1967 to which you refer, a copy of which is annexed hereto and made a part hereof, relates only to Chapter 347 county hospital real estate and not to Chapter 347A real property.

As pointed out in that opinion, §347.13, 1966 Code of Iowa, vests broad powers in the board of hospital trustees, including the authority to purchase, condemn, or lease a site for a public hospital and to provide and equip suitable hospital buildings. Under §347A.1, 1966 Code of Iowa, it is the county which is authorized and empowered to acquire, construct, equip, operate and maintain a county hospital and to acquire the necessary lands, rights of way and other property necessary therefore. Such section also provides that contracts for construction work for such a county hospital are to be awarded by the county board of supervisors. While §347A.1 does provide for the creation of a board of hospital trustees, such a board of trustees has much more limited powers than does its counterpart under §347. The board of trustees, under §347A.1 is, generally speaking, given only administrative control of the hospital. Thus, it would appear that the real estate of county hospitals organized under Chapter 347A, 1966 Code of Iowa, should be in the name of the county, rather than in the board of trustees of the hospital.

Further support for this position may be found in §347A.8, which provides in part:

"Any county undertaking to acquire, construct, equip, operate, and maintain a county hospital under the provisions of this chapter may enter into agreements with the board of directors or board of trustees of any corporation owning and operating existing hospital facilities in the county under which all assets of the corporation shall be conveyed to the county and the county shall assume and pay any existing indebtedness and liability of such corporation. A county may further acquire, by gift or purchase, existing privately owned property and hospital facilities located in the county to operate and maintain such property and facilities in conjunction with the hospital established under the provisions of this chapter and may issue revenue bonds pursuant to provisions of this chapter to pay all or any part of the purchase price of any such property and facilities."

Note that in the foregoing statutory provision, it is the county in each case which may acquire, construct, equip etc., and where assets are conveyed, they are conveyed to the county, and not to the board of hospital trustees.

September 16, 1968

COUNTIES AND COUNTY OFFICERS: Relief of indigent servicemen — §250.1, Code of Iowa, 1966. Funds raised for the relief of indigent servicemen pursuant to Chapter 250 must be used for direct relief and not services of a collateral nature such as employing an individual to counsel veterans generally, indigent or not, as to all types of relief and aid available to them. (Cullison to Klay, Sioux County Attorney, 9/16/68) #68-9-10

Mr. Earl T. Klay, Sioux County Attorney: In your letter of July 25, 1968, you requested a review of your opinion holding that funds raised for the relief of indigent servicemen, pursuant to Chapter 250, Code of Iowa, 1966, could be expended for the purpose of employing an individual to counsel veterans concerning all types of aid and relief available to

them. We do not concur with your opinion that such an expenditure is authorized by Chapter 250, Code of Iowa, 1966.

Our opinion is based on 46 OAG 62 construing §3828.051, Code of Iowa, 1939, which is identical to §250.1, Code of Iowa, 1966:

"A tax not exceeding one mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent men and women of the United States who served in the military or naval forces of the United States in any war including the Korean Conflict at any time between June 27, 1950, and July 27, 1953, both dates inclusive, and their indigent wives, widows and minor children not over eighteen years of age, having a legal residence in the county."

In the 1946 opinion it was held that such relief funds could not be used to defray expenses incurred by a County Veteran's Service Committee in the maintenance of a Service Welfare Center, the purpose of which was to disseminate to veterans generally, information regarding their rights and privileges. The import of this ruling appears to be that relief contemplated by the statute is direct "relief" of "indigent" veterans, not services of a collateral nature to veterans, whether indigent or not. We agree with this construction of §250.1.

September 17, 1968

ELECTIONS: Nominations by party state, county, district and subdistrict conventions and central committees where no candidate received the requisite number of votes in the primary election — §§43.52, 43.65, 43.66, 43.88, 43.97, 43.98, 43.101, 43.106, 43.109 and 43.110, Code of Iowa, 1966. Where no primary candidate received the number of votes required by §43.65, or in the case of write-in candidates by §43.66, nominations may nevertheless be made by a reconvened convention or in some cases by a party central committee. Where no primary candidates were on the ballot and no write-in votes were cast such nominations may still be made except where the office is to be filled by the voters of a county. Nominations so made may be certified to the secretary of state at any time so long as they are received in time to be printed on the general election ballot. (Turner to Landess, Deputy Sec. of State, 9/17/68) #S68-9-3

Mr. Robert C. Landess, Deputy Secretary of State: Reference is made to your letter of September 11, 1968, in which you state:

"If there is no candidate for an office on the ballot of the primary election, what situation must exist to enable a nomination to be made to be placed on the general election ballot?

"Is it necessary to have a write-in candidate in the primary before a nomination can be made subsequent to the primary? If nominations can be made, does the candidate who is to be nominated, have to have had write-in votes in the primary?

"Also, is a certain percentage of write-in votes required before a candidate can be considered for nomination? If nominations can be made, how are they made and how are they certified to the Secretary of State? If nominations can be made, what is the time limitation with which they must be filed with the Secretary of State? Does section 44.4 apply as to time limitations?"

In the interests of answering your questions in an orderly manner I have outlined the following six questions which I believe will cover all the matters you have raised.

1. May a nomination be made, and if so by whom, where there are three or more party candidates on the primary ballot but no candidate receives 35% or more of the vote cast, (a) for a statewide office, (b) for a seat in the United States House of Representatives, (c) for a county office, (d) for a state legislative office from a district larger than a county, (e) for a state legislative office from a district equal to a county, (f) for a state legislative office from a district (subdistrict) smaller than a county.

2. May a nomination be made and, if so by whom, where there are no party candidates in the primary but a write-in candidate received at least one vote although less than 10% of the vote cast for the party's candidate for governor in the district in the last general election and the office in question is (a) a statewide office, (b) a seat in the United States House of Representatives, (c) a county office, (d) a seat in the state legislature from a district larger than a county, (e) a seat in the state legislature from a district equal to a county, (f) a seat in the state legislature from a district (subdistrict) smaller than a county.

3. May a nomination be made, and if so by whom, where there were no party primary candidates on the ballot and no write-in votes were cast and the office in question is (a) a statewide office, (b) a seat in the United States House of Representatives, (c) a county office, (d) a seat in the state legislature from a district larger than a county, (e) a seat in the state legislature from a district equal to a county, (f) a seat in the state legislature from a district (subdistrict) smaller than a county.

4. Where nominations are permitted to be made in situations described in questions 1, 2 and 3 above what is the procedure for certifying such nominations to the secretary of state?

5. What, if any, time limitations apply to such certifications?

6. Do the time limitations set forth in §44.4, Code of Iowa, 1966, apply to the foregoing certifications?

The paragraphs which follow are numbered to correspond with the foregoing numbered questions and parts thereof.

1. §43.65, Code of Iowa, 1966, provides:

"43.65 Who nominated. The candidate of each political party for each office to be filled by vote of the people having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five percent of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office, except as provided in section 43.66."

It is clear from the foregoing that where there are three or more party candidates for a particular office on a primary ballot at least one of them must receive not less than thirty-five percent of all the votes cast by that party for the office in question for a nomination to have been duly and legally made. See also §43.52 for parallel provisions on county offices.

1(a). Where none of the party's candidates whose names appear on the ballot receive at least 35% of the votes cast and the office in question is a statewide office a nomination may nevertheless be made by a recon-

vened state convention. The controlling statutory provision is §43.109, Code of Iowa, 1966, which provides in relevant part:

"43.109 Nominations authorized. Said state convention shall make nominations of candidates for the party for any office to be filled by the voters of the entire state:

1. When no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor if such convention is held following the primary election. If the state convention was held preceding the primary election, the delegates to the last preceding state convention shall be reconvened within five days following the certification of the official election results for the purpose of making such nominations as may be required by this subsection."

Note that the state convention must be reconvened within five days following certification of the official election results.

1(b) Where no candidate whose name appeared on the primary ballot received at least 35% of the vote cast and the office is that of a member of the United States House of Representatives a nomination may nevertheless be made by a district convention made up of delegates from the congressional district in question. The controlling statutory provision is §43.101, Code of Iowa, 1966, which provides in relevant part:

"43.101 District convention. Each political party shall hold a senatorial, representational or congressional convention in districts composed of more than one county:

1. When no nomination was made in the primary election for the office of senator or representative in the general assembly, or of representative in Congress, as the case may be, because of the failure of any candidate to receive the legally required number of votes cast by his party for such candidates."

Note that there is no requirement that such a district convention be reconvened within five days.

1(c). Where none of the candidates whose names appear on the primary ballot received at least 35% of the votes and the office in question is a county office the nomination may nevertheless be made by a reconvened county convention. The controlling statutory provision is §43.97, Code of Iowa, 1966, which provides in relevant part:

"43.97 Duties performable by county convention. The said county convention shall:

1. Make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive the legally required number of votes cast by such party therefor if such convention is held following the primary election. If the county convention was held preceding the primary election, the delegates to the last preceding county convention shall be reconvened within five days following the certification of the official election results for the purpose of making such nominations as may be required by this subsection."

Note that here again that the convention must be reconvened within five days of the certification of the official election results.

1(d). See 1(b) above.

1(e). See 1(c) above.

1(f). Where no candidate on the primary ballot received at least 35% of the vote and the office in question is for a seat in the state legislature from a district (subdistrict) smaller than a county a nomination may nevertheless be made by a subdistrict convention comprised of delegates to the county convention from the precincts comprising the subdistrict in question. See the attached opinion of the attorney general to Stephen C. Robinson, Secretary of the Executive Council, dated September 11, 1968.

2. §43.66, Code of Iowa, 1966, provides:

"43.66 Minimum requirement for nomination. A candidate whose name is not printed on the official ballot, must, in order to be nominated, receive such number of votes as will equal at least ten percent of the whole number of votes cast for governor at the last general election in the state, or district of the state, as the case may be, on the ticket of the party with which such candidate affiliates."

It is clear from the foregoing that where a party has no primary candidates whose names are printed on the official ballot a write-in candidates must receive at least 10% of the votes cast for governor at the last general election in the relevant geographical district for the ticket of the party of such write-in candidate before such write-in candidate can be nominated. See also §43.52.

2(a). §43.110, Code of Iowa, 1966, provides:

"43.110 Nominations permitted. The state convention of a party, if the convention is held following the primary election, may make nominations for any office for which no nomination exists due to the failure of a candidate to file nomination papers for such office or due to the failure of any candidate to receive the number of votes required for nomination by section 43.66. If the state convention was held preceding the primary election, the party state central committee may make such nominations or may reconvene the delegates of the last preceding state convention for such purpose."

Under the foregoing statutory provision where there are no primary candidates names printed on the ballot but a write-in candidate does receive some number of votes, more than 1 but less than 10% of the votes by the party in question for governor at the last general election, a nomination may nevertheless be made by either the party state central committee or by a reconvened state convention.

2(b). Where the situation is such as that described in paragraph 2(a) above but the office in question is that of a member of the United States House of Representatives the controlling statutory provision is §43.106, Code of Iowa, 1966, which provides:

"43.106 Nominations permitted. A district convention of a party may be held to nominate candidates for any office for which no nomination exists due to the failure of a candidate to file nomination papers for such office, due to the failure of any candidate to receive the number of votes required for nomination by section 43.66 or to place a name on the ballot as authorized under subsection 1 of section 43.59."

Note that the nomination may be made only by a district convention and there is no provision for any central committee to make such a nomination.

2(c). Where the situation is similar to that described in paragraph 2(a) above but the office in question is a county office a nomination may be made by either the county central committee or by a reconvened county convention. The controlling statutory provision is §43.98, Code of Iowa, 1966, which provides:

"43.98 Nominations permitted. The county convention, if the convention is held following the primary election, may make nominations for any offices for which no nomination exists due to the failure of any candidate to receive the number of votes required for nomination by section 43.66. If the county convention was held preceding the primary election, the party central committee may make such nominations or may reconvene the delegates of the last preceding county convention for such purpose."

See also an opinion of the attorney general to State Representative Earl Yoder, dated September 9, 1968, a copy of which is attached.

2(d). See 2(b) above.

2(e). See 2(c) above.

2(f). Where the situation is similar to that described in paragraph 2(a) above but the office in question is that of a member of the state legislature from a district (subdistrict) smaller than a county applying the rationale of the September 11, 1968 opinion attached hereto it is our opinion that §43.106, Code of Iowa, 1966, would apply. See 2(d) above.

3(a). Where a party has no primary candidates on the ballot and receives no write-in votes and the office in question is a statewide office a nomination may nevertheless be made by either the party state central committee or a reconvened state convention under §43.110, Code of Iowa, 1966.

3(b). Where the situation is such as that described in 3(a) above but the office in question is a seat in the United States House of Representatives a nomination may nevertheless be made under §43.106 but only by a reconvened district convention.

3(c). Where the situation is similar to that described in paragraph 3(a) above but the office in question is a county office no nomination may be made. This is so because §43.98 dealing with county conventions makes no provision for the situation where there has been a failure of a candidate to file nomination papers for a county office such as is contained in §§43.106 and 43.110. A prior attorney general's opinion dated October 4, 1966, has stated that where there are no primary candidates names printed on the primary election ballot a primary candidate must have received at least one vote before it can be said that there has been a failure of any candidate to receive the number of votes required for nomination by §43.66.

3(d). Where the situation is similar to that described in paragraph 3(a) above but the office in question is that of a member of the general assembly from a district larger than a county a nomination may nevertheless be made under §43.106. See 3(b) above.

3(e). No nomination may be made. See 3(c) above.

3(f). Where the situation is similar to that described in 3(a) described above but the office in question is that of a member of the general assembly from a legislative subdistrict the rationale of the September 11, 1968 opinion referred to above, attached hereto, would apply and the nomination could be made under §43.106. See 3(b) above.

4. Nominations made in the foregoing situations should be certified to the secretary of state pursuant to §43.88, Code of Iowa, 1966, which provides:

"43.88 Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election."

5. There is no time limit on such certifications other than that they must be received by the secretary of state in time for the names of the nominees to be printed on the official general election ballot.

6. In our opinion §44.4, Code of Iowa, 1966, does not apply to nominations made in the situations described herein. While on its face such section 44.4 would appear to apply to all nominations made under the provisions of Chapter 43, Nominations by Primary Election, Chapter 44, Nominations by Nonparty Organizations, and Chapter 45, Nominations by Petition, it is necessary to give it much more limited application in order to harmonize with numerous other provisions of the election law including those to which reference has been made hereinbefore.

September 17, 1968

LIQUOR, BEER AND CIGARETTES — Authority of Liquor Control Commission to issue special class "B" beer permits to air common carriers and passengers carrying boats and ships — §§123.27, 124.14, Code of Iowa, 1966. There is no statutory authority for the Commission to issue special class "B" beer permits to other than dining car or railway companies. A class "D" liquor license may be issued to air common carriers and certain passenger carrying boats and ships although such carriers are not able to obtain a special class "B" beer permit. (Claerhout to Lemon, Director, Law Enforcement Div., Iowa Liquor Control Commission, 9/17/68) #68-9-5

Mr. Harlan L. Lemon, Director, Law Enforcement Division, Iowa Liquor Control Commission: This is in response to your letter of September 11, 1968, wherein you have requested an opinion as follows:

"Would the Commission be correct in issuing a state beer permit to air common carriers and passenger carrying boats and ships pursuant to section 124.14? In the event such action would not be correct, could the Commission issue a liquor control license to such an applicant without the applicant having obtained a retail beer permit?"

Section 124.14 of the 1966 Iowa Code states in pertinent part:

"Subject to the provisions of this chapter, any dining car company or railway company may make application to the commission for a special class 'B' permit, and the commission may issue a permit to any such

company which shall authorize the holder thereof to keep for sale and sell on any dining car, sleeping car, buffet car or observation car operated by such applicant in, through or across the state, beer . . ."

The words of §124.14 are clear and specific. There is repeated reference to various types of railroad cars but no mention of any other common carriers such as boats or airplanes. The Iowa Supreme Court has often subscribed to the rule of statutory construction that express mention of one thing in a statute implies the exclusion of others, the Latin phrase being "expressio unius est exclusio alterius." *Dotson v. City of Ames,* 1960, 251 Iowa 467, 101 N. W. 2d 711. Because there appears to be no other provision of the beer law which allows a special class "B" beer permit to be issued to an air common carrier or passenger carrying boat or ships, the answer to your first question is both clear and unavoidable. The Iowa Liquor Control Commission is without statutory authority to issue special class "B" beer permits except to "any dining car company or railway company."

Based on the above conclusion that the commission has no statutory authority to issue special class "B" beer permits to air common carriers or passenger carrying boats and ships, your inquiry next confronts the effect on such carriers in making application for liquor license. According to §123.27(6)(d), 1966 Code of Iowa:

"A class 'D' liquor control license may be issued to a railway corporation, to an air common carrier, and to passenger-carrying boats and ships for hire with a capacity of twenty-five persons or more operating in inland or boundary waters, and shall authorize the holder thereof to sell or furnish alcoholic beverages to passengers for consumption only on trains, watercraft as described herein, or aircraft, respectively. Each such license shall be good throughout the state . . .

Section 123.27(4) provides that liquor license applicants shall possess, among other requirements, ". . . a retail beer permit as defined in Chapter 124." A comparison of the various types of beer permits allowed by Chapter 124 shows, as previously discussed, that a special class "B" permit is provided for trains but not for any other common carriers. Although other types of common carriers may be able to qualify for those kinds of beer permits issued by local authorities according to the provisions of Chapter 124, it is clear that the legislature did not provide the other carriers with the same simple method of obtaining a state wide beer permit from the commission, as was done for the railroads. Assuming, without deciding, that air common carriers and passenger carrying boats and ships are left without the opportunity of obtaining a retail beer permit under Chapter 124, then an inconsistency exists between §§123.27(4) and 123.27(6)(d). Reading the general requirements placed on all liquor license applicants in §123.27(4) literally, the legislatures clear intent to allow class "D" liquor licenses to air common carriers and passenger carrying boats and ships is rendered void.

Ordinarily, the courts have followed the rule of statutory construction which harmonizes statutes unless they are in direct conflict and if two interpretations are possible, the logical result will be reached rather than the illogical. *Hardwick v. Bublitz,* 1961, 253 Iowa 49, 111 N. W. 2d 309. An interpretation which would render void the clear intent of the legislature to allow the commission to issue class "D" liquor licenses to specifi-

cally mentioned common carriers is not reasonable and cannot be followed. However, it is logical to find that if the legislature has not made provision for air common carriers and passenger carrying boats and ships to hold "a retail beer permit as defined in chapter 124," that part (and only that part) of §123.27(4) is not applicable to those carriers applying for a class "D" liquor license. Thus, it is my opinion that although there is no statutory authority for the commission to issue a special class "B" beer permit to air common carriers and passenger carrying boats and ships, the commission may issue class "D" liquor license under §123.27 (6)(d) to those abovementioned carriers meeting all requirements of §123.27(4) except that they need not hold a beer permit under that provision.

September 17, 1968

CITIES AND TOWNS: Playgrounds and recreation centers — §§28E.3, 297.22, 377.1, Code of Iowa, 1966. (1) A school board and city council have authority to enter into a lease, from the school district to the city, for land to be used, at least initially, as a playground or recreation center. (2) Where reasonable, a governmental agency or body may properly approve a lease, the term of which is longer than the terms of office of the officers of the governmental body approving the lease. (3) A city must, prior to acquiring lands to be used for playgrounds or recreation purposes, hold an election as required by §377.1. (4) The school district and city may split the cost of demolition of an unneeded structure on the premises. (Martin to DeKoster, State Senator, 9/17/68) #68-9-8

The Hon. Lucas J. DeKoster, State Senator, 50th District: In your letter of July 24, 1968, and in a letter of August 9, 1968, from the city attorney of Rock Rapids, Iowa, the following factual situation is presented:

The city council and school district of Rock Rapids, Iowa, desire to enter into a lease arrangement under which one-half block of real estate located in the city of Rock Rapids would be leased by the Board of Directors of the school district to the city. The purpose of the lease would be to provide a playground and recreation center in an area of Rock Rapids needing such a facility. There is currently a building located on the land which the school board and city propose to have demolished. Funds for this purpose will be provided by the school board and the city each furnishing $1,250. The city's $1,250 would constitute the rental for the first year. Thereafter, the rental fee would be $100 per year.

Based upon this factual situation the following questions are presented:

1. Do the school board and the city council have authority to enter into such a lease?

2. Could such a lease covering a five-year period contain an option to renew for a like period?

3. May the city enter into such a lease without the necessity of the election referred to in §337.1, Code of Iowa, 1966?

4. Do the school district and city have authority to split the cost of the demolition of the building located on the premises?

There is little question that a school district has the power, within certain limits, to lease its realty. Section 297.22, Code of Iowa, 1966, provides in pertinent part as follows:

". . . The board of directors of other school corporations may sell, lease, or dispose of, in whole or in part, any school house or site or other property belonging to the corporation of a value not to exceed the following amounts:

"1. Twenty-five hundred dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was two hundred or less.

"2. Five thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was more than two hundred but less than five hundred.

"3. Ten thousand dollars in school districts which maintain a high school and in which the average daily attendance in the preceding year was five hundred or more.

"4. Five hundred dollars in any school district which does not maintain a high school.

"Proceeds from the sale, lease or disposition of real property shall be placed in the school house fund and proceeds from the sale, lease or disposition of the property other than real property shall be placed in the general fund.

"Before the board of directors may sell, lease or dispose of any property belonging to the school corporation it shall comply with the requirements set forth in sections 297.15 to 297.20, inclusive and sections 297.23 and 297.24."

It therefore appears that the school district has the authority to lease the real estate upon compliance with the provisions of §297.22, Code of Iowa, 1966. 1966 O.A.G. 2.4.

This office is unable to state whether the consideration of $100 per month after the first year, or the $1,250 for the first year is adequate consideration. Nor are we asked to examine the issue of whether or not the furnishing of such a service by the city, e.g. supervising, maintaining, and establishing a playground, may in and of itself constitute some consideration. In any event there must be some consideration. 1966 O.A.G. 2.4.

The city is likewise empowered to acquire playgrounds and recreation centers or lands for the purpose thereof by lease. Section 377.1, Code of Iowa, 1966, provides as follows:

"Cities may, when authorized by the voters, provide one or more playgrounds and recreation centers, and may construct and equip a recreation building either on lands to be acquired, or on lands already owned or to be leased by the city. The number and location thereof shall be determined by the city council."

This section, in the case of *Fetters v. City of Des Moines*, ...Iowa ....., 149 N. W. 2d 815 (1967) was considered substantial enough authority, upon which to base a lease of a playground from a school district to a city, to attach a quasi-ownership liability to the city for a child's damages, received from a defective merry-go-round.

It would therefore appear that both the school district and the city would have authority to enter into a lease of land to be utilized by the city for a playground or recreation center.

Where reasonable, a governmental agency or body may properly ap-

prove a lease the term of which is longer than the terms of office of the officers of the governmental body approving the lease. 1940 O.A.G. 458; 1964 O.A.G. 18.18. As a matter of law, the term of the instant lease does not appear to be patently unreasonable. However, the factual determination of reasonableness should be made by the local authorities who are familiar with all the circumstances.

Section 377.1, Code of Iowa, 1966, provides in pertinent part as follows:

"Cities may, *when authorized by the voters*, provide one or more playgrounds and recreation centers. . . ." (emphasis added)

The clear language of this statute requires that an election be held as a condition precedent to your contemplated action. 1966 O.A.G. 2.4.

The city and the school district may divide the cost of demolition of an unneeded building on the premises. It cannot be gainsaid that the city's power to provide playgrounds and recreation centers includes the power to remove structures therefrom. Likewise, a school district's general authority to manage and control its lands, at least impliedly, empowers them to improve it with a view toward a specific use. See also §28E.3, Code of Iowa, 1966.

September 17, 1968

STATE OFFICERS AND DEPARTMENTS: Salaries and longevity distinguished — §257.24, Code of Iowa, 1966; Chapter 1, §40, Acts of the 62nd G. A. Longevity pay is not salary within the meaning of §257.24, Code of Iowa, 1966, and Chapter 1, §40, Acts of the 62nd G. A. (Turner to Johnston, State Supt. of Public Instruction, 9/17/68) #68-9-12

Mr. Paul F. Johnston, State Superintendent of Public Instruction: Reference is made to your letter of July 22, 1968, in which you state:

"The State Board of Public Instruction desires to establish a longevity pay plan, for assistant superintendents of public instruction, within the meaning of 'longevity pay' as distinguished from 'salary,'' defined in your opinion of July 26, 1967, to State Representative E. A. Hicklin.

"Your opinion is requested as to whether the longevity pay proposed by the enclosed resolution would be in violation of either section 257.24 or chapter 1, section 40, 62nd G. A., in the event that the total sum of longevity pay under the resolution and the existing salary to which such longevity increments were added was in excess of the percentage limits for 'salary' specified in said sections of law."

§257.24, Code of Iowa, 1966, provides in relevant part:

"257.24 Salaries of superintendent and assistants. The salary of the superintendent of public instruction shall be fixed by the general assembly. The salaries of the assistant or assistants provided for in section 257.22 shall be fixed by the state board but not to exceed eighty percent of the salary of the superintendent. * * *."

Chapter 1, §40, Acts of the 62nd General Assembly, is the appropriation to the department of public instruction for the biennium beginning July 1, 1967. Among other things such §40 provides that, "The salary of any employee of the department of public instruction shall not exceed eighty-five (85) percent of the salary of the superintendent."

In our opinion of July 26, 1967, we were called upon to construe the

language of §66 of Senate File 853, now Chapter 1, §66, Acts of the 62nd G. A., in substance similar to the language of §257.24 and Chapter 1, §40, hereinbefore set forth. In that opinion we concluded that for the purpose of computing the salary limitations contained in §66 longevity pay should be excluded.

We see no reason why the same conclusion should not be reached with respect to the question you present. Accordingly, it is our opinion that the longevity pay proposed by the resolution attached to your letter would not be in violation of either §257.24, Code of Iowa, 1966, or Chapter 1, §40, Acts of the 62nd G. A., in the event that the total sum of longevity pay under the resolution and existing salary to which such longevity increments were added were to exceed the percentage limits for salary contained in said sections of law.

This opinion is limited strictly to the question asked and should not be construed as approval of the resolution, the amounts of the longevity increments, or the power of the State Superintendent, the Department of Public Instruction or the State Board of Public Instruction to adopt such a plan.

September 19, 1968

IOWA NATIONAL GUARD TECHNICIANS — §29A.28, 1966 Code of Iowa. National Guard Technicians are state employees having suffered no loss of pay within the provisions of §29A.28, and are not entitled to severance pay provided in the foregoing numbered section. (Strauss to Andersen, State Representative, 9/19/68) #68-9-13

Hon. Leonard C. Andersen, State Representative: Reference is herein made to your recent request for an opinion as to whether the Air National Guard Technicians are entitled to one month's severence pay in the state of Iowa upon their call up to active duty in the army.

These Technicians are members of the Iowa National Guard and at this time are full time employees of the State of Iowa, although paid from Federal funds. The statute under which this situation arises is §29A.28, 1966 Code of Iowa, providing as follows:

"All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces or nurse corps of this state or nation, or who are or may be otherwise inducted into the military service of this state or of the United States, shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence. The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence."

A like question to that propounded by you involving this statute was considered by this department previously, and answered by opinion appearing in the report for 1956, page 166, copy of which is hereto attached and by reference made a part hereof.

On the authority hereof, I am of the opinion that the Air Guard Technicians have not suffered a "loss of pay from the State of Iowa," and

therefore are not entitled to the thirty day severence pay provided by the foregoing numbered Section.

June 8, 1956

PUBLIC EMPLOYEES — MILITARY LEAVE. The phrase "without loss of pay during the first thirty days of such leave of absence" as used in section 29.28, Code 1954, refers to "pay" as a civilian public employee.

Mr. Leo J. Tapscott, Polk County Attorney, Des Moines, Iowa: Receipt is acknowledged of your letter of May 26th as follows:

"Section 29.28 of the Code of Iowa, 1954 provides:

" 'All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, organized reserves or any component part of the military, naval, or air forces * * * shall, when ordered by proper authority to active state or federal service, be entitled to a leave of absence from such civil employment for the period of such active state or federal service, without a loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence.'

"It has been the practice of the Independent School District of Des Moines to pay an employee, when he is called into military service for reserve training or full time active duty, the difference between his military pay and his school district pay for the first thirty days of his service. For example, if he were gone two weeks and he received $50.00 military pay and if his teaching salary was $300.00, the School District would pay him $250.00.

"One employee, whose rank is sufficiently high that he receives more pay from the military when on duty than he does from his teaching salary, the School District has paid nothing to on the theory that he had suffered no loss of pay.

"This employee has now presented a claim to the Independent School District for his full salary as a teacher covering the first thirty days of his military service. The School District has not made payment to date on the theory that there was no loss of pay while in the military service and would like an Attorney General's opinion as to whether or not this employee is entitled to any pay and as to whether or not the rule heretofore adopted by the Board, of paying to an employee the difference between his military pay and the pay he received from the School District for the first thirty day period, or part thereof, that he is in military service, is a compliance with Section 29.28 of the Code.

"The Attorney General's opinions for 1936, page 619, for 1940, page 587, for 1940, page 579 and 1942, page 136, all deal with the question of leave of absence, but none of them specifically answers the question raised by the Independent School District of Des Moines."

It is our opinion that the phrase "without loss of pay" as used in section 29.28 means without loss of pay from the state, subdivision thereof or municipality. There is no authority in the section for deduction of military pay from regular salary. The section clearly contemplates that the first thirty days of military leave shall be with full pay. This is the administrative construction which has consistently been followed by all state departments since the enactment of the law.

September 19, 1968

IOWA PUBLIC EMPLOYEES RETIREMENT SYSTEM: Status of technicians as state employees — Chapter 97B, 1966 Code of Iowa. Technicians now regarded as state employees lose such status on January 1,

1969, when such technicians by Act of the 90th Congress, S. §3865, become federal employees and they may not retain participation in the Iowa Public Employees Retirement System by election. (Strauss to Miller, Adjutant General, 9/19/68) #68-9-14

Mr. Junior F. Miller, Major General, The Adjutant General: Reference is herein made to yours of the 15th inst. in which you submitted the following:

"S. 3865, recently passed by the Congress and signed by the President, (see Congressional Record, July 25, 1968), entitled 'The National Guard Technicians Act of 1968,' provides as follows:

" 'Sec. 2, Title 32 U. S. Code is amended as follows:

(1) Section 709 is amended to read as follows:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in —

'(1) the administration and training of the National Guard; and

('2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this Title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. * * *'

"In 1945 it was established that technicians, although compensated by Federal funds, were state employees and as such were subject to the benefits and obligations of the Iowa Public Employees Retirement System and PL 87-224 (1961) provided Federal funding authority in support of the employer's (State) share of costs incident to participation of technicians in the Program as authorized by State-Federal agreement.

"The Attorney General of Iowa, in an Opinion to the Executive Council (16 Feb. 1965), ruled that National Guard technicians were State employees and eligible for membership in State sponsored insurance programs.

"Section 6.(a) of S. 3865 provides as follows:

" 'Notwithstanding section 709 (d) of Title 32, U. S. Code, a person who, on the date of enactment of this Act, is employed under section 709 of Title 32, United States Code, and is covered by an employee retirement system of, or plan sponsored by a State * * *, may elect, not later than the effective date of this Act, not to be covered by subchapter III of Title 5, United States Code, and with the consent of the State concerned * * *, to remain covered by the employee retirement system of, or plan sponsored by, that State * * *.'

"Letter, National Guard Bureau, dated 7 August 1968, subject, 'Election to Remain Under State Retirement System,' copy inclosed, directs the Adjutant General of Iowa to submit a one-time report (para. 6c) not later than 15 December 1968, reflecting, among other things, the number of technicians electing to remain under the State retirement system,

and (para. 6b) an accompanying blanket consent statement by an appropriate State agency authorizing and approving such action.

"Opinion is respectfully requested as to whether or not Iowa law will permit technicians, who so elect, to continue participation in the IPERS Program and the State Employee's Group Health Insurance Program, and if such participation may be elected, the State Agency competent to authorize and approve such action."

In reply thereto, I advise you that there is no authority either express or implied for the State of Iowa to permit technicians who are now as state employee members of the Iowa Public Employees Retirement System, to retain by their election such membership after the effective date of the provisions of §3865, to wit January 1, 1969. Reason for such conclusion is based upon the following:

(1) §97B.41, §2, (Amended Ch. 121, §9, 62nd G. A., Ch. 237, §6, 62nd G. A., 1966 Code of Iowa provides:

"The term, 'employment,' means any service performed under an employer-employee relationship under the provisions of this chapter."

Section 3 thereby defines the term 'employer and employee' in terms as follows:

"The term, 'employer' means the state of Iowa, the counties, municipalities and public school districts therein and all of the political subdivisions thereof and all of their departments and instrumentalities, all hereinafter called political subdivisions thereof and all of their departments and instrumentalities, all hereinafter called political subdivisions, as of July 4, 1953.

"The term, 'employee' means any individual who is in employment as defined in this chapter, except

"'(1) Members of the general assembly, elective officials in positions for which the compensation is on a fee basis, elective officials of school districts, elective officials of townships, and elective officials of other political subdivisions who are in part-time positions."

In accordance with the foregoing, the State of Iowa is the employer and any individual who is in employment as defined in this chapter, is a state employee. In accordance with §97B.42 as amended by Chapter 121, §10, 62nd G. A., such membership by an employee is mandatory. Such Section provides the following:

"Each employee whose employment commences after July 4, 1953 or who has not qualified for credit for prior service rendered prior to July 4, 1953, or any publicly elected official of the state or any of its political subdivisions, other than individuals who are students and who devote their time and efforts chiefly to their studies, rather than to incidental employment, shall become a member upon the first day in which such employee is employed. He shall continue to be a member so long as he continues in public employment except that he shall cease to be a member if after making said election he joins another retirement system in the state which is maintained in whole or in part by public contributions or payments which has been in operation prior to July 4, 1953 and was subsequently liquidated and may have thereafter been re-established. However, the participation on such other retirement system shall be voluntary and shall not be a condition for continuance of employment."

Thus, at the effective date of S. §3865, Technicians shall become federal employees and thereby lose their status as state employees and their participation in the Iowa Employment Retirement System ceases by operation of the foregoing federal and state statutes. There is no pro-

vision in §97B.42, 1966 Code of Iowa or otherwise, for acquiring membership in the Iowa Public Employees Retirement System by election. The state of Iowa has not given its consent to the admission to Iowa Public Employees Retirement System of Federal Employees by their election.

September 25, 1968

COUNTIES AND COUNTY OFFICERS: Board of Supervisors, aid to Harrison Treatment and Rehabilitation Center — Chapter 28E, §§224.2, 230.24, Code of Iowa, 1966. The Polk County Board of Supervisors may enter into an agreement to furnish financial assistance to the Harrison Treatment and Rehabilitation Center for the treatment, care and rehabilitation of alcoholics. (Turner to Fenton, Polk County Attorney, 9/25/68) #S68-9-4

Mr. Ray Fenton, Polk County Attorney: You recently requested my opinion as to whether the Polk County Board of Supervisors and the Broadlawns Polk County Hospital can supply financial and other assistance to the Harrison Treatment and Rehabilitation Center for the treatment and rehabilitation of alcoholics.

The Harrison Treatment and Rehabilitation Center is operated by the College of Osteopathic Medicine and Surgery, Des Moines, Iowa, and is financially supported by various private organizations as well as certain municipalities. It is licensed by the State of Iowa, which license is restricted to the care of alcoholics and their problems. You also stated in your letter that the Harrison Treatment and Rehabilitation Center does and would continue to relieve Broadlawns Hospital of the care for some alcoholic cases for which Broadlawns Hospital is not equipped.

Chapter 28E, Code of Iowa, 1966, contains broad authorization for the joint exercise of governmental powers. Section 28E.1 states:

"The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. This chapter shall be liberally construed to that end."

Section 28E.4 provides, specifically, that:

"Any public agency of this state may enter into an agreement with one or more public or *private agencies* for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force." (Emphasis added)

Section 28E.2 defines the term "public agency" as "any political subdivision of this state." Polk County is, therefore, a public agency within the meaning of this chapter.

Care and treatment of the mentally ill is an authorized county function. §230.24, Code of Iowa, 1966.

§224.2, Code of Iowa, 1966, makes statutes pertaining to the care of the mentally ill also applicable to the care of persons addicted to the excessive use of intoxicating liquors. §224.2 states:

"All statutes governing the commitment, custody, treatment, and maintenance of the mentally ill shall, so far as applicable, govern the commitment, custody, treatment, and maintenance of those addicted to the excessive use of . . . intoxicating liquors."

See also 66 OAG 113, in which it is held that a county board of supervisors may use the proceeds of a levy under §230.24 for the treatment of the mentally retarded by a private charitable corporation.

For the foregoing reasons, it is my opinion that the Polk County Board of Supervisors may enter into a contract with the Harrison Treatment and Rehabilitation Center to assist the Center in the treatment and rehabilitation of alcoholics.

September 25, 1968

SCHOOLS: Merged area community colleges, provisions of Ch. 279, Code of Iowa, 1966, apply to employment of teachers and superintendents — §§279.12, 279.13, 279.14 and 280A.23, Code of Iowa, 1966. Provisions of §279.12, 279.13 and 279.14 dealing with teachers and superintendents employment contracts, terms of employment and contract termination apply to merged area community colleges because of the provisions of §280A.23(4). (Turner to Johnston, Supt. of Public Instruction, 9/25/68) #S68-9-5

Mr. Paul F. Johnston, State Superintendent of Public Instruction: This replies to your request dated May 9, 1968, for an opinion on the following:

"Whether §280A.23(4), Code of Iowa, makes the provisions of §279.13, particularly those relating to continuing contract and method of contract termination, applicable to merged areas, or; whether the general power to contract conferred in §280A.23(5) amounts to 'powers and duties . . . otherwise provided in this chapter,' so as to preclude applicability of §279.13, as well as §§279.12 and 279.14, to merged areas."

It is our view that the power of the Board of Directors of an area community college under §280A.23(5) to "enter into contracts and take such other necessary action to insure a sufficient curriculum and efficient operation and management of the school or college and maintain and protect the physical plant, equipment, and other property of the school or college," does not supersede nor affect the provisions of §280A.23(4) which provides that the Board of Directors shall have:

"The powers and duties with respect to such schools and colleges, not otherwise provided in this chapter, which are prescribed for boards of directors of local school districts by Chapter 279."

Inasmuch as there is no other specific provision in Chapter 280A with respect to the duties of such boards in the matter of employment of teachers or superintendents or the termination of their contracts, the provisions of Chapter 279 apply.

We note that §279.13 as amended by the 62nd General Assembly defines the term "teacher" to include all certified school employees, including superintendents. There appears to be no other provisions in §280A.23 specifically relating to the teacher's contract. Therefore, the general provisions relating to contracting powers would, according to the rules of statutory construction, be limited by the specific provision contained in Chapter 279.

September 25, 1968

CITIES AND TOWNS: Municipal election as prerequisite to furnishing general extraterritorial fire protection. §§368.11, 368.12, Code of Iowa, 1966. Prior to the undertaking by a municipality to furnish general fire protection to townships, portions of townships, and benefited fire districts without its corporate limits, the municipality must hold an election. (Martin to Carr, Delaware County Attorney, 9/25/68) #68-9-15

Mr. E. Michael Carr, Delaware County Attorney: I received your letter of May 9, 1968, in which you request an opinion of the Attorney General on the following issue:

"Does section 368.12 make it mandatory upon any city or town desiring to enter into any fire agreement (fire protection for tax money) have to hold a city or town election to approve this or does Section 368.11 which states that cities and towns may provide conditions upon which the fire department will answer calls outside the corporate limits and outside the territorial and boundary limits of the State of Iowa alleviate the necessity for holding a city election, the condition being you pay us so much of your tax money and we will come out of our city or town and protect you."

Section 368.12, Code of Iowa, 1966, provides as follows:

"They shall have the power, when authorized by a majority vote of the electors thereof at a regular or special election called for that purpose, upon notice as required by law, to own, use, or operate jointly with any other city, town or township, or benefited fire district as provided in chapter 357A, fire apparatus, equipment, or facilities and to provide for the purchase, rental, or maintenance of such equipment, facilities, or services."

This section has been interpreted by an opinion of a former attorney general, Abels to Klotzbach, May 21, 1958, to require a municipal election even if the facilities of the municipality need not be expanded in order to provide and furnish the expanded services.

It would therefore appear clear that if expansion of a municipality's fire protection equipment and facilities is contemplated as a result of the expanded responsibility for service, a municipal election must be held.

Apparently under consideration in that opinion, was a loose arrangement of the type contemplated in your area. That opinion thus seems to hold that the type of arrangement set forth in your letter is covered by the language of §368.12, Code of Iowa, 1966.

Section 368.11, Code of Iowa, 1966, states in pertinent part as follows:

"[Municipalities] may provide conditions upon which the fire department will answer calls outside the corporate limits. . . ."

If this language is construed to allow a municipality to establish as the sole condition, the occurrence of a fire, the provisions of §368.12 are meaningless.

It is therefore the opinion of this office that prior to the joining of townships, benefited fire districts, portions of townships and cities for the purpose of furnishing all with fire protection, a municipality must hold an election.

September 25, 1968

STATE OFFICERS AND DEPARTMENTS: Agriculture Dept. — Ch. 189A, 1966 Code of Iowa. Retail dealers who sell meat other than directly to consumers in retail stores are not exempt from the licensing provisions of Ch. 189A. (Ivie to Liddy, Sec. of Agriculture, 9/25/68) #68-9-16

The Hon. L. B. Liddy, Secretary of Agriculture: You have asked this office for a legal definition of the terms "wholesaler" and "retail dealer" as they relate to Chapter 189A, 1966 Code of Iowa.

As you are aware, neither of the terms is specifically defined in the chapter. However, §189A.3 provides for licensing "establishments," which is defined in the singular in §189A.2(4) as:

" 'Establishment' means all premises where animals or poultry are slaughtered or otherwise prepared for food purposes, meat or poultry canneries, sausage factories, smoking or curing operations, and similar places."

Then in §189A.4, certain establishments are exempted from all or part of the requirements of the chapter. Included therein are:

§189A.4(2) "*To retail dealers* or retail butchers *with respect to meat and poultry products sold directly to consumers in retail stores . . .*" (Emphasis supplied)

Since all "establishments" as previously defined are to be licensed, whether wholesale or retail, unless they are expressly exempted, no definition of the terms "retail dealer" and "wholesaler" are necessary to properly enforce the Act. A retail dealer is not exempt if he sells meat other than "directly to consumers in retail stores." Unlike the Federal law, where a dealer retains the exemption by keeping sales other than direct to a consumer within 2% of total sales, no such deviation is allowed under Iowa law.

September 25, 1968

COUNTIES AND COUNTY OFFICERS: Drainage district trustees — air pollution control, Article 1, Section 18, Iowa Constitution; Section 462.28, 1966 Code of Iowa; Chapter 162, Acts of the 62nd G. A. A drainage district does not have authority to spend tax moneys for establishing air pollution testing stations. (Fred Hendrickson to Tucker, Deputy County Attorney, Lee County, 9/25/68) #68-9-17

Mr. Thomas E. Tucker, Deputy, Lee County Attorney: This is in response to your letter dated February 26, 1968, in which you posed the following question regarding House File 480, entitled "Air Pollution Control," now Chapter 162, Acts of the 62nd General Assembly:

"The question arises as to whether or not the drainage district trustees have the legal authority to use the drainage district moneys for the establishment of air pollution testing stations and the monitoring of those stations together with the expense of analyzing the results of such test."

The above cited legislation allows the political subdivisions the additional power to conduct air pollution control programs and tests. The power, as stated in §4, paragraphs 11 and 16 of said Act, encompasses drainage districts. Due to the fact that drainage districts do not make use of general tax funds, but are limited to the use of special taxes levied

for the specific purpose defined in the 1908 amendment of Article 1, §18 of the Iowa Constitution, and §462.28, 1966 Code of Iowa, your inquiry becomes pertinent.

The Iowa Supreme Court, in *Board of Trustees v. Board of Supervisors*, 232 Iowa 1098, 5 N. W. 2d 189 (1942), concluded:

"A drainage district is a legislative creation and has no rights or powers other than found in the statutes which gave and sustain its life." (Citing *City of Des Moines v. Iowa Telephone Co.*, 181 Iowa 1282, 162 N. W. 326.)

Similar language may be found in *Seabard Air Line R. Co. v. Sarosota-Fruitville Drainage District*, 251 F. 2d 583 (C. A. Fla. 1964), and *Nutwood Drainage and Levee Dist. v. Mamer*, 10 Ill. 2d 101, 139 N. E. 2d 247 (1957).

The California case of *Silby v. Oakdale Irrigation Dist.*, 140 Cal. App. 171, 35 P. 2d 125 (1939), presents even more convincing language. The court concluded that:

"Where the constitution, statute or ordinance provides for the levying of a tax, specifying the purpose, purpose specified is both mode and the measure of the power that can be legally exercised by the taxing body . . . any attempt to go outside [same], is and must be held ineffective."

This is precisely the situation in Iowa. The Iowa Constitution, as amended, provides for the measure and mode of taxation regarding drainage districts. The above doctrine is further substantiated in 85 C.J.S. 646, Taxation §1057(b), which states:

"Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose."

Under the circumstances in which the instant question is raised, the Iowa Legislature, in enacting the "Air Pollution Control Act," conferred the necessary authority upon the drainage districts to cope with the problem of air pollution, but failed to appropriate the needed funds for so doing.

In discussing the problem of diverting tax receipts, the Arkansas Supreme Court in *Hooker v. Parkins*, 235 Ark. 218, 257 S. W. 2d 534 (1962), concluded:

"A tax levied for one purpose cannot be used for another. When a tax is collected pursuant to being levied for a specific purpose, the money so collected cannot be diverted for a different purpose." (Accord: *McFarland v. Town of Bourbonnals*, 339 Ill. App. 328, 89 N. E. 2d 849)

Accordingly, the Supreme Court of South Dakota, in the case of *In Re Opinion of the Judges*, 59 S. D. 469, 240 N. W. 600 (1932), related:

"Moneys now on hand or hereafter to be received as the result of payment of taxes . . . already levied and the proceeds of which have already been appropriated *must* be applied to the purpose for which they were levied and to which they have already been appropriated, and we think the same could not now be divested, *even by the legislative action to any other purpose.*" (Emphasis added)

In an analogous situation in Nebraska, a drainage district was denied the right to participate in irrigation activities since the statute pertaining to drainage districts conferred no rights or authority on such a dis-

trict to engage in irrigation activities. *Drainage Dist. No. 1 v. Suburban Irrigation Dist.*, 139 Neb. 333, 297 N. W. 645 (1941).

Thus, both logic and legal opinion, substantiate the conclusion that since no mention is made in the Iowa Drainage District Statutes pertaining to the expenditure of special funds for air pollution control, such activity is unauthorized.

Therefore, it is the opinion of this office that the question you posed should be answered in the negative: Drainage district trustees may not utilize district funds to carry on air pollution control activities.

September 25, 1968

COUNTIES AND COUNTY OFFICERS: Compatibility of offices, chairman of the soldiers relief commission and office manager and alcoholic counselor of a county comprehensive alcoholism project — §§123.50 and 250.5, Code of Iowa, 1966. There is neither incompatibility nor conflict of interest involved in the office manager and alcoholic counselor of a county comprehensive alcoholism project holding the additional office of chairman of the soldiers relief commission. (Haesemeyer to Knoshaug, Wright County Attorney, 9/25/68) #68-9-18

Mr. Dewayne A. Knoshaug, Wright County Attorney: In your letter of April 26, 1968, you state:

"I request your opinion as to whether the office of Office Manager and Alcoholic Counselor of the Wright County Comprehensive Alcoholism Project is incompatible with the office of the Chairman of the Soldiers Relief Commission.

"The Wright County Comprehensive Alcoholism Project is provided for by Section 123.50 as amended by the 62nd General Assembly and the party in question receives an annual salary of $4,800.00 for serving in this position. As Chairman of the Soldiers Relief Commission the party in question receives compensation pursuant to Section 250.5. The Wright County Soldiers Relief Commission does not employ administrative or clerical help.

"If you should rule that the offices are incompatible because of the annual salary and the per diem allowance, would the offices be compatible if the party in question waived the per diem allowance for serving as Chairman of the Soldiers Relief Commission."

An examination of prior opinions of the attorney general do not disclose that the precise question you present has been raised before. However, it has been determined in the past that an elected clerk of court can legally hold the additional office of chairman of the soldiers relief commission and that such clerk may keep and retain the pay and expenses drawn by him for serving on such commission. OAG 12/13/67. The attorney general has also previously ruled that an employee of the state department of agriculture may be a member of the soldiers relief commission, OAG 10/13/55, and that a member of a city council may be appointed secretary of a soldiers relief commission, OAG 2/4/52. On the other hand in an opinion of the attorney general issued on December 11, 1962, it was stated that the offices of county attorney and member of the soldiers relief commission are incompatible. However, in the latter case the disqualification stemmed in large part from the fact that the county attorney would have as one of his duties advising the members of the soldiers relief commission which in effect would mean that he would be advising himself.

Generally speaking, a public officer other than a legislator may hold an additional public office or employment so long as there is no incompatibility between the two offices held. Guidelines for determining whether or not incompatibility exists between two offices have been laid down by the Iowa supreme court in *State v. White*, 257 Iowa 606, 133 N. W. 2d 903, 904 (1965) as follows:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338, 36 S. W. 639, 33 L.R.A. 616; Attorney General v. Common Council of Detroit, supra (112 Mich. 145, 70 N. W. 450, 37 L.R.A. 211); State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921. A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128, 129."

Applying the foregoing tests or criteria to the situation you describe we find that there is neither incompatibility nor a conflict of interest involved in the office manager and alcoholic counselor of the Wright County comprehensive alcoholism project holding the additional office of chairman of the soldiers relief commission. Moreover, he may retain the per diem and expenses paid to him under §250.5, Code of Iowa, 1966, for serving as chairman of the relief commission in addition to his regular salary as office manager and alcoholic counselor. *Burlingame v. Hardin County*, 180 Iowa 919, 164 N. W. 115 (1917).

September 25, 1968

EXECUTIVE COUNCIL—§§8.13 and 217.10, Code of Iowa, 1966. Officers and employees of the department of social services are required to have approval of the executive council for travel outside of the state with the exception of the members of the board of control, its secretary and employees, who may travel outside the state at state expense under the authority of §217.10. (Strauss to Robinson, Sec., Executive Council, 9/25/68) #68-9-19

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to your letter of April 16, 1968, in which you submitted the following:

"The Executive Council, in their meeting of April 15, 1968, directed that I obtain from you an opinion as to whether or not employees under the new Department of Social Services are required to obtain Executive Council approval for travel outside the State of Iowa.

"The Council, acting under Section 8.13(2), of the Code of Iowa, has required prior approval for travel outside the State of Iowa except those exempted in the above Section.

"Section 217.10 of the Code of Iowa, exempts the Board of Control of

State Institutions from obtaining Executive Council approval and substitutes in lieu thereof, approval in writing by the Governor.

"The Department of Social Services was established by Senate File 739 of the 62nd General Assembly. What authority does the Council have in granting approval of travel for employees of said Department."

In reply thereto I advise that so far as travel expense allowance for trips outside the state of Iowa is concerned such expense remains under the control of §8.13, Code of Iowa, 1966. Therefore, officers and employees of the new department of social services are required to obtain approval of the council for travel outside the state of Iowa. While §8.13 specifically exempts the board of control from the foregoing noted statute to that extent such statute was impliedly repealed by the provisions of sections 5 and 6 of Chapter 209, Acts of the 62nd G. A. Sec. 5 provides the following:

"All powers heretofore exercised by the board of control of state institutions and the board of social welfare and department of social welfare are hereby transferred to and shall hereafter be possessed by the department of social services or the council of social services. All duties, functions and programs heretofore imposed upon or charged to the board of control of state institutions, the board of social welfare and department of social welfare are hereby transferred to and shall hereafter be imposed upon or charged to the department of social services."

Sec. 6 provides the following:

"The governor shall appoint the council on social services on or before January 1, 1968. The commissioner of the department of social services shall be appointed at the earliest date thereafter in accordance with the provisions of this Act. The governor by executive order shall accomplish the transfer of functions, records, equipment, appropriations, other property, and personnel provided in this Act no later than July 1, 1968. Any such powers, duties, functions, responsibilities and programs not so transferred, shall be transferred by operation of law on July 1, 1968.

"The assignment of functions shall consist of a realigning of authority and responsibility in accord with the terms of this Act and need not necessarily involve the movement of personnel or equipment, the establishment of any subdivision or bureau within any office or department, the revision of any job description, or other detailed matter relating to the internal operation of any new office or department.

"The governor may also by executive order prior to July 1, 1968, after he has determined that the board of control or the board of social welfare no longer has any significant functions to perform, provide that the offices of the members thereof be abolished. Thereafter such offices shall stand abolished and the members thereof shall not be entitled to any further compensation. In any event such offices shall stand abolished as of July 1, 1968 and the members thereof shall not be entitled to or receive any further compensation.

"The governor may submit to the general assembly thirty (30) days prior to the convening of the sixty-third general assembly, bills in the form of amendments to the Code or subsequent session laws which may be necessary to implement the terms of this Act and the application of functions and duties among the subdivisions or bureaus within the offices or departments. Where the transfer or assignment of any particular function presents special administrative or legal difficulties, the governor may delay the effective date of that particular transfer and shall present the reasons therefor to the sixty-third general assembly."

This Act became effective August 15, 1967, and the order of transfer provided for in the foregoing Sec. 209.6 was issued by the governor on February 10, 1968.

September 25, 1968

COUNTIES AND COUNTY OFFICERS: §337.11, Code of Iowa, 1966. In county of less than 50,000 the sheriff is required to provide meals for prisoners and county board of supervisors is not authorized to contract with county home for such meals. (Nolan to Vanderbur, Story County Attorney, 9/25/68) #68-9-20

Mr. Charles E. Vanderbur, Story County Attorney: In your letter of May 25, 1968, you requested an opinion on the following question:

"Story County is unofficially much above 50,000 in population but as of the last census, the county was just under 50,000. We are about to move into a new courthouse which has no quarters for the sheriff. Our prior setup had the jail in the same building with the sheriff's living quarters so that it was comparatively easy for the sheriff's wife to prepare meals for prisoners and serve them. Under the new setup where the sheriff lives several miles away, this cannot be accomplished so easily. Our county home, located near our county seat, because of its volume meal production, can furnish meals for prisoners at less than the statutory allowance. My question is this: Can the Board of supervisors, with the sheriff's permission, contract with the county home to furnish prisoners meals?"

In answer to your question I advise that inasmuch as the last official census of Story County establishes the population at 49,327 the provisions of Chapter 338, Code of Iowa, 1966, relating to the care of prisoners in counties having a population in excess of 50,000 do not apply in your county at the present time. We are unable to find any other authority under which the board of supervisors, with the sheriff's permission, might contract with the county home to furnish prisoners' meals. Under §337.11, Code of Iowa, 1966, the sheriff is required to charge and is entitled to collect fees for "boarding a prisoner . . . fifty-five cents for each meal in counties having a population of more than forty thousand and less than fifty thousand, and not to exceed three meals twenty-four consecutive hours; and fifteen cents for each night's lodging."

Inasmuch as the statutes are silent on the matter of where the sheriff is to obtain the meals furnished to the prisoners it is immaterial whether they are cooked by the sheriff's wife in the sheriff's living quarters or obtained from a restaurant, catering service, or other source.

September 25, 1968

PRACTICE OF CHIROPRACTIC — Chapter 151, §§151.1, 151.5, 1966 Code of Iowa. A person holding a license to practice medicine or surgery may practice the profession in all its branches, and use any method of healing he may choose including the chiropractic system. (Sell to Fenton, Polk County Attorney, 9/25/68) #68-9-21

Mr. Ray A. Fenton, Polk County Attorney: This is in reply to your request for an Attorney General's opinion on the following question: "Is a doctor of medicine authorized to use the techniques and practices of a doctor of chiropractic?"

Section 151.1, Iowa Code 1966, provides:

"For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

"1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic.

"2. Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments."

Section 151.5, Iowa Code 1966, provides:

"A license to practice chiropractic shall not authorize the licensee to practice operative surgery, osteopathy, nor administer or prescribe any drug or medicine included in material medica."

These sections restrict the practice of chiropractic to that branch of the healing art by which human ailments are treated by the adjustment of the spine or by other incidental adjustments.

The statutory definition of chiropractic does not vary to any great extent from the generally accepted definitions of this form of the healing art. *Black's Law Dictionary* defines "chiropractor" as one professing a system of manipulations which aims to cure disease by the mechanical restoration of displaced or sublaxated bones, especially the vertebrae, to the normal relation. It is similar defined in *Webster's New World Dictionary* as "a system of healing based upon the theory that disease results from a lack of normal nerve functions and employing treatment by scientific manipulation and specific adjustment of body structures (as the spinal column) and utilizing physical therapy when necessary."

In 70 C.J.S., Physicians and Surgeons, §1, page 804, it stated:

"Chiropractic or Chiropratics. A system of healing that treats disease by manipulation of the spinal column; a system, or the practice, of adjusting the joints, especially of the spine, by hand for the curing of disease.

* * *

"The word is coined from two Greek words 'chiro' and 'practicos,' signifying something done with the hands."

On the other hand, the practice of medicine is "the science and art of preserving health and preventing and curing disease." *Ballantine's Law Dictionary, Black's Law Dictionary; Lowman v. Kuecker*, 246 Iowa 1227, 71 N. W. 2d 586 (1955). It embraces the whole field of medicine and surgery. *Lowman v. Kuecker*, supra.

It was specifically held in *State v. Boston*, 226 Iowa 429, 284 N. W. 143 (1939) that the practice of medicine and surgery comprehends the whole field of medicine and materia medica. It was stated thusly:

"The practice of medicine and surgery is the practice of the healing art, and unless some restriction be placed thereon by the legislature, the whole field of medicine and surgery is open to the practitioner. On the other hand, the practice of chiropractic although recognized as a branch of the healing art, is throughout held and considered to be only one form of practice within well-edfined limits, of the science of healing, as such practice is defined by Code section 2555.

* * *

"We believe that medicine and surgery comprehend the whole field of medicine and materia medica; and that it was the intent of the legislature

that chiropractic should be merely a form of treatment, and that it must be practiced according to the rules laid down by law."

Therefore, a license to practice chiropractic limits the holder to practice as that term is defined. Chapter 151 sets out the limits within which a chiropractor might practice. However, a person holding a license to practice medicine or surgery may practice the profession in all its branches, and use any method of healing he may choose including the chiropractic system.

September 25, 1968

SOLDIER'S RELIEF COMMISSION — §250.12, 1966 Code of Iowa. The offices of the Secretary of the Soldier's Relief Commission and Executive Director of the County Poor Fund are compatible. The holding of such offices by the same person is not a violation under §250.12, 1966 Code of Iowa. (Strauss to Mullin, Adams County Attorney, 9/26/68) #68-9-22

Mr. Eugene W. Mullin, Adams County Attorney: Reference is herein made to yours of May 17, 1968 in which you submitted the following:

" 'Can the Secretary of the Soldier's Relief Commission, under Chapter 250, Code of Iowa, be one and the same person as the Executive Officer for the Board of Supervisors, Under Chapter 251?'

"An attorney general's opinion was rendered on May 5, 1964 in which it was stated that the offices were not incompatible, however, under Section 250.12 the Soldier's Relief Commission, or the Board of Supervisors, were attempting in that instance to place the administrations under a new department.

"In our county, the Soldier's Relief Commission acts and makes all the distribution of funds and the same are reviewed by the Board of Supervisors. The Secretary of the Solder's Relief Commission is paid a salary.

"The Board of Supervisors is not integrated with the Social Welfare Department of the State of Iowa but maintain their own executive officer to administer relief to the poor people in our county. The executive officer is paid a salary from said funds.

"It is my interpretation and opinion that the Soldier's Relief Commission, under 250.12, is not designated or attempting to remove said funds to any other agency nor is the board of supervisors or the funds of the Soldier's Relief Commission co-mingled with any other funds of the county, nor is the powers and duties of the Soldier's Relief Commission abridged in any way.

"As stated earlier, the question has been raised in our county that the Secretary of the Soldier's Relief Commission and executive officer for the poor cannot be held by the same person. I am personally of the opinion that it can be. The Board of Supervisors have requested that I write to have an opinion."

In reply thereto, I advise the following:

(1) Guidelines resolving the question of incompatibility between offices has been laid down in the case of *State v. White,* 257 Iowa 606, 133 N. W. 2d 903 (1965), where it is said:

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

Also, in a different test in the case of *State ex rel Crawford v. Anderson*, 155 Iowa 271, 136 N. W. 128, it is said:

"Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper; from considerations of public policy, for an incumbent to retain both."

Upon application of the foregoing cases to this situation it appears that the offices of the Secretary of the Soldier's Relief Commission and the executive director operating under the Board of Supervisors in the administration of the county poor fund are not incompatible.

(2) Nor are the provisions of §250.12 (1966 Code of Iowa), as follows, applicable to this situation:

"It shall be unlawful for the Board of Supervisors of any county or the Soldier's Relief Commission of any county to place the administration under any other relief agency of any county. . . ."

The administration of Soldier's Relief funds is not to be administered by another relief agency of the county. It still remains in the jurisdiction of the Soldier's Relief Commission.

September 25, 1968

STATE OFFICERS AND DEPARTMENTS — Highway Commission, authority to pay overtime to certain employees — Art. III, §31, Constitution of Iowa; §§8.5, 79.1 and 307.5, Code of Iowa, 1966. The Highway Commission has no authority to retroactively make overtime payments to certain of its salaried employees who may in the past have been required to work in excess of 40 hours per week. However, there is nothing to prohibit such commission from prospectively paying overtime to such employees by the device of paying them on an hourly basis or by fixing their compensation as a set salary with an additional amount for each hour worked in excess of 40 per week. (Haesemeyer to Coupal, Dir. of Highways, Iowa State Highway Commission, 9/25/68) #68-9-23

Mr. Joseph R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: You have requested an opinion of the attorney general with respect to the following:

"Will you please give me your opinion as to whether or not the State Highway Commission may legally pay overtime to its construction employees.

"Would you please give me your opinion as to whether or not the Commission has authority to require its employees to work more than 40 hours per week without overtime and what the liability of the State is, if any, to employees caused to work more than 40 hours per week."

As you know, we deferred action on your request for two reasons. First, the attorney representing a number of affected highway commission employees asked that he be given an opportunity to present arguments and authorities in support of the position of such employees that they were entitled to overtime compensation. We felt that in fairness and to give the matter thorough and complete consideration we should receive and study all materials the employees' attorney wished to submit in behalf of their position.

Second, we learned that a claim for overtime compensation had been submitted to the appeal board by a number of the same highway commis-

sion employees and it was our feeling that we should not render an opinion while a claim was pending before an administrative body in which the same legal questions were involved.

The employees' attorney some time ago submitted extensive arguments and materials in support of their position and recently on September 9, 1968, the appeal board acted to deny the claim of the employees. Hence, we are now in a position to respond to your request for an opinion.

Turning first to the question of whether or not the state has any liability to employees who may have, in the past, been required to work more than 40 hours per week it is our opinion that there is no authority to pay such employees additional compensation over and above the annual or monthly salary established by law.

§307.5 of the Iowa Code provides, among other things, that the highway commission shall have the authority to appoint all assistants necessary to carry on the work of the commission, to define their duties and "fix their compensation." Heretofore, construction inspectors have been paid a set salary, which salary was established by the commission in accordance with the above statutory provision. With this in mind, it should be noted that §79.1 of the Code provides, in part, as follows:

"Salaries specifically provided for in an appropriation Act of the general assembly shall be in lieu of existing statutory salaries, for the positions provided for in any such Act, and all salaries shall be paid in equal monthly or semi-monthly installments *and shall be in full compensation of all services, except as otherwise expressly provided.*" (Emphasis supplied)

The salaries of the construction inspectors have not been, at least up until now, as we have already noted, specifically provided for in an appropriation Act — such salaries were statutorily set by the commission and in keeping with §79.1 of the Code those salaries as set were "in full compensation for all services, except as otherwise expressly provided." We have thoroughly searched the Code and have found no express provision which in effect states that the salaries set for these construction inspectors were not "in full compensation of all services." Moreover, since the salaries set by law "shall be in full compensation of all services" Article III, Section 31, of the Iowa Constitution appears to prohibit the additional compensation sought. This constitutional provision reads in part as follows:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, . . ."

In our opinion the claimants fall within either the term "officer" or "public agent" and there is express constitutional prohibition against providing them with extra compensation over and above the salary set by law for their services.

The claimants' attorney bases much of his argument for additional compensation on certain rules that were promulgated by the director of personnel and approved by the executive council in accordance with the authority found in §8.5 of the 1958 Code of Iowa. (See 1966 I.D.R. at pp. 380-382.) The rules most particularly relied upon are found under the heading of "Hours of Service, Holidays, Vacations, Sick Leave, etc." Two of the rules read as follows:

"1. Hours of service: The work day for employee (sic) shall be an 8-hour day.

"2. Work week: The normal work week shall be defined as the 5 days Monday through Friday; thus, a total of 40 hours per week."

It may have been that these rules which were promulgated by the personnel director and approved by the executive council were applicable to the highway commission. See §8.5(c) of the 1966 Code of Iowa. Moreover, without deciding the issue it may be that supervisory personnel of the highway commission violated these rules by causing construction personnel employed by the commission to work well in excess of the hours provided therein. These rules relied upon by counsel representing employees are, however, irrelevant to the issue of whether the employees are entitled to extra compensation for hours worked in excess of 40 per week. As I have already noted, the salary of these employees was statutorily set by the commission and the receipt of such salaries was "in full compensation of all services, except as otherwise expressly provided." Nothing in the departmental rules relied upon by councel can be construed as expressly providing for a different rule than that set forth in §79.1 of the Iowa Code. It should be noted also that the foregoing departmental rules soon will be of no further force and effect because of the new merit system law.

Insofar as your question relates to the authority of the highway commission to prospectively pay overtime to its construction employees it is our opinion that this could be done. There is nothing in the Code which would prohibit the commission from either paying such employees on an hourly basis or paying them on a set salary basis with additional compensation for hours over and above 40 per week.

September 25, 1968

BOARD OF REGENTS: Open Meetings — Chapter 98, Laws of the 62nd G. A. Applies to meetings of the Professional Advisory Commitee set up by the board. (Nolan to Richey, Ex. Sec., Board of Regents, 9/25/68) #68-9-24

Mr. R. Wayne Richey, Executive Secretary, Board of Regents: This is in reply to your letter of June 24, 1968, which states:

"A question has arisen as to whether a study group appointed by the State Board of Regents is subject to the open meetings requirement of Chapter 98, Laws of the 62nd General Assembly.

"Some background concerning the creation of the group might be helpful in reaching a decision. Pursuant to the provisions of Section 4, H.F. 747, 62nd General Assembly, the State Board of Regents engaged the consulting firm of Cresap, McCormick and Paget of New York to carry out a study relating to the establishment of an institution of higher education in Western Iowa. The Board of Regents wished to insure that the study was comprehensive and factual and that it related to the educational situation in Iowa. Consequently, it appointed a group of professional educators representing both public, private, two-year and four-year institutions to 'monitor' and assist the consultants in their study. The members of the group, called the Professional Advisory Committee, represented most major fields of education — graduate, under-graduate, business, education, science, etc.

"The charge to the Professional Advisory Committee stated that its purpose is 'to insure that the study (by the consultants) covered all per-

tinent matters and that the methodology is designed to produce a comprehensive, factual and objective study.' It was to act 'as a resource group in furnishing valuable leads as to sources of information and data.' Cresap, McCormick and Paget, under the direction of the Board of Regents, presents all pertinent information, findings, conclusions and tentative recommendations to the Committee for its review before its reports are presented to the Board of Regents for consideration. The main purpose of the Committee is to assure the Board that the basic study leading to the recommendations is sound. The wisdom or acceptability of the recommendations are left to the Board to determine.

"It is desired that this committee be able to meet with the consultants without benefit of press, for the purpose of examining the reports of the consultants and advising them as to what facts might be in question, what other avenues might be explored, etc. before the consultant makes its presentations to the Board of Regents. The presentations to the Board of Regents have been in open session and are covered by the press.

"I would appreciate your opinion as to whether the Professional Advisory Committee falls within the purview of Chapter 98, Laws of the 62nd General Assembly, as it relates to any meetings of this committee."

In answer to your request, we advise that the provisions of §1(3) of Chapter 98 of the laws of the 62nd General Assembly appear to apply to the professional advisory committee appointed by the state board of regents. The pertinent part of this statute is as follows:

"Section 1. All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited, unless closed meetings are expressly permitted by law:

* * *

3. Any committee of any such board, council, commission, trustees, or governing body.

Whenever used in this Act, 'public agency' or 'public agencies' includes all of the foregoing, and 'meeting' or 'meetings' includes all meetings of every kind, regardless of where the meeting is held, and whether formal or informal."

Inasmuch as the group about which you inquire has been designated a committee by the board of regents, it would appear to fall squarely under the provisions set out above. However, under §3 of the Act cited above such committee may:

"hold a closed session by affirmative vote of two-thirds (2/3) of its members present, when necessary to . . . prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings."

September 25, 1968

SCHOOLS: Legalizing Act, Ch. 459, 62nd G. A. Applies to merged areas as well as school corporations organized or reorganized pursuant to §274.1 and §275.27, Code of Iowa, 1966. (Nolan to Johnston, Supt. of Public Instruction, 9/25/68) #68-9-25

Mr. Paul F. Johnston, Superintendent of Public Instruction: In answer to your letter of July 31, 1968 requesting an opinion as to whether Chapter 459, 62nd G. A. is applicable to merged area schools which are recognized as school corporations by §280A.16, Code of Iowa, as well as those recognized in §§274.1 and 275.27, we advise:

Chapter 459, 62nd G. A. provides:

"SECTION 1. All proceedings taken prior to January 1, 1967, purporting to provide for the organization of, reorganization of, attachment of territory to, enlargement of, or change in boundaries of any school corporation in this state and not heretofore declared invalid by any court are hereby legalized, validated and confirmed.

"SEC. 2. The foregoing shall not be construed to affect any litigation that may be pending at the time this Act becomes effective, involving the organization of, reorganization of, attachment of territory to, enlargement of, or change in boundaries of any school corporation.

"SEC. 3. This Act shall not apply to proceedings purporting to provide for the attachment of territory to a school corporation pursuant to section two hundred seventy-five point one (275.1), Code 1966, if such attachment was disapproved by the state board of public instruction pursuant to said section and was not subsequently approved by the state board of public instruction prior to January 1, 1967."

Sections 1 and 2 of the Act set out above are similar to the provisions of §594A.5, 1966 Code of Iowa. At the time §594A.5 was enacted no merged areas had been established. Consequently, it may be argued that by use of similar language in the subsequent legalizing statute, the legislature intended to limit the application of such statute to the school districts formerly covered. However, the provisions of §280A.16 specifically designate the merged area formed under the provisions of Chapter 280A as follows:

". . . a body politic as a school corporation for the purpose of exercising powers granted under this chapter, and as such may sue and be sued, hold property, and exercise all the powers granted by law and such other powers as are incident to public corporations of like character and are not inconsistent with the laws of the state."

Therefore, it is our opinion that the legalizing Act of the 62nd General Assembly, (Chapter 459), is applicable to the merged area established under §280A of the Code of Iowa.

September 25, 1968

CITIES AND TOWNS: Cable Television franchise — §§368.35, 386.1 and 386.3, Code of Iowa, 1966. When exclusive right to provide cable television service to a community is sought from the city council, the applicants and the council must comply with the provisions of Chapter 386. (Martin to Wood, Hamilton County Attorney, 9/25/68) #68-9-26

Mr. Carroll Wood, Hamilton County Attorney: I have received your letter of April 9, 1968, in which you request an opinion of the attorney general in the following terms:

"The City Council of the City of Webster City has been requested by a private party to grant a franchise for the purpose of installing and operating a television cable service to residents of the City of Webster City. . . ."

* * *

"Can a municipality grant a television cable franchise under the authority of Section 368.35, Code of Iowa without proceeding to a franchise election as provided in Chapter 386, Code of Iowa?"

In telephone conferences you have informed me that it is contemplated that a master antenna will be constructed from which cables will flow throughout the city. It is proposed that these cables be placed upon the

existing light poles which the city now owns as a part of its municipal light plant. Residents desiring this service, will need to connect directly to one of these cables. For this connection the group proposing this system will charge a connection fee. Thereafter, there will be a monthly charge for the furnishing of this service. The group proposing this system will be organized as a private profit making group. This group seeks from the City Council the *exclusive right* to so utilize the streets of the city.

Section 386.1, Code of Iowa, 1966, provides as follows:

"Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway, and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, the places where, the same shall be placed upon, along, or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city into districts for that purpose."

Section 386.3, Code of Iowa, 1966, provides in pertinent part as follows:

"No franchise shall be granted, renewed, or extended by any city or town for the use of its streets, highways, avenues, alleys, or public places, for any of the purposes named in sections 386.1 and 386.2 unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or town, or special election."

Section 368.35, Code of Iowa, 1966, provides as follows:

"Any municipal corporation may lease any municipal property including the air space over any street, alley or public way, which in the opinion of the council is not likely to be needed for municipal purposes within the term of the proposed lease, upon a two-thirds vote of the council. Provided, however, that when the period of such lease is for more than three years, the council shall cause a notice of the terms of the proposed lease to be published once in the manner provided by section 618.14, together with the date, time, and place of a public hearing at which the council will hear objectors against and proponents for the lease. If, after such hearing, the council is of the opinion that such lease is in the best interests of the public, it may, by a two-thirds vote in favor thereof, cause said lease to be executed."

Due to the result reached in this opinion we need not consider the application of §368.35, last above set out. Since the rights sought by the applicant are a franchise, it is governed by the provisions of Chapter 386, Code of Iowa, 1966. This follows upon an examination of the scope of §§368.35 and 386.1. Section 368.35 is a general statute relating to the leasing of all municipal property. §386.1 is a specific statute, having narrow application to acquisition of utility-like rights. When a conflict arises between a general statute and a specific statute, the specific statute controls. *Smith v. Newell*, 254 Iowa 496, 501, 117 N. W. 2d 883, 886 (1962); *Gade v. City of Waverly*, 251 Iowa 473, 477, 101 N. W. 2d 525, 527 (1960); *Liberty Consolidated School Dist. v. Schindler*, 246 Iowa 1060, 1065, 70 N. W. 2d 544, 547 (1955); *Iowa Mut. Tornado Ins. Ass'n. v. Fischer*, 245 Iowa 951, 955, 65 N. W. 2d 162, 165 (1954); *Yarn v. City of Des Moines*, 243 Iowa 991, 998, 54 N. W. 2d 439, 443 (1952).

First we must determine what the accepted definition of "franchise" is, and then whether or not this definition is of the nature, considering the type of franchise, that would place it within the scope of section 386.1, Code of Iowa, 1966.

Whether a grant by a municipal corporation is a "franchise" is not determined by the status of the one to whom it is to be given, but by the nature of the rights to be granted.

A franchise, by its accepted definition, is an exclusive or special privilege granted by a government to a person or corporation and which is not possessed by the public generally as a common right. *Incorporated Town of Mapleton v. Iowa Light, Heat and Power Co.*, 206 Iowa 9, 15, 216 N. W. 683, 685 (1927); Black's Law Dictionary; Ballantine's Law Dictionary; 23 Am. Jur. Franchises §2; 37 C.J.S., Franchises §1.

There is little question, that a franchise is what is sought here. We do not mean to hold, however, that exclusivity is requisite to a franchise. In the proper case it may be that something less than an exclusive right may be a franchise.

Having determined this, it is necessary to discover whether the grant of a franchise for a television cable service falls within the listed services in §386.1, Code of Iowa, 1966, and is of such a nature that the public interest and welfare demands an election for its approval.

As of this date, no decisions concerning franchises for cable television service have been brought before the Supreme Court of Iowa. The language of the statute is unclear. Thus, legislative intent must be referred to in order to determine whether such franchises were meant to be included within Chapter 386, Code of Iowa, 1966.

In interpreting Chapter 386, the Iowa Court has said,

"Indeed, from the time when cities and towns were first authorized to incorporate and became, within defined limits, self-governing neighborhoods, the care and control of their streets have been quite uniformly regarded as coming appropriately within their special domain; and persons and corporations seeking to use such streets in the establishment of works of public utility or private profit have been quite generally expected to obtain the permission of and comply with the reasonable terms imposed by the city or town in whose jurisdiction the enterprise is to be launched. The right to so use the streets has been regarded a franchise, without a grant of which by proper municipal authority the proposed work could not be lawfully undertaken." *Farmers' Telephone Co. of Quimby v. Town of Washta*, 157 Iowa 447, 133 N. W. 361 (1911).

In *East Boyer Telephone Co. v. Incorporated Town of Vail*, 166 Iowa 226, 147 N. W. 327 (1914), the Court stated:

"The right of control of the streets of cities and towns has been conferred by the Legislature, and as a limitation upon the right of full and possibly injurious grants of the right of occupancy and use of the streets to public service corporations and bodies of like character there has been enacted Code §776, [now 386.3] which places the right of ultimate control in the legal voters. . . .

". . . The use and control of its public streets is admittedly a matter of police regulation by the municipality. . . . In the exercise of this power the municipality, or the voters, if the ultimate voice is lodged in them, may determine to what private uses the streets may be put, governed, as we must presume they would be, by the test as to whether by permitting such private use the right of public enjoyment and use would be impaired."

In *Incorporated Town of Ackley v. Central States Electric Co.*, 204 Iowa 1246, 214 N. W. 879 (1927), the Court said, in construing the now §§386.1 and 386.3:

"If the Central States Electric Company could contract to sell electricity to Hadley under these circumstances, there would be nothing to prevent every other user thereof within the city limits from making a similar contract with the electric company, and therefore sections 5904 and 5905, Code 1924, would be fully nullified, because the electric company would have the full advantage of furnishing its commodity to every resident of the town, notwithstanding the fact that it had no franchise whatever. If this process were allowed, then the electric company would have all the rights it would have under a franchise, without having procured one by a vote of the people, as required by the aforesaid sections of the statute. Such a nullification of the statute will not be countenanced by an equity court."

And in *Schnieders v. Incorporated Town of Pocahontas*, 213 Iowa 807, 234 N. W. 207 (1931), the court stated, while speaking of a franchise under Chapter 386:

" 'It is a privilege or authority vested in certain persons by grant of the sovereign to exercise powers or to do and perform acts which without such grant they could not do or perform. . . . The council had power to enact an ordinance prior to the vote, although no action of the council could establish the plant without the approving vote.' "

The statute speaks of ". . . telegraph, district telegraph, telephone, street railway, and *other electric wires*. . . ." (emphasis added). To determine whether cable television falls within the words "other electric wires" it is necessary to be cognizant of rules of construction as well as the intent of the legislature.

The rule ejusdem generis, provides that when an enumeration of specific things is followed by a general or catchword phrase, this latter phrase, is interpreted in such a way as to refer to things of the same general type as are specified.

In light of the statements of policy and intent in the cited cases, it is the opinion of this office that an exclusive right to utilize the streets of a municipality for cable television is a right which may not be conferred without compliance with the provisions of Chapter 386, Code of Iowa, 1966. The policy of the statute is as much a limitation on the exercise of a municipality's power, as it is an authorization to do business upon compliance with its terms. Under the above recited facts, following the rule of construction, ejusdem generis, one may not exclude cabe television from the language "other electric wires" contained in §386.1. In terms of occupancy of public space, there is no distinction. In terms of the utility service aspects, there is no differentiation. It is only distinguishable on the basis of the type of the communication involved. This is not sufficient to exclude it from the statute.

September 25, 1968

STATE OFFICERS AND DEPARTMENTS: Board of Parole — §247.5, 1966 Code of Iowa. Board of Parole does not have power to force parole upon an unwilling prisoner. (Claerhout to Bobzin, Board of Parole, 9/25/68) #68-9-27

Mr. R. W. Bobzin, Secretary and Director of Parole, Board of Parole:

This is in response to your letter of August 22, 1968, wherein you have requested the opinion of the Attorney General regarding the following question:

"Does the Board have the right to force a prisoner to accept a parole under Section 247.5?"

Section 247.5 of the 1966 Code of Iowa states in pertinent part:

"The board of parole shall, except as to prisoners serving life terms, or under sentence of death, or infected with veneral disease in communicable stage, have power to parole persons convicted of crime and committed to either the penitentiary or the men's or women's reformatory . . ."

No mandatory language is found in Chapter 247 to indicate that the board has the power to impose the statutory privilege of parole upon an unwilling prisoner. While there appears to be no Iowa authority for such conclusion, other jurisdictions almost universally recognize such a position. *In re Hart's Petition,* 1965, 145 Mont. 203, 399 P. 2d 984; *Rider v. McLeod,* 1958, Okla. Cr., 323 P. 2d 741; *Woods v. State,* 1956, 264 Ala. 315, 87 So. 2d 633; *Application of Kimler,* 1951, 37 Col. 2d 568, 233 P. 2d 902, cert. den., 342 U. S. 898, 72 S. Ct. 233, 96 L. Ed. 672; *Pierce v. Smith,* 1948, 31 Wash. 2d 52, 195 P. 2d 112, cert. den., 335 U. S. 834, 69 S. Ct. 24, 93 L. Ed. 387. It is therefore my opinion that a prisoner does have the right to refuse to accept parole privilege under §247.5 of the 1966 Code of Iowa.

September 25, 1968

SCHOOLS — School Tax — §282.2, 1966 Code of Iowa. The term "school tax" as used in §282.2 encompasses all taxes levied for school purposes under Chapters 278, 288, 294 and 298 of the Code of Iowa. (Nolan to Johnston, Supt. of Public Instruction, 9/25/68) #68-9-28

Mr. Paul F. Johnston, State Superintendent of Public Instruction: In reply to your letter of August 13, 1968 we advise that the term "school tax" as used in §282.2 of the 1966 Code of Iowa encompasses all taxes for school purposes levied persuant to Chapters 278, 288, 294, and 298 of the Code of Iowa.

In the letter transmitted with your letter, the question was raised:

"Does the amount of state income tax returned to an individual's school district from his total income tax paid constitute 'school tax' under the provisions of §282.2 of the Iowa Code?"

This question must be aswered in the negative. §282.2 provides:

"The parent or guardian whose child or ward attends school in any district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of tuition required to be paid."

It is our view that the words "school tax paid by him in said district" refer only to those taxes that are levied locally against taxable property through the chapters cited above. In an Attorney General's opinion in 1940 it was stated that where taxpayer's children attend a school in a district in which he does not reside but owns property, the full amount of school tax should be deducted from tuition charged by the school district for the attendance of his children therein even though a part of the

tax is in a form of credit given to the taxpayer as homestead credit since the county actually receives the full amount of the taxes. (1940 OAG 567. See also Opinion Attorney General April 24, 1967, a copy of which is enclosed herewith.)

Under Chapter 356 of the laws of the 62nd General Assembly, the levy made on property within a school tax unit for the support of the public schools within the unit is referred to as the "basic school tax" and is used in the formula for computing the amount to be placed in the basic school tax equalization fund. The monies paid to the counties under this act are appropriated from "monies in the general fund of the state" (§18, Chapter 356, laws of the 62nd G. A.). The revenues in the state general fund are obtained through income, corporation, sales tax, property tax and other sources, but a school tax as such is not collected by the state.

A query was also raised about the effect of a taxpayer designating a school district where his children attend school on a tuition basis on his state income tax return when they all reside in another school district. Under §422.21 of the 1966 Code of Iowa as amended by Chapter 347 of the Laws of the 62nd G. A., there is a reference to the designation of a school district by the taxpayer for the purposes of completing the state income tax form:

"* * *

"A space shall be provided by the tax commission, on the prescribed income tax form, wherein the taxpayer shall enter the name of the school district of his residence. Such place shall be indicated by prominent type. *A non-resident taxpayer shall so indicate.* If such information is not supplied on the tax return it shall be deemed an incompleted return." (Emphasis added)

From this we conclude that the designation of the school district on the state income tax return is not binding in all respects as to what district is to receive the payment of school equalization monies.

September 25, 1968

TRADE AND COMMERCE: FHA insured loans — §535.2, Code of Iowa, 1966. §535.2 setting maximum interest rates does not apply to FHA insured loans. (Cullison to Knoke, Pottawattamie County Attorney, 9/25/68) #68-9-29

Mr. George J. Knoke, Pottawattamie County Attorney: You requested an opinion of the Attorney General as to whether the one-half of one percent charged by the FHA for insurance premiums on loans would be considered interest, thus raising the total interest charge to borrowers to 7¼%, which amount would exceed the legal limit set by §535.2, Code of Iowa, 1966. Broad powers of investment in federal housing securities are authorized by §682.45, Code of Iowa, 1966, which states in part:

"It shall be lawful for insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fiduciaries, the state and its political subdivisions, and institutions and agencies thereof, and all other persons, associations, and corporations, subject to the laws of this state, to invest their funds, and the moneys in their custody or possession, eligible for investment, in bonds and notes secured by mortgage or trust deed insured by the federal housing administrator,

and in the debentures issued by the federal housing administrator pursuant to title II of the National Housing Act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under title III of the National Housing Act, and in real estate loans which are guaranteed or insured by the administrator of veterans' affairs under the provisions of title III of the Servicemen's Readjustment Act of 1944, as amended, otherwise known as the 'G.I. Bill of Rights.' "

Section 682.46, Code of Iowa, 1966, expressly makes inapplicable the maximum legal interest rate as set by §535.2, Code of Iowa, 1966. Section 682.46 states:

"No law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments which may be made, shall be deemed to apply to loans or investments pursuant to section 682.45."

In conclusion, the total interest charge does not violate the Iowa Usury Laws for the reason that those laws are inapplicable to investments in FHA loans.

September 25, 1968

CITIES AND TOWNS: Extraterritorial authority to enforce municipal housing laws. §§413.1, 413.9, 413.3(20), 413.121, 135.11(8), 135.12, 368.9, 368.26, Code of Iowa, 1966, Chapter 316, §1(1), Acts of the 62nd General Assembly. Outside its municipal corporate limits a city or town may enforce only those provisions of its housing ordinances which relate to "sewer connections" or "sanitary toilet facilities" and then only if the property sought to be regulated is, or is to be, located abutting on a sewer line and within ten miles of the municipal corporate limits. (Martin to Knoke, Pottawattamie County Attorney, 9/25/68) #68-9-30

Mr. George J. Knoke, Pottawattamie County Attorney: You have requested an attorney general's opinion on the following issues:

"1. Under Chapter 413, Code of Iowa, 1966, does the City of Council Bluffs have the authority to enforce its housing laws, including plumbing code, building code and electrical code in the one mile area outside the city limits of the city?
"2. [Does] . . . the state plumbing code, page 211, Iowa Departmental Rules, . . . give authority to cities to enforce their plumbing code where city water is furnished outside the city limits?"

Section 413.1, Code of Iowa, 1966, provides as follows:

"This chapter shall be known as the housing law and shall apply to every city which, by the last federal census, had a population of fifteen thousand or more, and shall apply to any dwelling in any area adjacent to and within one mile of such municipalities, ..."

Council Bluffs is a city with a population in excess of 15,000.

Section 413.9, Code of Iowa, 1966, provides in pertinent part as follows:

"Nothing herein contained [referring to this Chapter] shall be deemed to invalidate existing ordinances or regulations of any city or county imposing requirements higher than the minimum requirements laid down in this chapter relative to light, ventilation, sanitation, fire prevention, egress, occupancy, maintenance, and uses for dwellings; nor be deemed to prevent any city subject to this chapter from enacting and putting in force from time to time ordinances and regulations imposing require-

ments higher than the minimum requirements laid down in this chapter; nor shall anything herein contained be deemed to prevent such cities from prescribing for the enforcement of such ordinances and regulations, remedies and penalties similar or additional to those prescribed herein. *Every city subject to this chapter is empowered to enact such ordinances and regulations and to prescribe for their enforcement; and to enact such other ordinances pertaining to the housing of the people not in conflict with the provisions of this chapter, as shall be deemed advisable by the city council.*" (Emphasis added)

We find the dispositive issue to be whether §413.1, above set out, applies the ordinances of the city to the area within the one mile area adjacent to such municipality. We find it does not.

Section 413.3(20), Code of Iowa, 1966, provides in pertinent part as follows:

"Wherever the words 'charter,' 'ordinances,' 'regulations,' . . . occur in this chapter they shall be construed as if followed by the words '*of the city in which the dwelling is situated.*'" (Emphasis added)

When this language is read in connection with that found in §413.9, above set out, it is apparent that municipal ordinances are to have no extra territorial effect. When §413.3 is applied to §413.9, the resultant language reads as follows:

"Every city subject to this chapter is empowered to enact such ordinances and regulations [of the *city in which the dwelling*, is situated] and to prescribe for their enforcement; and to enact such other ordinances [of the *city in which the dwelling* is situated] pertaining to the housing of the people not in conflict with the provisions of this chapter as shall be deemed advisable by the city council." (Emphasis added)

Further evidence of a legislative intent to restrict the application of municipal ordinances to municipal corporate limits is found in the provisions of §413.121, which provides as follows:

"The provisions of this chapter shall be enforced in each city by the health officer, except that the department of buildings, where such department exists in a city, shall enforce the provisions contained in sections 413.35 to 413.46, inclusive, and 413.89 to 413.91, inclusive, *and in the area adjacent to and within one mile of such municipalities, the provisions of this chapter shall be enforced by the county board of health.*" (Emphasis added)

By this section the duty of enforcement of the Housing Law within the one mile area adjacent to cities is delegated to the county board of health. If a city's ordinances were the standards to be enforced within this area, the logical enforcement authority would be the municipality itself. Presumably, the municipality would be best acquainted with its ordinances and the enforcement thereof and would best understand the problems inherent in the ordinances. Assurance of compliance with the Housing Law would also be of greater interest to the municipality than to county officials. We therefore find that under the provisions of chapter 413, legislative intent was to continue the traditionally distinct jurisdictional dividing line.

There is no authority in the code for the provisions of §368.9, Code of Iowa, 1966, to be applied outside of municipal corporate limits.

Your second question invites this office to construe 1966 I.D.R. 215 Rule 2.1(2). That rule provides as follows:

"*Applicability.* The provisions of this code are applicable to the plumbing in buildings and premises within cities and towns and to plumbing in buildings and premises located outside the corporate limits of any city or town but which are served by individual connections to municipal water supply or sewer systems located inside the corporate limits."

This rule was promulgated by the plumbing code committee under the following statutory provisions:

"The code of rules governing the installation of plumbing provided for in section 135.11, subsection 8, may be amended biennially as conditions may require. The necessary amendments shall be determined by a plumbing code committee which shall be appointed by the commissioner of public health on or before July 1, 1925, and every four years thereafter. Such committee shall consist of the engineer who is head of the division of sanitary engineering, the commissioner of health, the housing commissioner, one master plumber, and one journeyman plumber. The engineer member shall be chairman of the committee." §135.12, Code of Iowa, 1966.

The initial duty of establishing the plumbing code of the state of Iowa is imposed upon the state department of public health by the provisions of §135.11, which in pertinent part provides as follows:

"The commissioner of public health shall be the head of the 'State Department of Health,' which shall:

* * *

"8. Establish, publish, and enforce a code of rules governing the installation of plumbing *in cities and towns* and amend the same when deemed necessary in the manner prescribed in section 135.12." (Emphasis added)

Clearly, as §135.11(8), Code of Iowa, 1966, is the only source of authority upon which the plumbing code committee may draw in amending the state plumbing code, no provision of the state plumbing code may be enforced without the corporate limits of a city or town. However, §368.26, Code of Iowa, 1966, as amended by Chapter 316, Sec. 1(1), Acts of the 62nd G. A., provides in pertinent part as follows:

"They [municipalities] shall have power to provide sewer systems and sewage disposal plants and to regulate sewer connections to private property. They may order sanitary toilet facilities to be installed by any property owner whose property abuts on a sewer line and the abandonment and removal of all other toilet facilities and in the event such order is not complied with may cause the work to be done and the cost to be assessed against the property, which assessment may be spread over a period not to exceed ten years.

* * *

"They [municipalities] shall have power to extend their sanitary systems and provide sanitary sewer facilities to areas not more than ten (10) miles beyond their corporate limits."

This section does authorize municipalities to control "sewer connections to private property" and "sanitary toilet facilities" by ordinance, within ten miles of the municipal corporate limits if connected to a municipal sewer line.

Due to the fact that §368.17, Code of Iowa, 1966, requires the application of the state plumbing code to all cities of 6,000 or more population,

unless such a city should opt to enact a plumbing code, the provisions of which may not be inconsistent with state law or state administrative regulations, the general authority of a municipality to act in the area is tainted by provisions of the state plumbing code. Therefore, a municipality, in regulating such connections or facilities, must comply, to the extent required, with the provisions of the state plumbing code.

It is therefore the opinion of this office that while the provisions of Chapter 413, Code of Iowa, 1966, relative to general housing matters are applicable to the area adjacent to and within one mile of city limits (64 OAG 17, 64 OAG 202) a municipality may not enforce its plumbing code, building code, or electrical code, *in toto* without the territorial limits of the city as a general rule. A municipality may, however, enforce those provisions of its plumbing code which relate to "sewer connections" or "sanitary toilet facilities," if the property sought to be regulated abuts a sewer line and is within ten miles of the municipal corporate limits.

September 25, 1968

COURTS: Justice of the Peace — §735.5, Code of Iowa, 1966. Criminal jurisdiction extends five hundred feet beyond boundary of county wherein he presides. (Cullison to Millhone, Page County Attorney, 9/25/68) #68-9-31

Mr. James N. Millhone, Page County Attorney: In your letter of July 26, 1968, you requested an opinion concerning jurisdiction of Justices of the Peace, particularly a construction of §753.5, Code of Iowa, 1966.

Generally, jurisdiction is coextensive within the county in which a justice serves as provided by §601.1, Code of Iowa, 1966:

"The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace actions for the recovery of money against actual residents of any other county, except as provided in this chapter."

This jurisdiction in the case of a commission of a public offense is extended by five hundred yards beyond the perimeter of the county in which the justice serves by §753.5, Code of Iowa, 1966:

"When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county, except as otherwise provided by law."

There is no language in the statute indicating that the legislature intended this extra county jurisdiction to be anything less than that granted within the county.

It is our opinion, concerning a public offense committed within five hundred yards outside a county line, that a justice within the county may receive a preliminary information, issue warrants of arrest and search, and hold preliminary hearings in the same manner as if the offense had occurred within the county.

September 26, 1968

CITIES AND TOWNS: Low-rent housing elections. §§403A.2(9), 403A.5, 403A.25, Code of Iowa, 1966. A municipality is limited in the number of low-rent housing units it may construct to the number of units

stated in the notice of hearing or on the ballot, without receiving further authorization from the voters. (Martin to Henke, Floyd County Attorney, 9/26/68) #68-9-34

Mr. E. W. Henke, Floyd County Attorney: Through your letter of August 27, 1968, and correspondence and conferences with James F. Smith, attorney for the Charles City Housing Commission, an opinion of the attorney general has been requested on the following issue:

May a low-rent housing project be expanded by adding dwelling units without an election?

In the correspondence and conferences above alluded to, the following facts have been developed.

Commencing on November 18, 1963, published notice was given to the residents of Charles City. This notice stated that construction of eighty low-rent housing units would be considered at a hearing before the city council. The minutes of that meeting reveal that construction of eighty units was discussed, objections were heard, and the project was approved.

On February 25, 1964, the electors of Charles City voted on the following proposition:

" 'Shall the following public measure be adopted:

" 'Shall the City of Charles City, Iowa, engage in Low Rent Housing activities under the provisions of Chapter 403A of the Code, 1962, Iowa.' "

This proposition received a favorable vote of 70% of those voting.

A successful application for Federal funds was then made to the Housing and Home Finance Agency. The request was for funds sufficient to construct eighty units.

Thereafter, eighty apartments were constructed. On May 15, 1968, a tornado totally destroyed sixty units, while twenty units were fifty to seventy-five percent demolished. None of the units could be occupied.

The eighty units were covered by insurance which will bear the cost of reconstruction. It is proposed that the forty-unit expansion be constructed in conjunction with the reconstruction of the eighty units.

Section 403A.5, Code of Iowa, 1966, provides in pertinent part as follows:

"Any municipality may create, in such municipality, a public body corporate and politic to be known as the 'Low-Rent Housing Agency' of such municipality except that such agency shall not transact any business or exercise its powers hereunder until or unless the local governing body has elected to exercise its municipal housing powers through such an agency as prescribed in this section; and, except further, that any such agency shall not undertake any low-rent housing project until such project has been approved by a referendum as provided in section 403A.25."

Section 403A.2, Code of Iowa, 1966, provides in pertinent part as follows:

"The following terms, wherever used or referred to in this chapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

* * *

"9. 'Housing project' or 'project' means any work or undertaking: (a) to demolish, clear or remove buildings from any slum areas; or (b) to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; or (c) to accomplish a combination of the foregoing. Such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, utilities, parks, site preparations, landscaping, administrative, community, health, recreational, welfare or other purposes. The term 'housing project' or 'project' also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration or repair of the improvements and all other work in connection therewith, and the term shall include all other real and personal property and all tangible or intangible assets held or used in connection with the housing project."

Section 403A.25, Code of Iowa, 1966, provides in pertinent part as follows:

"No municipality nor any low-rent housing agency shall proceed with the acquisition of any property for, or with the erection or operation of any low-rent housing project unless authorized by a vote of at least fifty percent of the electors of such municipality voting on the proposition at any regular, primary or general election or by special election called by the governing body of the municipality.

"Notice of the time and place of such election shall be given by publication once each week for three consecutive weeks prior thereto in some newspaper having a general circulation in such municipality. Such election may be called by the governing body of the municipality, and shall be called when a petition asking for such election, signed by at least two percent of the electors of the municipality voting for governor at the last preceding general election, has been filed with the clerk of the municipality.

"The form of the question to be presented for a vote of the electors shall include the name of the proposed project, describe its location with reasonable certainty, specify the maximum number of housing units in said project, state whether new construction or rehabilitation of existing structures is contemplated, or a combination of same, state the maximum amount of funds to be expended for the contemplated construction or rehabilitation or both, and state the type of occupancy contemplated whether it be without limitation as to age or designed for the elderly."

It is clear that under §403A.2(9) the furnishing of low-rent housing units constitutes the engaging in a 'project' for which an election must be held under the provisions of §§403A.5, and 403A.25. The issue becomes: Is a municipality's "project" limited to the number of units stated in the notice of hearing, or, under modern procedure in the ballot proscribed by §403A.25, without receiving further authorization from the voters. We are of the opinion that it is. To construe the statute in any other manner would be to ignore the purpose of holding an election. The only question before the electors of Charles City, although not expressed on the ballot, was: Shall Charles City construct eighty low-rent housing units. This is the only authority that was requested by the city — all the electors gave.

It is therefore the opinion of this office that an election must be held before the Charles City Housing Commission undertakes to provide the city with forty additional low-rent housing units.

September 26, 1968

LABOR: State office employees — §88.3, 1966 Code of Iowa. State office employees are not employed in "workshops" and are not covered by provisions contained in said statute. (Zeller to Parkins, Commissioner, Bureau of Labor, 9/26/68) #68-9-32

Mr. Dale Parkins, Commissioner, Bureau of Labor: Reference is made to your recent letter, requesting an opinion as follows:

"I would like to request an opinion on the scope of the words: factories, mercantile establishments, mills, and workshops found in Chapter 88.3 Code of Iowa, 1966.

"As an example, are offices of State government covered under any of these terms? Are they classified as workshops?"

Chapter 91.15 is more comprehensive and includes public or private work where wage earners are employed. These items are not covered by the provisions of §88.3 which reads as follows in part:

"In factories, mercantile establishments, mills, and workshops, adequate washing facilities shall be provided for all employees; . . . ."

The question is whether state office workers are employed in workshops, as they are not included under work in factories, mercantile establishments or mills.

Workshops is defined in Webster's Third International Dictionary as follows:

"a small establishment where manufacturing or craftwork is carried on by a proprietor, with or without helpers and often without power machinery."

A nursing home which operated a laundry as an adjunct of its main business was not a workshop within the hazardous employment provisions of the Workmen's Compensation Act. *Shaw v. State Industrial Acc. Commission*, 254 P. 2d 207, 210, 197 Oreg. 545 (1953).

A waitress employed in a coffee shop which contained in the kitchen a number of power-operated machines such as an electric mixer, a dishwashing machine, etc. was not employed in a workshop. *McAlester Corp. v. Wheeler*, 239 P. 2d 409, 412, 205 Okla. 446, (1951).

Based on these definitions, it is my opinion that state office workers, handling the usual clerical jobs of the state, are not included within the title of "factories, mercantile establishments, mills and workshops" as found in Chapter 88, §88.3, Code of Iowa, 1966.

September 26, 1968

TAXATION: Military Service Property Tax Exemptions. §§427.3(4), 427.5, 427.6, Code of Iowa, 1966; Chapter 351, Acts of 62nd General Assembly (1967). In order to obtain a military service tax exemption, one must be honorable separated, retired, furloughed to a reserve, placed on inactive status, or discharged from the United States mili-

tary, served on active duty during one of the enumerated periods in §427.3, and have followed the procedures contained in §§427.5 and 427.6. (Griger to W. H. Forst, Dir. of Revenue, 9/26/68) #68-9-33

Mr. W. H. Forst, Director of Revenue, Department of Revenue: This will acknowledge receipt of your letter of August 8, 1968, in which you requested an opinion of the Attorney General on the following questions:

"(1) 'A' entered the U. S. Military Service in the year 1952, and has been in the active service continuously to the present time. He served in Korea in 1952 and served in Vietnam in 1965 and 1966. He has never been separated from such military service at any time, so that it appears he is not an honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged military service man at this time. He is a resident of the state of Iowa, and owns taxable property in this state, and is a career military man. He has not had recorded in this state any of the documents or papers mentioned in Section 427.5, Code of Iowa, 1966. Is 'A' eligible for Iowa military service tax exemption where he has never been separated from military service since entering same?

"(2) 'B' entered the U. S. Military Service on or about January 4, 1964, and in the year 1965 was sent to Germany where he continued in active service until October 1, 1965, when he was returned to the United States, and on October 15, 1965, was issued an Order by the U. S. Military Department to inactive service, and as of January 1, 1966 he became an employee of a bank in the state of Iowa and is presently so employed. He owns property in Iowa. He never was in or near vietnam at any time. Is 'B' eligible for Iowa military service exemption where he did not actually serve in Vietnam?

"(3) 'C' entered the U. S. Military Service on January 31, 1967, and has been serving in Vietnam from October, 1967 to the present time. He is a resident of the state of Iowa, and owns taxable property in this state. He has never been honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged from military service. Is 'C' eligible for military service tax exemption in the state of Iowa for 1968 taxes collectible 1969? If not, then why not?"

§427.3(4), Code of Iowa, as amended by Chapter 351, Acts of 62nd General Assembly (1967) provides for a property tax exemption in part as follows:

"The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse . . . of the Korean Conflict at any time between June 27, 1950 and January 31, 1955, both dates inclusive, or the Viet Nam Conflict beginning August 5, 1964 and ending on the date the armed forces of the United States are directed by formal order of the government of the United States to cease hostilities, both dates inclusive."

§427.5, Code of Iowa, 1966 prescribes a procedure to be followed by any person named in §427.3 for obtaining the tax exemption and provides in part:

"In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence . . . is lost he may record in lieu of the same, a certified copy thereof."

§427.6, Code of Iowa, 1966, provides in part:

"Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption only for the year in which such exemption is filed."

In regard to your first question, the Iowa Supreme Court, in construing §427.3(4) of the Code, stated in *Jones vs. Iowa State Tax Commission*, 247 Iowa 530, 74 N. W. 2d 563 (1956) at 247 Iowa 538:

"The language of our statute herein involved is also quite indicative of what is intended. The exemption is quite evidently meant to benefit those who have been in the military or naval service, but have been in some manner released or terminated therefrom."

You state in your letter that "A" has never been separated from active duty in the military service at any time since he entered the same in 1952 and that he has never recorded any of the documents mentioned in §427.5 of the Code. Consequently, it is clear that "A" is not entitled to the Iowa military service property tax exemption and any claim filed by him pursuant to §427.6 must be denied.

Concerning your second question, "B" would be eligible for the tax exemption, notwithstanding the fact that his active military service was in Germany and not in Vietnam prior to being placed on inactive status. In 1934 O.A.G. 162, the Attorney General ruled that ex-servicemen who had enlisted for the Philippine insurrection and who were sent instead to Alaska in the coast artillery were entitled to the military service propperty tax exemption.

In regard to your third question, "C" would not be eligible for the tax exemption for 1968 taxes collectible in 1969. The reasons for "C's" ineligibility are fully set forth in the answer to your first question.

September 27, 1968

STATE DEPARTMENTS — Savings and Loan Division — §534.8. A loan made to a husband and wife is in violation of §534.8 where the wife is an employee of the savings and loan association making the loan and does not reside at the home which secures the loan. The title to the property being in the husband's name only does not remove the prohibition against making a loan to an employee. (Nolan to Aistrope, 9/27/68) #68-9-35

Mr. Gordon E. Aistrope, Supervisor, Savings and Loan Division, Office of Auditor of State: This replies to your letter of June 12, 1968 wherein you requested an opinion interpreting the savings and loan law and particularly §534.8(2), 1966 Code of Iowa:

"Could an association grant a loan to the spouse of an officer or employee of the association if the title to the property is vested only in the spouse's name."

In response to your question, I advise that §534.8 Code of Iowa, makes it unlawful for an officer, director or an employee of an association to make a real estate loan to "a director, officer, or employee of the association, or to any attorney or firm of attorneys, regularly serving the association in the capacity of attorney at law, or to any partnership in which any such director, officer, employee, attorney or firm of attorneys has any interest."

While your question does not reflect that the loan was actually made to a husband and wife jointly, the wife being the employee of the savings and loan association, this appears in fact to be the case, according to the report of the examiner which was attached to your letter. Under such circumstances the loan would be a violation of §534.8, if the loan were not made "on the security of a first lien on the home property owned and occupied" by such employee.

September 30, 1968

LABOR: Child Labor. §§92.10 and 92.11, Code of Iowa, 1966. Employer violates labor law by employing a child under age of 16 years in cafe. Proof of violation does not depend upon making demand upon employer for documentary evidence. (Zeller to Barrett, Deputy Labor Comm'r., 9/30/68) #68-9-36

Mr. R. Earl Barrett, Deputy Labor Commissioner, Bureau of Labor: Reference is made to your recent letter requesting our opinion upon the following facts:

Your inspectors are required to make inspections of restaurants to determine whether any children are working there, who are under sixteen years of age. In some cases, the child employee is apparently under sixteen years of age and in other cases he seems to be older. In the former case, pursuant to Chapter 92.10, the inspector is entitled to demand of his employer, that he furnish documentary proof of the child's age or that he cease to employ him. However, Section 92.11, Code of Iowa, 1966, clearly forbids the employment of any person under sixteen years of age in a hotel or restaurant.

Your question is whether an inspector must make a demand upon the employer for documentary proof of age, before claiming a violation in his restaurant in the following cases:

"(1) Where they have valid proof of age, showing that the child is under 16 years of age?

"(2) Where the child is working in a place of business where the child can not get a valid work permit?"

Section 92.10, Code of Iowa, 1966, provides as follows:

"Any officer whose duty it is to enforce the provisions of this chapter shall have authority to demand of any employer in or about whose place or establishment a child apparently under the age of sixteen years is employed, permitted, or suffered to work, and whose permit is not filed as required by this chapter, that such employer shall either furnish him within ten days the same documentary evidence of age of such child as is required upon the issuance of a work permit, or shall cease to employ or permit or suffer such child to work in such place or establishment."

Section 92.11, Code of Iowa, 1966, provides as follows:

"No person under sixteen years of age shall be employed at any work or occupation which, by reason of its nature or the place of employment, the health of such person may be injured, . . . or in or about any hotel, cafe, restaurant, ..."

Section 92.10 provides authority to the Labor Department to demand documentary evidence from an employer of the age of any child apparently under the age of 16 years and the employer must then furnish evidence of the child's age or cease to employ him.

Section 92.11 provides explicitly that no person under the age of 16 shall be employed in a restaurant. There is no exception or condition contained in this section and it is not related to any demand to be made by your inspector upon the employer. If your inspector has valid proof showing that the child is under 16 years of age then the employer, in my opinion, is violating the statute. Also, if the child is working in a place of business where he cannot obtain a valid work permit, there is also a violation of the statute.

The violation of the statutory injunction forbidding employment of children under the age of 16 may be proved by other evidence, and the labor inspector is not required to obtain his proof from the child's employer in order to prove the violation.

October 1, 1968

INSURANCE: State Officers and Departments, broad form, comprehensive personal liability coverage authorized — §517A.1, Code of Iowa, 1966. A state department may purchase broad form comprehensive personal liability insurance coverage including business pursuits, personal injury and bodily injury. (Haesemeyer to Robinson, Sec., Executive Council, 10/1/68) #68-10-1

Mr. Stephen C. Robinson, Secretary, Executive Council: Reference is made to your letter of September 25, 1968, in which you state:

"The Executive Council, in their meeting held September 23, 1968, directed that I obtain from you an official opinion in regard to the purchase by the Department of Public Safety of liability insurance covering the Department of Public Safety, Commissioner, Members and Clerical Workers of the Department while in the performance of their duties. Said insurance to be broad form comprehensive personal liability coverage including business pursuits, personal injury and bodily injury to insure against personal corporate or quasi-corporate liability that said persons may incur. (See copy of 'Notice to Bidders' attached)

"You will further note that said Notice provides that the insurance shall be in compliance with the provisions of Chapter 517A of the Code of Iowa, 1966.

"Is the purchase of such insurance, as is outlined above, permissive by a State Department for the protection of its employees, either under Chapter 517A of the Code of Iowa, or other provisions of the Code?"

§517A.1, Code of Iowa, 1966, provides:

"517A.1 Authority to purchase. All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa not otherwise authorized are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur.

"The form and liability limits of any such liability insurance policy purchased by any commission, department, board, or agency of the state of Iowa shall be subject to the approval of the attorney general."

In our opinion insurance of the type you describe would fall within the

broad language of §517A.1, Code of Iowa, 1966, hereinbefore set forth. Hence, in answer to the specific question you present it is our view that under Chapter 517A a state department can purchase broad form comprehensive personal liability coverage of the type you describe. Whether or not, as a matter of policy, this should be done is another matter.

October 2, 1968

ELECTIONS: Certification of nominations — §§43.88, 43.98, 53.40, Code of Iowa, 1966. The county auditor should accept certifications of nominations under §43.98 and cause a nominee's name to be printed on the ballot if it is possible for this to be done and the ballots still be ready for mailing to servicemen not later than thirty days before the election. (Haesemeyer to Pelzer, Emmet County Attorney, 10/2/68) #68-10-19

Mr. Max O. Pelzer, Emmet County Attorney: You have orally requested an opinion of the attorney general with respect to the following two questions:

1. Under §43.98, Code of Iowa, 1966, must the candidate nominated by a county central committee be the same person or one of the same persons who received one or more write-in votes at the primary election, or may such candidate be some other person who received no votes at the primary election?

2. Must certifications of nominations made in case of vacancies, and nominations by state, district, and county conventions and committees be received (a) only up to the time the printing of ballots has begun, or (b) at any time before the printing of ballots is completed, or (c) even though ballots have been printed at any time which will still allow ballots to be reprinted or names added to the ballot in time for the general election?

In answer to your first question, it is our opinion that under §43.98, Code of Iowa, 1966, a reconvened county convention or a party county central committee could nominate anyone and would not be limited to selecting one of the persons who received write-in votes for the office in question at the primary election. 64 OAG 186, 60 OAG 112.

In answering your second question it is necessary to consider §§43.88 and 53.40, Code of Iowa, 1966. §43.88 provides:

"43.88 Certification of nominations. Nominations made in case of vacancies, and nominations made by state, district, and county conventions, shall, under the name, place of residence, and post-office address of the nominee, and the office to which he is nominated, and the name of the political party making the nomination, be forthwith certified to the proper officer by the chairman and secretary of the convention, or by the committee, as the case may be, and if such certificate is received in time, the names of such nominees shall be printed on the official ballot the same as if the nomination had been made in the primary election."

In an opinion of the attorney general to Deputy Secretary of State Robert C. Landess, dated September 17, 1968, we said that because of the language of §43.88:

"There is no time limit on such certifications other than that they must be received by the county auditor in time for the names of the nominees to be printed on the official general election ballot."

§53.40, Code of Iowa, 1966, dealing with absentee voting by servicemen provides in relevant part:

"The county auditor shall immediately on the thirtieth day prior to the particular election transmit ballots to the voter by mail or otherwise, postage prepaid, as may be directed by the Iowa servicemen's ballot commission, requests for which are in his hands at that time, and thereafter so transmit ballots immediately upon receipt of requests for same."

In order for the county auditor to comply with the foregoing statutory provision it is clear that the ballots would have to be printed and available for mailing not less than thirty days before the election.

In view of the foregoing it is our opinion that the county auditor should accept certifications of nominations under §43.98 and cause a nominee's name to be printed on the ballot if it is physically possible for this to be done and the ballots still be ready for mailing to servicemen not later than thirty days before the election. The fact that printing of the ballots had already been begun or completed would not alter the matter so long as time still remained to print new ballots.

October 8, 1968

TAXATION: Collection — Delinquent Taxes. §445.6, Code of Iowa, 1966. Delinquent taxes shall be collected through distress and sale only and a garnishment proceeding cannot be maintained under the statute. (McLaughlin to Goodhue, Warren County Attorney, 10/8/68) #68-10-6

Mr. Darrell Goodhue, Warren County Attorney: You have requested an opinion of the Attorney General as follows:

Can wages or bank accounts be garnisheed under a Distress Warrant issued by the County Treasurer as provided by Chapter 445?

By way of delineating your inquiry, you have further advised that the County Sheriff has in his possession Distress Warrants issued under Section 445.6, Code of Iowa, which could be collected if he is authorized to garnishee bank accounts or wages. Section 445.6, Code of Iowa (1966) provides:

"445.6. Distress and sale — immediate collection of tax. The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest, and costs to the time of payment.

"Whenever the county treasurer shall have reason to believe that any owner of taxable personal property, who is a resident of the state of Iowa and against whom personal property taxes have been assessed, is about to remove from the county or is about to dispose of his personal property, he shall immediately regard and declare the taxes due and payable, shall file a notice of such lien with the county recorder, and shall proceed immediately to collect such taxes, together with costs and any interest and penalty that may be due, by distress and sale of the personal property so assessed which is not exempt from taxation. In the event the county treasurer proceeds to collect such taxes prior to date of

levy, the amount of such taxes shall be presumed to be the taxable value of such property multiplied by the tax rate established at the date of levy next preceding."

The statute uses the words "distress or sale." In the case of *Plymouth Co. vs. James E. Moore* (1901) 116 Iowa 700, 87 N. W. 662, the Court held that where the statute authorized means by which the tax is to be collected, such means are exclusive and no other type of action is authorized.

In a more recent case, *In re Estate of McMahon* (1946) 237 Iowa 236, the Court made the following statement:

"A proceeding for the collection of taxes is one in remand under our Iowa authorities is an exclusive one. . . ."

On the basis of the foregoing cases, it is our opinion that under §445.6, Code of Iowa (1966), delinquent taxes may be collected through the means of "distress and sale" only and that a garnishment proceeding cannot be maintained.

October 8, 1968

DEPARTMENT OF SOCIAL SERVICES — Riverview Release Center, Chapter 217, Acts of 62nd G. A.; Chapter 247, 1966 Code of Iowa, as amended; Chapter 209, Acts of 62nd G. A. Paroles may be given on such terms and conditions so that parolee could be returned to the Release Center for brief stays in order to re-evaluate the parolee. (Seckington to Ellandson, Dept. of Social Services, 10/8/68) #68-10-2

Mr. Nolan H. Ellandson, Director, Bureau of Adult Correction Services, Department of Social Services: You have requested an opinion of the Attorney General as to:

"Whether or not parolees could be returned to the Riverview Release Center for brief stays in order to reassign, reassess, or to take a different approach with the case rather than having to violate and go back to Fort Madison or Anamosa."

The Riverview Release Center referred to in your letter was established by Chapter 217, Acts of the 62nd General Assembly. Section 1 of that Act is as follows:

"The board of control is hereby authorized to establish a facility for the preparation of *all* male inmates of the corrective institutions under the board's jurisdiction for discharge or parole. The facility shall be known as the correctional release center and shall be operated in conjunction with and utilize the facilities of the prison honor farm at Newton, Iowa."

Section 3 of the above cited Act states:

"The board may transfer any male inmate of a corrective institution within ninety (90) days of the inmate's approaching release from custody to the release center for intensive training to assist the inmate in the transition to civilian living."

Your question involves those prisoners who are transferred to the Release Center, and subsequently released on parole from that institution.

When the parolee is transferred to Riverview, the superintendent of that facility, pursuant to §2 of the above cited Act, is the individual who is charged with the supervision and control of the parolee.

Chapter 247, 1966 Code of Iowa, as amended, specifies the procedures for the granting and revoking of paroles.

Section 247.9 is as follows:

"*Legal custody of paroled prisoners.* All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject at any time, to be taken into custody and returned to the institution from which they were paroled.

"During such time as the United States is at war the board of parole may relinquish the legal custody of a paroled prisoner to a military or naval authority for the period of service by the prisoner in the armed forces of the United States."

Reading §247.9, quoted above, in conjunction with Chapter 217, Acts of the 62nd General Assembly, indicates that the Board of Parole has the power to return the parolee to the institution from which he was paroled. Thus, where the prisoner was released on parole from Riverview, §247.9 would require that the parolee be returned to that facility.

The case of *Curtis v. Bennett*, 256 Iowa 1164, 131 N. W. 2d 1, Cert. denied 85 S. Ct. 1096, 380 U. S. 958, 13 L. Ed. 974 (1965) indicates that the Board of Parole may grant paroles upon such terms and conditions as the Board deems just and proper; and when the prisoner accepts the parole, he also accepts the terms and conditions of said parole. If the parolee subsequently violates any of the terms or conditions upon which the parole was granted, the parolee would be subject to being returned to the institution from which he was paroled.

Section 370 of Chapter 209, Acts of the 62nd General Assembly, states in part: (referring to the amendment of §247.6, 1966 Code of Iowa)

"The director of the division of corrections of the department of social services shall also establish rules and conditions which shall be enforced by the chief parole officer and his staff regarding the supervision of parolees and probationers."

It is therefore the opinion of this office that the director of the Division of Corrections and the Board of Parole may specify the terms and conditions upon which paroles may be granted. The terms and conditions could include provisions covering a situation whereby the Chief Parole Officer, the Board of Parole, and the Department of Social Services, all felt that the parolee was becoming involved in a situation not in the best interests of rehabilitation. When such a situation arises, the parolee could then be returned to the release center and his case reassessed, with the possibility that his parole could be granted under different terms and conditions or in another environment.

October 8, 1968

COUNTY OFFICERS — County Agricultural Extension Law — Ch. 176A and §24.9, 1966 Code of Iowa. Budget estimate of County Agricultural Extension Council is to be published in only one newspaper, rather than all official newspapers in the county. (Ivie to Soults, Cooperative Extension Service, 10/8/68) #68-10-3

Mr. Maurice Soults, Asst. Director, Cooperative Extension Service:

You have asked whether or not the annual budget required by §176A.8 (9), 1966 Code of Iowa, must be published in all official newspapers in the county, as is required for county budgets under §24.9, 1966 Code of Iowa, or whether a single publication as required of municipalities is sufficient.

Each extension council created under Chapter 176A, 1966 Code of Iowa, with the exception of those created in Pottawattamie County, governs a "district" that is a county wide district (§176A.4), and, I am certain that any ambiguity you feel exists under the requirements of §24.9, 1966 Code of Iowa, comes about because of this fact.

However, §24.2(1), 1966 Code of Iowa, defines municipality as follows:

"The word 'municipality' shall mean the *county*, city, town, school district, and *all other public bodies or corporations* that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district." (Emphasis supplied)

§176A.3 defines "county agricultural extension district" as a "governmental subdivision" and a "public body corporate."

It is clear from these definitions that the requirement of §24.9, 1966 Code of Iowa, which directs publication of county budget estimates in the official newspapers of that county does not apply to budget estimates of a county agricultural extension district which by definition is a "municipality" distinct from the "county."

Therefore, publication in a single newspaper as directed for "any other municipality" in §24.9 is all that is required for the budget estimate of each county agricultural extension district.

October 8, 1968

COUNTY AUDITOR AND COUNTY FAIR BOARD — §§174.1 and 174.2, Code of Iowa, 1966. County Auditor is not barred from holding membership on the County Fair Board or its office of secretary. (Strauss to Atwell, Sup. of County Audits, Auditor of State, 10/8/68) #68-10-4

Mr. H. E. Atwell, Supervisor of County Audits, Office of Auditor of State: In reply to your letter of September 3, 1968 in which you asked if the county auditor could serve as either a member of the county fair board or as its secretary, I am of the opinion that the county auditor is not barred from being either a member of the county fair board or the secretary thereof.

If he be barred from being either a member of the county fair board or as its secretary, it is because there is, first, a statutory provision providing such bar; second, there is a conflict of interest between the office of the county auditor and membership on the county fair board; and third, that there is incompatibility between the office of county auditor and membership on the county fair board or its secretary.

I find that there is no such statutory bar to the holding by the county auditor of membership on the county fair board or being its secretary.

The county auditor being a ministerial office with described statutory

duties and not by statute expressly concerned with the affairs of the county fair board, conflict of interest is not present.

In so far as incompatibility is concerned, it is to be said that incompatibility is applicable to occupancy by a public officer of two public offices at the same time. However, while the county auditor holds a public office, the member of a fair board is an officer of a private corporation and so is its secretary. A society authorized to hold a county fair is a private corporation and, in addition to holding a fair annually, is by statute endowed with all the powers of a private corporation not for pecuniary profit. (See §§174.1 and 174.2 of the 1966 Iowa Code.)

Fair board offices are not public offices within the meaning of public offices as set forth below:

Essential elements to establish public position as "public office" are position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity. *State v. Taylor*, 144 N. W. 2nd 289.

October 8, 1968

SCHOOLS — Area Schools — Ch. 280A, 1966 Code of Iowa. Broadcasting and newspaper advertising is a reasonable means of informing interested persons of what is available at an area community school under §280A.1. (Nolan to McCray, State Representative, 10/8/68) #68-10-5

The Hon. Paul B. McCray, State Representative: This is in answer to your letter of August 1, 1968 in which you requested an opinion on the following:

"Is it legal for an area community school such as Area IX in our area to use funds for newspaper and radio advertising?"

Although the authority to expend money for this purpose is not specifically provided in the Code, §280A.18 does permit the board of directors of a merged area to receive and expend funds for the operation of such schools. Incident to such operation is the attracting of sufficient number of students to justify continuance. It is the stated policy that such schools offer "to the greatest extent possible, educational opportunities and services "to persons who may take advantage of the programs and training to be made available under §280A.1. It necessarily follows that some means of communication must be utilized to inform interested persons as to what is available. The use of broadcasting and newspaper advertising in such circumstance would be reasonable and proper.

It is my further view, however, that the board of directors must include in their annual budget prepared pursuant to §280A.17, the estimated proposed expenditure for advertising unless the funds to be used are derived from and expended in accordance with the terms of a donation or gift. §280A.18(6).

October 8, 1968

TAXATION: Collection — Delinquent Taxes. §445.6, Code of Iowa, 1966. Delinquent taxes shall be collected through distress and sale only and

a garnishment proceeding cannot be maintained under the statute. (McLaughlin to Goodhue, Warren County Attorney, 10/8/68) #68-10-6

Mr. Darrell Goodhue, Warren County Attorney: You have requested an opinion of the Attorney General as follows:

Can wages or bank accounts be garnisheed under a Distress Warrant issued by the County Treasurer as provided by Chapter 445?

By way of delineating your inquiry, you have further advised that the County Sheriff has in his possession Distress Warrants issued under Section 445.6, Code of Iowa, which could be collected if he is authorized to garnishee bank accounts or wages. Section 445.6, Code of Iowa (1966) provides:

"445.6. Distress and sale — immediate collection of tax. The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom such taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest, and costs to the time of payment.

"Whenever the county treasurer shall have reason to believe that any owner of taxable personal property, who is a resident of the state of Iowa and against whom personal property taxes have been assessed, is about to remove from the county or is about to dispose of his personal property, he shall immediately regard and declare the taxes due and payable, shall file a notice of such lien with the county recorder, and shall proceed immediately to collect such taxes, together with costs and any interest and penalty that may be due, by distress and sale of the personal property so assessed which is not exempt from taxation. In the event the county treasurer proceeds to collect such taxes prior to date of levy, the amount of such taxes shall be presumed to be the taxable value of such property multiplied by the tax rate established at the date of levy next preceding."

The statute uses the words "distress or sale." In the case of *Plymouth Co. vs. James E. Moore* (1901) 116 Iowa 700, 87 N. W. 662, the Court held that where the statute authorized means by which the tax is to be collected, such means are exclusive and no other type of action is authorized.

In a more recent case, *In re Estate of McMahon* (1946) 237 Iowa 236, the Court made the following statement:

"A proceeding for the collection of taxes is one in remand under our Iowa authorities is an exclusive one. . . ."

On the basis of the foregoing cases, it is our opinion that under §445.6, Code of Iowa (1966), delinquent taxes may be collected through the means of "distress and sale" only and that a garnishment proceeding cannot be maintained.

October 8, 1968

TAXATION: Personal Property Tax — National Banks. Tangible personal property, such as large tanks, owned by a national bank, are exempt from personal property taxation in the State of Iowa since state taxation of a national bank's tangible personal property is not one of the

ways permitted by U.S.C. §548. (Murray to Armknecht, Montgomery Co. Atty., 10/8/68) #68-10-7

Mr. Philip C. Armknecht, Montgomery County Attorney: In your letter of July 1, 1968, you have requested an opinion of the Attorney General concerning the liability of a national bank for Iowa personal property taxes. You state in your letter that a national bank, located in the State of Missouri, owns certain personal property, namely, large tanks which are situated in Montgomery County, Iowa, and your question is whether the bank must pay Iowa personal property taxes on these tanks.

Permissable state taxation of national banks is expressly stated in 12 U.S.C. §548 which provides as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following condition are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subsection (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. R.S. §5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223."

The Supreme Court of California, in construing the above statute held in *Security-First Nat. Bank of Los Angeles vs. Franchise Tax Board*, 55 Cal. 2d 407, 359 P. 2d 625, 627, 11 Cal. Rptr. 289 (1961) that personalty of a national bank could not be taxed by a state. The Court said:

"It is settled that taxation of personal property, which is not a method of taxation permitted in section 5219 (12 U.S.C. §548), is improper. Owensboro National Bank vs. City of Owensboro, 173 U. S. 664, 668 et seq., 19 S. Ct. 537, 43 L. Ed. 850; First National Bank of San Francisco vs. City and County of San Francisco, 129 Cal. 96, 97-98, 61 P. 778."

On June 17, 1968, the United States Supreme Court held that 12 U.S.C. §548 prescribed the only ways in which states can tax national banks and that state sales and use taxes, not being permitted by the Federal Statute, were not one of those ways. *First Agricultural National Bank of Berkshire County vs. State Tax Commission*, 36 LW 4686. The Supreme Court said in that case:

"It seems clear to us from the legislative history that 12 U.S.C. §548 was intended to prescribe the only ways in which the states can tax national banks. And this is certainly not a novel interpretation of the section, as shown by previous decisions of this Court."

An examination of 12 U.S.C. §548 discloses that the states are permitted to tax the real property of national banks. See 12 U.S.C. §548(3). However, this federal statute does not provide for taxation of a national bank's tangible personal property, such as the tanks mentioned in your letter. Consequently, it is our opinion that the tanks owned by the national bank are exempt from personal property taxation in the State of Iowa.

October 8, 1968

MOTOR VEHICLES — Motorcycles: head lamps — §§321.386, 321.409, 321.415, 1966 Code of Iowa. Meaning of distribution of light, composite beam. Motorcycle not required to have two beams. (Zeller to Taha, Deputy Public Safety Commissioner, 10/8/68) #68-10-8

Mr. Robert D. Taha, Deputy Public Safety Commissioner: Reference is made to your recent letter in which you write:

"Chapter 321.386 of the Code of Iowa 1966 as amended deals with head lamps on motorcycles. There is some conflict in the statutes which deal with lighting requirements as they apply to motorcycles.

"321.409 provides certain requirements for vehicle lamps but creates certain exemptions for motorcycles. 321.415 requires motor vehicles (and apparently this includes motorcycles) to have a beam directed to reveal persons at a safe distance and it also requires the capability of not projecting a beam into the eyes of oncoming drivers. . . .

"What is meant by the term distribution of light and composite beam as used in 321.415?

"If a motorcycle is equipped with one or two headlamps, are the lamps required to have a high beam and a low beam?"

Section 321.386, Code of Iowa, 1966, provides as follows:

"Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations of this chapter."

Section 321.409, Code of Iowa, 1966, provides as follows:

"Except as hereinafter provided, the headlamps or the auxiliary driving lamp or the auxiliary passing lamp or combination thereof on motor vehicles other than motorcycles or motor driven cycles shall be so arranged that the driver may select at will between distributions of light projected to different elevations and such lamps may, in addition, be so arranged that such selection can be made automatically, subject to the following limitations:

"1. There shall be an uppermost distribution of light, or composite beam, . . . as to reveal persons and vehicles at a distance of at least three hundred fifty feet ahead. . . .

"2. There shall be a lowermost distribution of light, or composite beam . . . to reveal persons and vehicles at a distance of at least one hundred feet ahead; . . . ."

Section 321.415, Code of Iowa, 1966, provides in pertinent part as follows:

"Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the times specified in section 321.384, the driver shall use a distribution of light, of composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations:

"Whenever a driver of a vehicle approaches an oncoming vehicle within five hundred feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver. The lowermost distribution of light, or composite beam, specified in subsection 2 of section 321.409 shall be deemed to avoid glare at all times, regardless of road contour and loading."

In answer to your first question, the distribution of light means the dispensing, projecting or casting out of light so as to illuminate the highway ahead of the driver. See Webster's International Dictionary, Third Edition.

A composite beam means a beam made up of distinct parts or integral factors. See Webster's International Dictionary, Third Edition.

In answer to your second question, §321.409 seems to control. This section requires that head lamps on motor vehicles *other than motorcycles* shall have a high composite beam and a low composite beam which may be selected at will by the driver. Since this section excludes motorcycles, it is not mandatory as to them and they are not required to comply with the section. Motorcycles are excluded from the coverage of the statute insofar as it requires two beams.

Section 321.415 relates to the usage of light devices by drivers of motor

vehicles and relates to dimming of lights as well as to the usage of lighting devices. Since drivers of motorcycles are not required to have two beams, the directions for the use of two beams would not be applicable. I am of the opinion that §321.386 and §321.415 both must be construed with §321.409. Accordingly, since §§321.386, 321.409 and 321.415 should be construed together it is my opinion that motorcycles are not required to be equipped with a high beam and a low beam in order to comply with statutory requirements.

October 8, 1968

MOTOR VEHICLES: Horse trailers. §§321.310 and 321.1(25), Code of Iowa, 1966. Difference in registration fees required, when horses are transported by truck trailer to horse show, fair or race track for exhibition purposes. (Zeller to McDonald, Cherokee County Attorney, 10/8/68) #68-10-9

Mr. James L. McDonald, Cherokee County Attorney: Reference is made to your recent letter whereby you request our interpretation of §321.310, Code of Iowa, 1966, on the following statement of facts:

"A number of individuals in this county who are farmers operate four-wheeled trailers with steering axle for the purpose of transporting livestock, primarily horses, to and from horse shows.

"A controversy has arisen as to whether a stock trailer is a 'wagon-box trailer' and if it is, whether the transportation of horses or other livestock to an animal show would be considered hauling farm produce to and from the market, conceding the fact that most horses taken to horse shows are for sale for a price. * * *

"If a horse or stock trailer is not a wagon-box trailer, according to Section 321.310 its use by anyone would obviously be a violation of the section. If it could be construed as a wagon-box trailer, could the transportation of horses or other livestock to animal shows be considered the transportation of farm products to and from market?"

Section 321.310, Code of Iowa, 1966, reads as follows:

"No motor vehicle shall tow any four-wheeled trailer with a steering axle, . . . with the exception that this section shall not apply to any motor truck, truck tractor or road tractor registered at a combined gross weight of ten tons or more . . . , or a wagon box trailer used by a farmer in transporting produce, farm products or supplies hauled to and from market when registered under the provisions of section 321.123."

Accordingly, you have asked two questions; whether a stock trailer used for transporting horses is a wagon-box trailer and the second question is whether hauling horses to an animal show can be classified as transporting produce by a farmer to the market.

In answer to the first question, a wagon is defined in Webster's International Dictionary, third edition, as a four-wheeled vehicle for carrying freight, and a wagon-box is defined as the body of a wagon. Accordingly, it is my opinion that the stock trailer, which is a four-wheeled wagon and has a body for carrying freight or horses, may be appropriately classified as a wagon-box trailer. It is not necessary that the wagon or trailer have flare sides.

In answer to your second question, however, transporting horses or other livestock to other fairs and horse shows is not the same thing as transporting produce or farm products to the market. If the horses are

transported by a farmer in an agricultural operation for the purpose of delivering the horses to an auction sales market or to a buyer, then it would be the use of a farmer for transporting produce to market and the registration fee for the trailer would be five dollars. But if the horses are being transported to a horse show or fair or racing track which is primarily conducted for exhibition or racing purposes, it is my opinion that the motor truck, or truck tractor being used, should be registered at a combined gross weight of ten tons or more as provided in §321.310, and in §321.1(25), Code of Iowa, 1966, defining combined gross weight.

October 8, 1968

CRIMINAL LAW: Throwing explosive material — Ch. 412, Laws of the 62nd General Assembly not applicable. §§697.3, 714.2, Code of Iowa, 1966 may apply. (Cullison to Pahlas, Clayton County Attorney, 10/8/68) #68-10-10

Mr. Harold H. Pahlas, Clayton County Attorney: You requested the opinion of the Attorney General as to whether §2 of Chapter 412, Laws of the 62nd General Assembly, would apply to a case where explosive material was thrown on the premises of a dwelling house. You stated that such incidents have occurred in Clayton County and that in one of the incidents no one was occupying the dwelling house.

It is our opinion that Chapter 412, Laws of the 62nd General Assembly, was not intended to apply to this type of incident. Chapter 412 is entitled, "An act making the conveyance of threat or false information concerning the placement of bombs a felony, and prescribing the punishment thereof." Section 2 states:

"Any person who willfully makes any threat to any other person to place or attempt to place any bomb or other explosive or distructive substance or device in or upon the premises of any school, place of worship, business establishment, home or other dwelling place, place of accommodation, aircraft, bus, train, or other public or private transportation facility, public building or other public place shall be guilty of a felony."

We note that Chapter 412 is concerned with "threats" and "false information." Threats and false information do not appear to be an element in the incidents which you mentioned in your letter. Also, we do not believe that the words "attempt to place any bomb" mean that this act is a separate offense. The words "place or attempt to place" are a compound infinitive modifying "threat." If "attempt to place any bomb" were to be a separate offense, irrespective of a threat, then the word "attempt" should have been a verb, so that the language would have been, "Any person who willfully . . . attempts to place any bomb . . . ."

We believe that §697.3, Code of Iowa, 1966, may apply to the cases which you mentioned in your letter. Section 697.3 states:

"If any person, with intent to destroy or injure any building . . . deposits or throws in, under or about such building . . . any dynamite, nitroglycerin, giant powder, or other explosive material, by the explosion of which any such structure will or will be likely to be destroyed or injured, he shall be imprisoned in the penitentiary not more than fifteen years."

Section 697.3 does not require that an explosion actually occur, nor does it require that the building be occupied by any person.

We also believe that §714.2, Code of Iowa, 1966, may be applicable. It states:

"If any person, with intent to injure or terrorize the inhabitants of any dwelling house, or other building used as a dwelling . . . or with intent to injure or deface any such structure, throws at, against, or into the same any brick, stone, billet of wood, or missile . . . he shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than one year, or be fined not more than $1,000."

October 8, 1968

MEMBERSHIP IN LEGISLATURE — Article III, §§4 and 22 of the Constitution, Chapter 107 of the 62nd General Assembly. There is neither constitutional nor legislative bar to a registered lobbyist running for legislative office. (Strauss to Coffman, State Representative, 10/8/68) #68-10-11

The Hon. W. J. Coffman, State Representative: Reference is herein made to yours of the 11th day of September, 1968 in which you submit the following:

"I would like to have a ruling upon the constitutionality of a registered lobbiest running for the State Legislature. I would like an opinion as to whether a person so registered is eligible to be a candidate or not."

In reply thereto, I advise that there is no such thing as a right to hold public office. This is a mere privilege at all times within the control of the legislature save where limited by some constitutional provision. *Jones vs. Sargent*, 145 Iowa 298, 124 N. W. 339. One must be an elector to be eligible for elective office. *Blodgeet vs. Clark*, 177 Iowa 575, 159 N. W. 243. And the fixing of qualifications for office is a legislative and not a judicial function. See *Jones vs. Sargent*. Qualifications for aspirants for membership in the legislature are fixed by the Constitution. Sec. 4 of Article III of the constitution provides the following:

"No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this State one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county, or district he may have been chosen to represent."

Sec. 22 of Article III of the Constitution provides this further limitation upon membership in the General Assembly:

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

There is no absolute right to hold office or to be a candidate therefor, and the legislature in absence of constitutional prohibition has plenary power in fixing the qualifications therefore. *Jones vs. Sargent.* The legislature having placed no other limitations upon the candidacy for such office or the holding thereof, eligibility for such office is here present.

The foregoing view is supported by the following from 42 American Jurisprudence, page 907, entitled Public Offices:

"§37. Generally. To hold a public office, one must be eligible and possess the qualifications prescribed by law, and an election or appointment to office of a person who is ineligible or unqualified gives him no right to hold the office. It is frequently said that unless excluded therefrom by some legal disqualification, all persons are normally and equally eligible to public office, that is to say, legally qualified for office. There is, however, no inherent or constitutional right to hold office. It is a political privilege which depends upon the favor of the people, and this favor may be coupled with reasonable conditions for the public good. It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers be exclusive and free from external interference except so far as plainly provided by the Constitution of the United States.

Generally, in the United States the qualifications for holding public office are prescribed either by constitutional provision or legislative enactments. Whether these conditions of eligibility are set forth in a Constitution or are defined by the legislature, they must be complied with by persons seeking an office to which they relate, and such persons must have the prescribed qualifications at the proper time."

In as far as legislative lobbying is concerned, bearing upon this discussion, Chapter 107 of the 62nd General Assembly relating to conflicts of interest of employees, officials of Iowa and members of the General Assembly has provided duties and powers upon the House and Senate respectively concerning lobbyists and lobbying activities and providing a penalty for the violation of rules relating to lobbyists and lobbying by way of suspension of such lobbyists. This bill was passed on and after July 1, 1967 and approved by the governor on July 27, 1967 and became effective on August 15, 1967. The legislature not having been in session since such date, such duties and powers as described in Chapter 107 have not been activated. In any event, the violation of such rules has not by the legislature been made a ground for denying eligibility of such lobbyists the privilege of candidacy for seats in the legislature.

October 8, 1968

INSTITUTIONS: Transfers, commitment to private hospital within the state, outside of county of commitment — §§218.1, 227.1, 227.15, Code of Iowa, 1966. Commission of Hospitalization may transfer patient to private hospital within State of Iowa, outside county of commitment, provided transfer is made under the sanction of county board of supervisors with consent of Department of Social Services; and provided further that Commission of Hospitalization certifies patient is fit for treatment in private institutions. (Seckington to Harmon, Comm'r., Dept. of Social Welfare, 10/8/68) #68-10-13.

Mr. Maurice A. Harmon, Commissioner, Department of Social Services:
Receipt of your letter, dated August 16, 1968, is hereby acknowledged. In your letter you requested an opinion on the following question:

"Does the Commission of Hospitalization have authority to commit a mentally ill person to a private hospital within the State of Iowa but located outside the county of commitment?"

As you pointed out in your letter, §227.15, 1966 Code of Iowa, provides authority to confine a mentally ill person in a private hospital.

Section 227.14, 1966 Code of Iowa, states:

"Boards of Supervisors of counties having no proper facilities for caring for the mentally ill, may, with the consent of the state director, pro-

vide for such care at the expense of the county at *any convenient and proper* county or *private* institution for the mentally ill which is willing to receive them." (Emphasis supplied)

If a county has no proper facilities for the care of the mentally ill, the board of supervisors, with the consent of the board of control (now the Department of Social Services), may transfer a mentally ill person to a private non-ecclesiastic, non-sectarian institution, provided the county commission of hospitalization or two reputable physicians certify that such person is a fit subject for treatment and restraint in that institution. December 10, 1963, OAG.

The Commissioner of the State Department of Social Services is responsible for the management of the state hospitals (§218.1, 1966 Code of Iowa, as amended) and the supervision of all county and private institutions where the mentally ill are kept (§227.1, 1966 Code of Iowa, as amended). This being the case, and in light of the Attorney General's Opinion quoted above, it is clear that a mentally ill patient may be transferred to a private hospital within the State of Iowa, located outside the county of commitment, provided the county has no proper facilities for the care of the mentally ill patient in question, and provided further the transfer is made under the sanction of the board of supervisors, with the consent of the Department of Social Services provided the county commission of hospitalization certifies that the patient in question is fit for treatment and restraint in the private institution in question.

October 8, 1968

COUNTIES AND COUNTY OFFICERS — Public Employee Blanket Bonds — §§309.1, 309.17 and 347.11, Code of Iowa, 1966. County officials must furnish individual bonds. (Haesemeyer to Yenter, Deputy Auditor, State Auditor's Office, 10/8/68) #68-10-15

Mr. Ray Yenter, Deputy Auditor, State Auditor's Office: Reference is made to your letter of August 1, 1968, in which you state:

"We are advised that several of the counties of Iowa are bonding public officers by using Public Employee Blanket Bonds, apparently in most cases for all but the elected officers and their deputies. There is considerable inquiry from boards of supervisors and county auditors as to whether or not Public Employees Blanket Bonds meet the statutory requirements for bonds of public officials, elected or appointed, as set forth in Chapter 64 and related sections of the Code of Iowa, such as 309.1, 309.17, 347.11 and others of similar nature.

"It is urged by certain county officers, insurance company representatives and agents that Public Employee Blanket Bonds qualify for required bond coverage of Public officials, except perhaps elected officials and their deputies.

"Your opinion is respectfully requested as to whether or not Public Employee Blanket Bonds qualify for and provide the bond coverage of public officials required by the statutes of Iowa."

Substantially the same question you now ask was previously presented to the attorney general and an opinion rendered. In such prior opinion, 56 OAG 51, the attorney general stated:

"It has been the consistent opinion of this department that, unless otherwise expressly authorized, public officials are required to furnish individual bonds. This requirement is evident as to deputy county officers

in the introductory words of Section 341.4, Code 1954, which are as follows:

" 'Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, * * *.' (Emphasis supplied)

"As to the other county officers, the matter is controlled by the provisions of Section 64.2, Code 1954, wherein the introductory words appear as follows:

" 'All other public officers, except as otherwise specially provided, shall give bond with the conditions, in substance, as follows: * * *.' (Emphasis supplied)

"We have repeatedly held that the use of the word 'all' in this section has the connotation similar to the word 'each' in Section 341.4, Code 1954.

"There are some cases where the legislature has expressly provided for a blanket bond; such an instance is that as set forth regarding responsible and accountable officers of the Iowa National Guard under the provisions of Section 29.37, Code 1954. It is there provided that *each* such officer shall execute and deliver a bond. The section sets forth an express exception as follows:

" 'Provided, however, that the adjutant general, with the approval of the governor, may obtain an adequate indemnity bond covering all or part of the officers so accountable or responsible, in which case the officers so covered shall not be required to furnish individual bonds as hereinbefore provided.'

"In the instant case, had the legislature intended to provide for a blanket bond we must assume that a similar clear statement of authority would have been made by them in Senate File 88, Acts of the 56th General Assembly."

In a subsequent opinion, 64 OAG 102 the attorney general reaffirmed the earlier ruling and noted:

"The individual officer may determine whether or not a corporate bond or a private bond will be filed. In a like matter, it is our opinion that it is the individual officer's determination as to who will be his surety; and that it would be improper for the county board of supervisors to ask for bids for county officers' bonds and to give all bonds to the lowest bidder. The only determination to be made by the board of supervisors, in paying for bonds filed by county officers, is whether or not the price is reasonable."

These prior opinions of the attorney general appear to be both legally correct and soundly reasoned. We see no reason to reach a different conclusion now.

Accordingly, it is our opinion that all county officials must furnish individual bonds. While it may well be that the use of public employee blanket bonds is desirable and would result in certain economies to those counties using them, any determination to authorize such blanket bonds would have to be made by the legislature, not the attorney general.

October 9, 1968

COUNTY AND COUNTY OFFICERS — Township Trustees. §§359.42, 359.43, Code of Iowa, 1966. Township trustees have the power to compensate those who render services in extinguishing fires as a part of the organized township fire department. (Martin to Fenton, Polk County Attorney, 10/9/68) #68-10-14

Mr. Ray A. Fenton, Polk County Attorney: I have received your letter of September 12, 1968, in which you ask for the opinion of the attorney general on the following question:

"I would appreciate being advised as to whether or not the board of township trustees has authority to compensate persons who maintain the township's fire apparatus and equipment, answer alarms, fight fires, in fact those persons who constitute the township's fire department."

Section 359.42, Code of Iowa, 1966, as amended by §1 of Chapter 308, Acts of the 62nd General Assembly provides as follows:

"Township trustees of any township may, for the township or portion thereof, exclusive of any portion included in a benefited fire district, purchase, own, rent or maintain fire apparatus or equipment and provide housing for same *and furnish services in the extinguishing of fires. . . .*" (emphasis added)

Section 359.43, Code of Iowa, 1966, as amended by §2 of Chapter 308, Acts of the 62nd General Assembly provides in pertinent part as follows:

"The township trustees may levy an annual tax not exceeding one and one-half mills on the taxable property in the township or portions thereof, without the corporate limits of any city or town which may be wholly or partially within the limits of the township, for the purpose of exercising the powers granted in section 359.42, when so authorized by an affirmative vote equal to at least sixty percent of the total vote cast for and against a proposal therefor at an election held pursuant to section 359.44."

The Iowa court in *Koelling v. Board of Trustees of Mary F. Skiff M.H.* 259 Iowa 1185, 146 N. W. 2d 284 (1966) quoted with approval, the following language from *Willis v. Consolidated Independent School District,* 210 Iowa 391, 396, 227 N. W. 532, 535 (1929):

" 'It is the universal rule of statutory construction that, wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied.' " (loc. cit. 290 of the Northwest Reports.)

It is clear that the power to provide services in extinguishing fires is conferred under the provisions of §359.42. In order to carry out such a power it is necessary that the trustees be able to call upon people to aid in the carrying out of this function. The source of funds to compensate such persons and the authorization to make a levy to provide these funds is found in the provisions of §359.43, Code of Iowa, 1966.

October 11, 1968

COUNTY AND COUNTY OFFICERS: Acceptance of full-time outside employment by incumbent sheriff. §§66.1, 66.3, 66.4, 66.7 and 66.9. A sheriff may accept an outside employment provided such employment is wholly consistent with his public duties and does not interfere with his first and paramount duty of performing all of the duties of his office. The board of supervisors may not stop the sheriff's pay so long as he remains legally in office but may request the county attorney to institute removal proceedings against the sheriff in the district court for willful or habitual neglect or refusal to perform the duties of his office and in such event the district court may suspend the sheriff's pay pending a determination of such proceedings. (Haesemeyer to Morrison, Henry County Attorney, 10/11/68) #68-10-16

Mr. James L. Morrison: By your letter of September 27, 1968, you have

requested an opinion of the attorney general with respect to the following:

"1. Is it permissible for a lame duck sheriff to obtain and attend to full time outside employment for the balance of his term. Such outside employment obligates him to spend eight hours a day on that job.

"2. When a lame duck sheriff obtains such employment contrary to the request of the Board of Supervisors is the Board authorized to discontinue payment of the sheriff's salary."

We have been unable to find any statutory provision expressly dealing with the questions you raise. However, in *Burlingame v. Hardin County*, 180 Iowa 919, 164 N. W. 115 (1917), in a case involving facts somewhat analogous to the situation you describe the Iowa supreme court stated:

"A county officer does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county. 'His duties are fixed by statute, and when these are performed he is not required to do more.' Polk County v. Parker, 160 N. W. 320, L.R.A. 1917 B., 1176.

"If for example he receives payment or fees as a witness in a civil action, or for service as one of the board of arbitrators, or as clerk of an election board, or as laborer in the harvest field, or indulges in literary work for which he receives more or less in royalties, or being a merchant, or banker, or mechanic, wins profits wholly disconnected with the duties placed upon him by statute, no one would soberly contend that the county or any of its officers could rightfully lay claim to any part of the income or earnings so accruing."

In *State v. Hinshaw*, 197 Iowa 1265, 198 N. W. 634, 637 (1924), following the rationale laid down in *Burlingame*, supra, the court noted:

"A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, *if wholly consistent with public duties*, perform any other service or earn money from any other source. *His first and paramount duty is to perform all of the requirements of his office*, but he is not barred because he holds public office from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest." (Emphasis added)

Thus, it would appear that the sheriff in question could accept an outside employment provided such employment was "wholly consistent" with his public duties and did not interfere with "his first and paramount duty . . . to perform all of the duties of his office." While each case must be decided on its own peculiar facts we find it extremely difficult to conceive of a situation where a sheriff could hold down a full time eight hour per day job and at the same time effectively discharge the duties of his office. This would be especially true if the sheriff was required to attend to his private employment during regular business hours. Of all the duties of the county officers perhaps none is more likely to require the constant availability of the incumbent than that of sheriff. The duties imposed on the sheriff by the Code of Iowa are manifold and demanding. While your letter does not indicate whether or not law enforcement and the operation of the sheriff's office have suffered because of the present sheriff's outside employment it would be our view this would be the inevitable result of such outside employment and the sheriff should in good conscience resign.

However, if the sheriff should refuse to resign the board of supervisors could not simply discontinue paying his salary. As stated in *Bryan v. Cattell,* 15 Iowa 538, 552 (1864):

"It seems to us, the dictate of reason and good conscience, that the State should not be required to pay for *services never rendered;* that public officers should be paid their salaries when and only when they discharged the duties imposed upon them by law; that the same rule should apply to the State as to individuals, and that no Court ought to consent to the auditing of a demand against the State where it was admitted that the claimant made no pretense of having rendered the services for which he claims. It must be remembered, however, that we are dealing with a practical, and not an abstract, question. And practically, the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn. That is to say, how long an absence from official duties — how great delinquency shall work a forfeiture of salary. In the absence of statute, shall it be one day, or one week, or one month, or one year? Where shall faithfulness end, and delinquency begin? Add to these considerations the fact that it is frequently impossible to tell to what extent the services of the officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the State takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law."

The supervisors do, however, have a remedy available to them. §66.1, Code of Iowa, 1966, provides in relevant part:

"66.1 Removal by court. Any appointive or elective officer, except such as may be removed only by impeachment, holding any public office in the state or in any division or municipality thereof, may be removed from office by the district court for any of the following reasons:

1. For willful or habitual neglect or refusal to perform the duties of his office."

The petition for removal may be brought by the county attorney or by any five qualified electors of the county, §66.3, Code of Iowa, 1966. The filing of a bond for costs is not required if the petition for removal is filed by the county attorney, §66.4, Code of Iowa, 1966. The sheriff's salary could then be stopped by the district court under §§66.7 and 66.9, Code of Iowa, 1966, which provide:

"66.7 Suspension from office. Upon the filing of the petition in the office of the clerk of the district court, and presentation of the same to the judge, the court or judge may suspend the accused from office, if in his judgment sufficient cause appear from the petition and affidavits which may be presented in support of the charges contained therein."

"66.9 Salary pending charge. An order of the district court or of a judge thereof suspending a public officer from the exercise of his office, after the filing of a petition for the removal from office of such officer, shall, from the date of such order, automatically suspend the further payment to said officer of all official salary or compensation until said petition has been dismissed, or until said officer has been acquitted on any pending indictments charging misconduct in office."

October 11, 1968

COUNTY CONSERVATION BOARD—Chapter 111A, 1966 Code of Iowa. County Conservation Boards do not have express or implied authority to pay expenses incurred in preparing and mailing brochures urging approval or disapproval of bond issue. (Seckington to McCray, State Rep., 10/11/68) #68-10-17

Hon. Paul B. McCray, State Representative: This is in response to your letter of October 4, 1968, wherein you ask:

"Just recently the Conservation Board of Scott County voted to have printed 35,000 brochures regarding a pending bond issue and mail these brochures to 35,000 people in Scott County at the taxpayers' expense. This bond issue is a very controversial matter. Do they have the right to put the taxpayers to this cost? It is my understanding the matter was not brought before the Board of Supervisors."

Chapter 111A, 1966 Code of Iowa as amended, sets forth the powers and duties of the County Conservation Board. The issuance of bonds by the County Conservation Board is provided for in §111A.6, which provides in part as follows:

"Upon the filing of a petition by the conservation board with the county board of supervisors asking that bonds be issued in a specified amount for the purpose of paying the cost of acquiring land and developing the same for public park, parkway, preserve, playground, or other recreation or conservation purposes within the county, then the board of supervisors may call a special election to be held in the county to vote on the proposition of issuing such bonds."

Later, in the same section it provides:

"The expenses incurred in connection with the conduct of such election shall be paid by the conservation board from the county conservation fund."

The above quoted language gives the County Conservation Board the authority to ask for such election, and if granted by the County Board of Supervisors, the Conservation Board has the duty to finance such election. This duty and power goes only to the actual and necessary expense of conducting the election. So, for example, ballots must be prepared, polling places staffed and either voting machines or actual hand count of ballots provided. These are the necessary expenses in conducing an election. However, the preparation and mailing of brochures, either in favor of or opposed to the bond issue, is not an actual or implied expense in conducting an election.

Aside from any lack of statutory authority, we believe that the payment of expenses incurred in the proposed mail campaign is against public policy and illegal. To use public funds to obtain a favorable vote on a proposed bond issue where public opinion is divided, would be manifestly unfair and unjust to electors opposing the bond issue. *Mines v. Del Valle,* 257 P. 530, 201 Cal. 273; *Elsenau v. City of Chicago,* 165 N. E. 129, 334 Ill. 78.

It is therefore the opinion of this office that there is no express or implied authority or power in a County Conservation Board to use public money to prepare and mail prochures urging either approval or disapproval of a bond issue.

October 15, 1968

ELECTIONS: Residence for voting purposes — Article II, §1, Constitution of Iowa. Residence for voting purposes means domicile which is largely a matter of intent. An individual may retain his residence for voting purposes if he regards it as his domicile and intends to return there at some future date even if he has lived in another locale for a number of years. (Turner to Christensen, State Representative, 10/15/68) #S68-10-1

The Hon. Perry L. Christensen, State Representative: Reference is made to your letter of September 27, 1968, in which you state:

"I am writing in regard to Mr. and Mrs. Norlan Miller who formerly lived in Osceola but now in Grinnell, Iowa.

"He is employed by the State as an inspector of trucks on the highway. He claims Osceola as his legal residence and Grinnell as a temporary residence because it is near the center of his territory. He has no children in school and expects to make Osceola his home upon retirement.

"My question is: What is a legal residence for voting purposes? His vote in the primary election was challenged by the Democrats and was thrown out on the grounds that he had been away too long to call this his legal residence. He has not lived in Osceola for several years."

Article II, §1, Constitution of Iowa, provides:

"Every male citizen of the United States, of the age of twenty one years, who shall have been a resident of this State six months next preceding the election, and of the County in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

By reason of the adoption of the Nineteenth Amendment to the Constitution of the United States the right of suffrage was extended to women which in practical effect amounted to an amendment of the foregoing provision of the Iowa Constitution to delete the word "male" from the first line thereof.

The answer to the question you have raised turns upon what is meant by the word "resident" in Article II, §1, Constitution of Iowa. It is well settled in Iowa that the word "residence" used in election statutes and in Article II, §1 of the Constitution means domicile. *Dodd v. Lorenz*, 210 Iowa 513, 231 N. W. 422 (1930); *Vanderpoel v. O'Hanlon*, 53 Iowa 246, 5 N. W. 119 (1880); *State v. Savre*, 129 Iowa 122, 105 N. W. 387 (1905). The acquisition of residence or domicile necessary to confer the right to vote is largely a matter of intent and the inquiry in each case necessarily becomes a subjective one. *Dodd v. Lorenz*, supra. Matters to consider in determining residence of a person in a particular case are: Where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends. *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927).

A prior attorney general's opinion, 1911-1912 OAG 710, which appears to be directly in point, states:

"Your question briefly stated is, whether or not a former resident or citizen of Buchanan County, who is and has been in the employ of the state weighing coal for seven or eight years, and has bought a home and moved his family to Polk County, where his place of employment is located, should vote in Polk or in Buchanan County.

"It very frequently occurs that a person may have a domicile in one county to which he intends at some future time to return even though he has had for several years his residence in another county, and the question depends so largely upon the intention of the particular person that it is hard to lay down any definite rule. For instance, Governor Carroll has lived in Des Moines for a number of years and owns his home on Ninth Street in which he lives, and yet he returns every year to Bloomfield in Davis County to vote because he claims that as his home and it is his intention to return there when his official duties are completed. The Attorney General also owns his home in Des Moines and while he has lived here several years always returns to Audubon County to vote because he claims that as his domicile. So that in the case about which you inquire if the party still has an intention of returning to Buchanan County when his employment with the state is terminated he would doubtless have a right to vote in that county. On the other hand if he has no intention to return to Buchanan County but intends to remain in Polk County even after his employment with the state is terminated then the proper place for him to vote would be in Polk County rather than Buchanan County."

Thus, if as you say, Mr. Miller regards his residence in Grinnell as only temporary and expects to make his home in Osceola upon retirement he is entitled to claim Osceola as his residence and should have been permitted to vote in that city.

October 15, 1968

STATE FAIR BOARD: Issuance of bonds. §173.14, Code of Iowa, 1966. Iowa State Fair Board is not authorized to issue bonds for the improvement of buildings on its properties. (Zeller to Fulk, Sec., State Fair Board, 10/15/68) #68-10-18

Mr. Kenneth R. Fulk, Secretary, Iowa State Fair Board: Your recent letter has been received, asking if the Iowa State Fair Board has authority to issue bonds for building and development of State Fair grounds.

The powers of the State Fair Board are set forth in §173.14, Code of Iowa, 1966, reading in part as follows:

"The state fair board shall have the custody and control of the state fair grounds, including the buildings and equipment thereon belonging to the state, and shall have power to:

"1. Erect and repair buildings on said grounds and make other necessary improvements thereon."

There is nothing in the enumerated power of said board which appears to authorize it to issue bonds. The Board has no power except those specifically authorized by statute or necessarily and fairly implied as incidental to the exercise of an expressed power. And it would appear that the enumeration of the powers of the board, without listing the power to issue bonds, would impliedly exclude the latter. The Latin phrase is "expressio unius est exclusio alterius."

For instance, the authority to issue revenue bonds for the purpose of building and improving municipal electric plants must be found in the statute expressly granting it, or arise by necessary or fair implication from powers granted, and in case of uncertainty as to powers granted, all reasonable doubts are resolved against the municipality. *Miehl v. Independence*, 249 Iowa 1022; 88 N. W. 2d 50 (1958).

The same principle fully applies to your agency. Accordingly, the Fair Board may not legally issue bonds for building and developing the Iowa State Fair properties.

October 18, 1968

ELECTIONS: Canvass of votes — §50.24, 1966 Code of Iowa. The board of supervisors is not permitted to postpone the canvass of votes until the next day when the Monday after the general election is a holiday. (Nolan to Bentz, Madison County Attorney, 10/18/68) #68-10-20

Mr. C. R. Bentz, Madison County Attorney: Your letter of October 11, 1968 requested an interpretation of Iowa Code §50.24 which provides:

"At their meeting on the Monday after the general election, at twelve o'clock, noon, the board of supervisors shall open and canvass the returns, and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office."

Your letter inquires whether the canvass should be made on November 11 or postponed until the next day, November 12, due to the fact that the Monday following the general election this years falls on a legal holiday.

This office, applying the rule of statutory construction that the inclusion of specific provisions excludes all others, has previously stated that where Veterans Day falls on Sunday, the provisions of §4.1 of the Code of Iowa do not affect the day and time for canvassing returns fixed by statute. Section 4.1 extends the time for the commencement for any actions or proceedings, the filing of any pleadings or motions in a pending action, or proceedings or the perfecting or filing of any appeal from a decision or award of any court, board, commission or official to the day after a holiday when such holiday falls on Sunday. 1962 OAG 11.5.

There appears to be no statutory prohibition against the Board of Supervisors meeting on a legal holiday. Canvassing boards in casting up the returns of an election act in a purely ministerial capacity. The common law rule that judicial acts cannot be done on Sunday does not extend to mere ministerial acts. Similarly, it is held that ministerial acts performed on legal holidays do not come within statutes prohibiting judicial acts on such days. 50 Am Jur 863, §79. Therefore, it is our view that the canvass of the votes should be made by the Board of Supervisors on the day prescribed by §50.24 and not postponed until the next day.

Your letter also dealt with a problem presented under §69.11 of the Code. We concur with your view thereon that the term of the present county auditor who was appointed to fill a vacancy ends on election day, but he holds over until a successor is elected and qualified. The auditor elected for the short term would be entitled to qualify as soon as the declaration of the election is made by the Board of Supervisors under Code §50.27. See §39.8, which provides:

"The term of office of . . . an officer chosen to fill a vacancy shall commence as soon as he is qualified therefore."

The question of who is to make the certificate required by Code §50.29 apparently has not been presented previously. It is my view that the auditor whose term expires on the qualification of a new auditor should make this certification.

October 21, 1968

ELECTIONS: Party Circle — Straight ticket voting. §§49.42, 49.94 and 52.12, Code of Iowa, 1966. The provisions of §49.42 regarding the form of ballots to be cast at a general election are mandatory and provision must be made thereon for the party circle and straight party voting except on voting machines owned prior to April 1, 1921. (Turner to Kramer, Scott County Auditor, 10/21/68) #S68-10-2

Mrs. Ida Kramer, Scott County Auditor: As I told you on the telephone today, the Secretary of State has informed me that you intend to lock the Scott County voting machines so that the straight party circle does not appear thereon and so that a straight party ballot cannot be cast at the general election on November 5, 1968.

Section 49.42, Code of Iowa, 1966, provides that:

"Said ballot *shall* be substantially in the following form:"

and shows the party circle thereon. §49.94 of said code describes how a voter desiring to vote for all candidates whose names appear upon the same ticket may mark a straight ticket.

As nearly as I have been able to determine from the Secretary of State, the party circle and straight ticket will be used in every county with the possible exception of yours. In my opinion, these provisions for straight party voting, on either paper ballots or voting machines, are mandatory and the law requires you to set up your machines so that all voters in Scott County have an equal opportunity, insofar as possible, to cast their vote in the same manner as anyone else. The only exception provided in the code is in §52.12 which provides as follows:

"*Exception — party circle and general form.* The provisions of section 49.42 shall not be applicable to voting machines owned prior to April 1, 1921, by any county or municipality insofar as they relate to the party circle and the form of the ballot generally; but nothing herein contained shall prohibit the use of voting machines equipped to comply with the foregoing provisions."

It is well settled that an exception to a statute is to be strictly construed and unless the county owned the voting machines prior to April 1, 1921, they must be set to allow for straight party voting.

You have indicated that you may not follow my opinion with reference to this matter and that you will lock the machines so that voters cannot cast a straight party vote. If so, I consider it my duty to take such action as may be necessary to enforce this law in accordance with the foregoing opinion. Because of the proximity of the election, I will appreciate hearing your intentions immediately.

October 23, 1968

ELECTIONS: Challengers presence at polling place — §49.104, Code of Iowa, 1966. The total number of persons who serve on a challenging committee is subject only to the number of persons appointed and ac-

credited by their political party but no more than three may be present at a polling place at any one time. (Turner to Allen, State Representative, 10/23/68) #68-10-21

The Hon. Laurence E. Allen, State Representative: You have asked, with reference to §49.104, 1966 Code of Iowa, whether the provisions of subsection 2 thereof prohibit the presence of more than three members of a political party at a polling place to act as a challenging committee for the entire period during which the polls are open or, alternatively, whether the subsection simply prohibits the presence of more than three members of a political party to be simultaneously present to act as a challenging committee.

Sec. 49.104(2) reads as follows:

"49.104 Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

* * *

"2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party or organization."

§49.104 does not appear to have been the subject of any prior litigation or opinions of this office with regard to the question you pose. Undoubtedly this is because it is regulatory in character and creates certain exceptions to the prohibited acts spelled out in §49.107. It is clear that, under §49.104(2), each party may have the same three persons present at the polling places for all hours during which the polls are open. This being so, it appears reasonable to determine that any three persons appointed and accredited by the executive or central committee of their political party may reasonably be on the premises throughout the hours the polling places are open. To interpret §49.104(2) as requiring the same three, and only three, persons to perform this yeoman function would be unreasonable. If the legislature had intended to require a marathon performance it would have said so. Rather, the legislature sought to limit the number of persons who might be present at the polling place at any time in order to prevent any interference with the duties of the judges and clerks.

Therefore, the total number of persons who serve on the challenging committee is subject only to the number of persons appointed and accredited by their political party but no more than three may be present at the polling place at any one time.

October 23, 1968

ELECTIONS: Access to voter registration lists — §§48.5, 48.13, Code of Iowa, 1966. The commissioner of registration is obliged to prepare and make available to party county chairman duplicate newly registered voter lists up to and including election day (Turner to Walsh, State Senator, 10/23/68) #68-10-22

The Hon. John M. Walsh, State Senator: You have asked when the commissioner of registration may reasonably refuse access to registration lists for the purpose of making copies thereof as authorized by §48.5, 1966 Code of Iowa.

§48.5 reads as follows:

"48.5 Registration lists. The commissioner of registration shall proceed to take the necessary steps for establishing the permanent registration plan. He shall provide for an original list of qualified voters, indexed alphabetically, which shall be kept at the office of the commissioner of registration in a place and in such manner as to be properly safeguarded. Such list shall be known as the "original registration list' and shall not be removed from the commissioner's office except upon order of court. A second list, to be known as the 'duplicate registration list,' shall be prepared by the commissioner from the original registration list. Such duplicate registration list shall be open to public inspection *at all reasonable times.*

"The commissioner of registration shall also prepare lists of newly registered voters, indicating the name, address, precinct number and party affiliation of such voters. The lists shall be prepared weekly from July 1 until September 15 and daily thereafter except Saturdays and Sundays during the calendar months preceding any general election until registrations are closed. The lists shall be available to public inspection *at all reasonable times* and duplicate lists shall be prepared upon request for the county chairman of any political party polling in excess of two percent of the popular vote in the jurisdiction in the last preceding general election." (Emphasis supplied)

§48.13 reads as follows:

"48.13 Election registers. The commissioner of registration shall have nine full days between the last day of registration and election day to perfect his election registers and, for that purpose, nine days before any election day shall be days upon which voters may not register. During these nine days the commissioner shall complete the election registers and, on the day before election day, he shall deliver them as required by law to each election precinct."

It is apparent from the wording of §48.13 that the legislature recognized that a commissioner of registration would need a minimum of nine full days in which to perfect the registration lists. No person may register during this nine day period. But, it is to be noted that §48.13 is silent on the right of the general public to inspect the records during said nine day period and the right of a county chairman to obtain a duplicate list of registrants.

It will be noted that the right of a county chairman is to obtain a duplicate of the "newly registered voters." The lists are to be prepared weekly from July 1 through September 15, and daily thereafter until registration closes. A county chairman would obviously be entitled, upon request, to all such lists, and the commissioner would be obliged to prepare and make such lists available, up to and including election day.

October 24, 1968

STATE OFFICERS AND DEPARTMENTS: Executive Council, general contingency fund — §5 of Chapter 77, Acts of the 62nd General Assembly. Whether or not a contingency exists which would justify the executive council in making an allocation from the contingency fund to assist the City of Guttenberg in providing matching funds in connection with a federal control project is a question of fact within the discretion of the council to determine taking into consideration the fact that a contingency is considered to be an event which is to some degree unforseen. (Turner to Selden, State Comptroller, 10/24/68) #S68-10-3

Mr. Marvin R. Selden, Jr., Comptroller: Reference is made to your letter of October 9, 1968, in which you state:

"On September 23, 1968, representatives of the City of Guttenberg, Iowa, appeared before the State Executive Council. The purpose of their appearance was to determine if any State funds could be made available to them for flood control. Subsequently, this same day, these city officials visited with you and your staff relative to the funding possibilities, and you indicated some encouragement in the matter. You then appeared before the Council, and the entire matter was discussed with the Executive Council, city officials, and yourself.

"The question has now been put to this office for a written recommendation to the Council for funding the flood control project. We are, at this date, preparing a written report to the Executive Council relative to the entire project. As you are aware, the facts are as follows:

"(1) The total cost of the flood control project is approximately $250,000.00 of non-federal funds, as proposed by the Corps of Engineers.

"(2) The City of Guttenberg's bonding capacity for such a project is approximately $90,000.00.

"(3) Federal funds are available at this date for the Federal share of the project, contingent upon the state/city share being funded.

"(4) The balance of $160,000.00 must be financed by non-federal funds, and since there are no funds available to the city, the city is looking to the state for possible financing.

"Before the completion of our report to the Executive Council, we would ask your opinion as to the following questions:

"(1) Is this a proper contingency within the meaning of the statute?

"(2) If the answer to question one (1) above is affirmative, from which of the contingent funds should the allocation be made (i.e. performance of duty; Chapter 77, Section 5, Acts of the 62nd General Assembly; Chapter 93, Acts of the 62nd General Assembly)?"

In answering the questions you have raised it is perhaps relevant to consider, in addition to the information set forth in your letter, the facts set forth in a letter dated September 25, 1968, from Guttenberg Mayor Robert Leeman to Governor Hughes, a copy of which is annexed hereto.

Section 5 of House File 786, 62nd General Assembly, now §5 of Chapter 77, Acts of the 62nd General Assembly, provides:

"Sec. 5. The general contingent fund of the state for the biennium beginning July 1, 1967 and ending June 30, 1969 is hereby created and said fund shall consist of the sum of one million seven hundred thousand (1,700,000) dollars, hereby appropriated thereto from the general fund of the state. The contingent fund shall be administered by the executive council and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. The executive council shall not allocate any funds for any purpose or project which was presented to the general assembly by way of a bill and which failed to become enacted into law.

"Before any of the funds appropriated by this Act shall be allocated, a written recommendation shall be obtained from the state comptroller and the executive council and they shall determine that the proposed allocation shall be for the best interest of the state. Any allocation in excess of thirty-five thousand dollars ($35,000.00) shall first be approved by the budget and financial control committee.

"Any balance in the contingent fund as of June 30, 1969 shall revert to the general fund of the state as of June 30, 1969."

We have on numerous occasions in the past been called upon to furnish our opinion as to whether or not a particular event or circumstance is a "contingency" which would justify use of the funds appropriated pursuant to the foregoing statutory provision. OAG 10/12/67, Turner to Smith, State Auditor; OAG 10/13/67, Turner to Robinson, Secretary, Executive Council; OAG 1/16/68, Turner to Hughes, Governor of Iowa; OAG 1/29/68, Turner to Selden, State Comptroller; OAG 2/9/68, Haesemeyer to Robinson, Secretary, Executive Council; OAG 2/12/68, Haesemeyer to Robinson, Secretary, Executive Council; OAG 4/8/68, Turner to Executive Council.

These opinions adequately delineate the limitations on the use of the general contingent fund. As we have repeatedly said, to be a contingency an event must be to some degree unforseen but that in each situation it is for the comptroller, the executive council and, in an appropriate case, the budget and financial control committee to decide as a matter of fact whether or not a contingency does exist. In making a determination it would be appropriate to consider the contention of the City of Guttenberg that the increase in the cost of the flood control project which occurred in late 1967 was indeed an unforseen event.

In answer to your second question any allocation of funds should come from the general contingent fund appropriated by §5 of Chapter 77, Acts of the 62nd General Assembly.

October 31, 1968

COUNTIES: County levy for improvement, maintenance, and replacement of the county hospital. §347.7, Code of Iowa, 1966. After advertising for and receiving bids for construction of a county hospital, letting contracts to the successful bidder, and commencing construction, a levy may be made for improvement, maintenance or replacement of a county hospital under §347.7, Code of Iowa, 1966. (Martin to Mansfield, Humboldt County Attorney, 10/31/68) #68-10-23

Mr. John P. Mansfield, Humboldt County Attorney: I have received your letter of September 18, 1968, in which you request an opinion of the attorney general on the following question:

"The Board of Hospital Trustees for Humboldt County have requested that I secure your opinion with reference to an improvement, maintenance, replacement levy not exceeding one mill for the year 1968, payable in 1969."

In an opinion of the attorney general of July 10, 1968, we examined this question. Based upon the facts as they then were, we determined that no levy for improvement, maintenance, or replacement of a hospital could be made as no hospital existed. Section 347.7, Code of Iowa, 1966.

You have now informed me that bids for the construction of the hospital facility were received and opened on September 12, 1968; that construction contracts with a successful bidder were let on September 30, 1968; and that construction of the hospital has begun. The estimated date of occupancy is December, 1969.

Under these new facts, we are of the opinion that a hospital has been

established to such an extent that a levy for its improvement, maintenance, or replacement may be made in 1968, payable in 1969.

October 31, 1968

CITIES AND TOWNS: Assessment of garbage collection fees. §§394.5 and 394.9, Code of Iowa, 1966. A municipality may not enforce collection of a garbage collection fee for a private garbage collector by assessing the property of the person owing the fee. (Martin to Story, Jones County Attorney, 10/31/68) #68-10-24

Mr. Robert H. Story, Jones County Attorney: In your letter of October 22, 1968, and through telephone conferences with you and the Anamosa City Attorney, Larry Conmey, the following question has been presented for an opinion of the Attorney General:

May a municipality enforce collection of a garbage collection fee for a private garbage collector by assessing the property of the person owing the fee.

Section 368.2, Code of Iowa, 1966, provides in pertinent part as follows:

". . . [C]ities and towns shall not have power to levy any tax, *assessment*, excise, fee, charge or other exaction except as expressly authorized by statute." (emphasis added)

There is no section which expressly authorizes an assessment under the facts you present.

Section 394.9, Code of Iowa, 1966, provides as follows:

"The city or town council shall have power by ordinance, to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate, or building that is connected with and uses such works, by or through any part of the sewage system of the city or town, or that in any way uses or is served by such works, and may change and readjust such rates or charges from time to time and to charge and collect proper rates and charges for landing, wharfage, dockage, swimming, and golfing. Such rates or charges shall be sufficient in each year for the payment of the proper and reasonable expenses of operation, repair, replacements, and maintenance of the works, and for the payment of the sums herein required to be paid into a sinking fund, which said fund shall be sufficient to meet the principal and interest and other charges, except rates or charges for the use of swimming pools and golf courses, of the bonded indebtedness provided for herein. All such rates or charges if not paid as by the ordinance provided, when due, shall constitute a lien upon the premises served by *such works*, and shall be collected in the same manner as taxes." (emphasis added)

Section 394.5, Code of Iowa, 1966, provides as follows:

"Cities and towns may by ordinance provide as schedule of fees to be charged for the collection and disposal of garbage and may pay the cost of construction, extending, repairing, maintaining, and operating garbage disposal plants and/or incinerating plants out of the earnings of such plant; revenue bonds, payable solely and only out of the earnings of such plant, may be issued in the manner provided in this chapter."

Even if the lien provisions of §394.9 are said to apply to the provisions of §394.5, your factual situation does not involve these sections. Under your proposal the city would not own and operate a garbage collection service or "plant." Section 394.9 expressly states that fees shall constitute a lien upon the premises served by "such works." The words "such works" refer, assuming the applicability of §394.9 to §394.5, to the municipally-owned garbage plant, the construction of which is authorized under the provisions of §394.5.

Since no other section of the Code even approaches the authorization sought, we are of the opinion that a municipality may not enforce collection of a garbage collection fee for a private garbage collector by assessing the property of the person owing the fee.

November 1, 1968

ELECTIONS — General Elections — §§52.9, 49.107(1), 49.75, 77. 1. An election judge or clerk wearing a badge with the name of the incumbent candidate for auditor while working at the polls would be electioneering. 2. The clerk must call the name as given by a person desiring to vote in a loud and distinct tone of voice. 3. The chairman of each political party is entitled to have a representative present for the testing of all voting machines. (Nolan to Walsh, State Senator, 11/1/68) #68-12-2

The Hon. John Walsh, Senator: This is in response to your telephone request for the opinion of this office on the following questions:

"1. Does it constitute electioneering at the polls for a county auditor who is running for reelection to require each judge and clerk of election in each polling place to wear a badge of indentification with the auditor's name and office printed thereon?

"2. Must the judges call the names of voters in a loud voice?

"3. Do the provisions of §52.9 relating to inspection of voting machines mean that the chairman of each political party shall be notified of the time of the inspection of one machine or of all machines?"

It is my opinion that the first two questions must be answered affirmatively and that the language of §52.9 requires that opportunity be given to make a meaningful rather than a mere token inspection of the voting machines.

Electioneering at the polls is prohibited by §49.107(1) of the Code of Iowa. This section has been construed to apply to solicitation of any kind by anyone within one hundred feet of the outside of the door of a building containing a polling place and to any such acts within the building. 1934 OAG 282. Writing the names of persons seeking office on a blackboard within a polling place is prohibited by this section. 1960 OAG 12.15. Judges and clerks of election should be both resident and eligible voters in the precincts in which they are appointed to serve. 1960 OAG 12.32. But there is nothing in the law of this state which requires or permits such judges or clerks to wear an identification badge or other ornamentation. Section 49.12 of the Code requires that not more than two judges and not more than one clerk shall belong to the same political party. It certainly would not be within the spirit of the law nor tolerable to permit the county auditor, who is a candidate of one of the political parties, to require those who are not of the same party to wear a badge with such auditor's name while serving as an election official. In my view, it would be electioneering for such judge or clerk to wear the badge voluntarily while so serving, and would be a contradiction to the oath of impartiality taken pursuant to §49.75.

The requirement that the judge of election announce the name and residence of each voter in a loud and distinct tone of voice is for the purpose of permitting everybody in the polling place to know who is presenting himself to vote, and permitting a challenge upon part of any

judge or challenger including a challenger of a political party. 1940 OAG 588. The applicable statute is §49.77 of the Code of Iowa, which provides:

"The judges of election of their respective precincts shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall give his name, and, if required, his residence, to such judges, one of whom shall thereupon announce the same in a loud and distinct tone of voice."

Applying well established rules of statutory construction, the use of the word "shall" in this section imposes a mandatory duty upon one of the judges to announce the name and residence as given by the voter in a loud an distinct tone of voice.

The chairman of each political party is entitled to have a representative present for the testing of all voting machines. Section 52.9 provides in part:

" * * *

"It shall be the duty of the county auditor or the city clerk or their duly authorized agents not less than twelve (12) hours before the opening of the polls on the morning of the election to examine and test said machines. The chairman of each political party shall be notified in writing of the time said machines shall be examined and tested so that they may be present, or have a representative present. Those present for the examination and testing shall sign a certificate which shall read substantially as follows:

"The Undersigned Hereby Certify that, having duly qualified, we were present and witnessed the testing and preparation of the following voting machines; that we believe . . ."

While the law does not require the county chairman or the representatives to be present for the testing of any machines, it does give them an opportunity to be present at the time the machines are tested. The form for certification outlined in §52.9 makes provisions for the machine number, serial number, protective counter number of a number of machines. Consequently, the law should not be construed to permit merely a token inspection of a single machine, but should be read as providing opportunity for the examination and testing of any and all voting machines to be used in the election.

I am enclosing herewith a copy of an opinion dated October 23, 1968 issued by this office concerning the number of challengers entitled to be present at a polling place.

November 4, 1968

ELECTIONS: Non-party organization, entitled to challengers and poll watchers — double election boards, only counting boards may be present before polls close — §§43.2, 49.104, 44.1, 45.1, 51.11, Code of Iowa, 1966. Non-party organizations having candidates on the ballot are entitled to have challengers and poll watchers present at the polling place but where double election boards are in use only the counting board may be present in the space or room where ballots are being counted before the polls are closed. (Turner to Smith, State Auditor, 11/4/68) #S68-11-1

The Hon. Lloyd R. Smith, Auditor of State: You have requested an

opinion of the attorney general with respect to two questions which may be stated as follows:

1. Under §49.104, Code of Iowa, 1966, are only political parties as defined in §43.2 permitted to have challenging committees and poll watchers in the vicinity of the polling place, or may a political nonparty organization having one or more candidates on the election ballot also have challengers and poll watchers present?

2. In those places where double election boards are in use does the language of §51.11, Code of Iowa, 1966, prevent the presence of poll watchers in the space or room where the ballots are being counted prior to the time the polls close?

§49.104, Code of Iowa, 1966, provides:

"49.104 Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.

2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and accredited by the executive or central committee of such political party *or organization.*

3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots."

It is clear from subsections (2) and (3) of such §49.104 that each "political party" is entitled to have both challengers and poll watchers present at the polling place. The statute is, however, much less clear as to whether or not a political nonparty organization is entitled to have challengers and poll watchers present. The expression "political party" is a statutorily defined term in the election law. §43.2, Code of Iowa, 1966, provides:

"43.2 'Political party' defined. The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two percent of the total vote cast at said election.

"A political organization which is not a 'political party' within the meaning of this section may nominate candidates and have the names of such candidates placed upon the official ballot by proceeding under chapters 44 and 45."

As indicated in such §43.2 a political nonparty organization, while not a "political party" may nonetheless nominate candidates and have their names appear on the general election ballot under chapters 44 and 45. Thus §§44.1 and 45.1 provide respectively:

"44.1 Political nonparty organizations. Any convention or caucus of qualified electors representing a political organization which is not a political party as defined by law, may, for the state, or for any division or municipality thereof, or for any county, or for any subdivision thereof, for which such convention or caucus is held, make one nomination of a candidate for each office to be filled therein at the general election. Provided that to qualify for any nomination made for a statewide elective office by such a political organization shall require a minimum of fifty qualified electors with at least one elector from each of ten counties, in attendance at such convention or caucus and such fact shall be certified

to the secretary of state together with the other certification requirements of this chapter."

"45.1 Nominations by petition. Nominations for candidates for state offices may be made by nomination paper or papers signed by not less than one thousand qualified voters of the state; for county, district or other division, not less than a county, by such paper or papers signed by at least two percent of the qualified voters residing in the county, district or division; as shown by the total vote of all candidates for governor at the last preceding general election in such county, district or division; and for township, city, town or ward, by such paper or papers signed by not less than twenty-five qualified voters, residents of such township, city or ward."

Returning to §104 and particularly to the words "or organization" underlined in subsection (2) thereof it is our opinion that the term "political parties" as used in §104 must be given a broader meaning than the definition contained in §43.2 would indicate and that nonparty organizations having candidates on the ballots should be permitted to have poll watchers and challengers present at the polling place. To conclude otherwise would render the words "or organization" in §49.104(2) meaningless. It will not be presumed that useless and meaningless words are used in a legislative enactment and a holding that the legislature enacted a meaningless provision should be avoided if possible, *State ex rel. Fenton v. Downing*, ... Iowa ....., 155 N. W. 2d 189 (1968). Moreover, the conclusion we have reached is consistent with the manifest purpose of the provision authorizing challengers and poll watchers which is that political parties and organizations having candidates on the ballot be given some means of satisfying themselves that the balloting is conducted fairly.

Nevertheless, the legislature has seen fit to make an exception to this overriding policy where double election boards are in use. Thus §51.11, Code of Iowa, 1966, provides:

"51.11 Presence of persons. No person shall be admitted into the space or room where such ballots are being counted until the polls are closed, except the counting board."

The language of the foregoing statutory provision is clear, plain and unambiguous. It is well settled that where the language of a statute is so clear and free from ambiguity and obscurity that its meaning is evident from mere reading, there is no need for construction or search for its meaning beyond the language used. *Kruck v. Needles*, 259 Iowa 470, 144 N. W. 2d 296 (1966). The same question you now raise formed the subject matter of an earlier attorney general's opinion, 40 OAG 578. As stated in such prior opinion:

"It is our opinion that under the provisions of Section [51.11] challengers may not be present during the counting of the ballots by the counting board while the polls are open. After the polls are closed it is clear that they may be present. The statute so specifically provides. Section [49.104], subsection 3, clearly has reference to such counting as is done after the closing of the polls and is, therefore, not in conflict with Section [51.11]. If any conflict exists Section [51.11], having been passed after Section[49.104], has modified the latter section insofar as challengers are concerned."

This 1940 opinion is, in our opinion, well reasoned and legally sound and we see no reason to depart from the conclusions reached therein.

November 13, 1968

STATE OFFICERS AND DEPARTMENTS: Highway Commission, open public meetings — S.F. 536, chapter 98, Acts of the 62nd G. A. Where firm proposals for specific real estate purchases are to be discussed at a meeting of a public agency it may be closed by a two-thirds vote of the members present. To the extent that the highway commission's five-year plan does not meet these requirements a meeting to discuss such five-year plan should be open to the public. The commission has no right to instruct representatives of the news media that certain comments made at a meeting are not for publication. (Haesemeyer to Coupal, Director of Highways, Iowa State Highway Commission, 11/13/68) #68-11-1

Mr. J. R. Coupal, Jr., Director of Highways, Iowa State Highway Commission: Reference is made to your letter of November 6, 1968, in which you requested an opinion from the attorney general with respect to the following questions:

"1. Does the Iowa State Highway Commission have a right under the laws of Iowa to call a closed meeting to discuss the Highway Commission's five-year program?

"2. Does the Commission have the right to conduct a meeting, which is open to public, but at which media representatives are instructed that certain comments are not for publication?"

The 62nd General Assembly enacted Senate File 536, now Chapter 98, Acts of the 62nd G. A., which is a measure designed to insure that meetings of all public agencies are to be open to the public at all times except in the most extraordinary circumstances, and then a meeting may be closed only by a two-thirds vote of the members of the public agency who are present. Thus, §§2 and 3 of the Open Meetings Act provide:

"Sec. 2. Every citizen of Iowa shall have the right to be present at any such meeting. However, any public agency may make and enforce reasonable rules and regulations for conduct of persons attending its meetings and situations where there is not enough room for all citizens who wish to attend a meeting.

"Sec. 3. Any public agency may hold a closed session by affirmative vote of two-thirds (2/3) of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such reason need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some other provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted."

Your letter does not go into any detail in describing what the highway commission's five-year program is, but I understand that it would involve long-range planning for future highway construction. If such five-year plan did involve proposals to purchase real estate, which could lead to land speculation along a proposed right-of-way, which could be reasonably expected to lead to inflating land costs to the state, it would be our

view that the commission could, by two-thirds vote, close that portion of the meeting at which the proposed real estate purchases were to be discussed. But in doing so, the commission should bear in mind the manifest public purpose of the Act for the utmost openness of meetings of governmental agencies and should be reluctant to close its meetings except under the most compelling circumstances. Certainly, secret meetings are to be avoided except in the most extraordinary situations.

Where a meeting held to discuss a five-year program would involve only preliminary discussions which would not involve firm proposals to purchase real estate, and there was not present a sufficient danger to the public welfare as to constitute an exceptional reason so compelling as to override the general public policy in favor of public meetings, it would be our view that the meetings should be open.

Apart from the bare words of the statute set forth above the Act furnishes no guidelines as to what circumstances will justify a public agency in closing its meetings. Hence, the highway commission and any other public agency which wishes to avail itself of the exceptions contained in the Open Meetings Act is going to have to exercise its own discretion in deciding whether the public interest will be best served by a closed rather than an open meeting, and we must presume that they will use the utmost good faith in reaching any such decision.

In answer to your second question, it would be our opinion that the commission could not *instruct* representatives of the news media that certain comments are not for publication in the sense that any such instruction would have any binding force or effect. Obviously, the commission could *ask* representatives of the news media to refrain from publishing matters which were felt to be unusually sensitive and the premature disclosure of which might be harmful to the public welfare. It has been our experience that representatives of the press generally adhere to a high standard of ethics and citizenship and may, for the most part, be relied upon to act responsibly where the public interest is concerned.

November 15, 1968

STATE OFFICERS AND DEPARTMENTS: State Car Dispatcher, bids for purchasing on new cars — §21.2(4), Code of Iowa, 1966. In drawing specifications and taking bids for new cars the state car dispatcher may (1) specify only certain makes of automobile, (2) include in the specifications a requirement that parts and service be available in all or a certain number of counties, (3) accept bids only on the entire letting, or (4) in awarding the contract take factors other than price into consideration, e.g., availability of parts and service. (Haesemeyer to Langford, State Car Dispatcher, 11/15/68) #68-11-2

Mr. J. R. Langford, State Car Dispatcher: Reference is made to your letter of November 4, 1968, in which you state:

"This office intends to take bids on 1969 Model cars. [One particular manufacturer] has expressed a desire to bid on Departmental cars only.

"This office ran a survey, and find that there are 28 counties without an authorized dealer, and many more that carry only a very limited, if any, stock of parts.

"It was recommended by this office to the Executive Council that [the manufacturer in question] be excluded from the bidding for lack of au-

thorized dealer servicing, and parts supply. Cars procured by this office are assigned all over Iowa, and it is recommended that cars be returned to an authorized dealer for repairs and servicing.

"Bearing in mind that the cost of towing is about $1.00 per mile, therefore maintenance costs would rise sharply, plus considerable down time while parts are ordered, with the state employee tied up while car is being repaired.

"The Council directed that I get an opinion from the Attorney General's office regarding the legality of excluding [the manufacturer in question], before taking bids."

§21.2(4), Code of Iowa, 1966, provides:

"4. The state car dispatcher shall purchase all new motor vehicles for all branches of the state government. Before purchasing any motor vehicle he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the *type and make* of car designated. No passenger motor vehicle except the motor vehicle provided by the state for the use of the governor, ambulances, buses or trucks shall be purchased for an amount in excess of the sum of two thousand dollars; provided that if the passenger motor vehicle is to be used by the highway patrol or the narcotics division or the bureau of criminal investigation for actual law enforcement, the maximum amount shall be twenty-two hundred fifty dollars." (Emphasis added)

It is clear from the italicized words contained in the foregoing statutory provision that the state car dispatcher may in his specifications designate not only the type but also the make of vehicle to be purchased. Thus by not including the manufacturer in question among the makes specified such manufacturer might be excluded from participating in the bidding. And the lack of adequate authorized dealer servicing and parts supply facilities might reasonably justify such exclusion.

In addition we note that this manufacturer apparently wants to bid on only departmental cars. In our opinion the car dispatcher may reasonably require that bidders bid on all of the cars forming the subject matter of the letting and not just some of them.

Finally, the requirement that bids be let to the lowest responsible bidder does not necessarily mean that the lowest price bidder must be awarded the contract. Other factors may be considered including the availability of parts and extent of service facilities.

To summarize, it is our opinion that several courses of action are open to the state car dispatcher and the executive council.

1. Specify only certain makes of automobile.

2. Include in the specifications a requirement that parts and service be available in all or a certain number of counties.

3. Accept bids only on the entire letting.

4. In awarding the contract take factors other than price into consideration, e.g., availability of parts and service.

November 18, 1968

DEPARTMENT OF LABOR: Inspection of Ordinance Plant — Chs. 88 and 88A, §1.4, Code of Iowa, 1966. Federal government has exclusive

jurisdiction on safety and health conditions at Burlington Ordinance Plant. (Ivie to Parkins, Commissioner of Labor, 11/18/68) #68-11-4

Mr. Dale Parkins, Commissioner of Labor: Reference is made to your recent letter in which you write:

"Our department has tried to get into the Army Ammunition Plant located at Burlington, Iowa. We have been refused entry on the basis that the Federal Government has exclusive jurisdiction over the plant there in Burlington. . . .

"Apparently, this plant and land is wholly owned by the U. S. Government and they are claiming exclusive jurisdiction in the area of Health & Safety regulations and claim that we have no jurisdiction over the conditions that exist there.

"Our question is this, does the U. S. Government have exclusive jurisdiction over the health & safety conditions existing at this plant or is their jurisdiction concurrent with our jurisdiction in the area of health & safety conditions."

The land upon which this plant is located was acquired during the years 1941 and 1942 through negotiation and condemnation by the United States. At the time the acquisition occurred, §4, 1939 Code (now §1.4, 1966 Code) read:

"Acquisition of lands by United States. The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise exclusive jurisdiction over its holding.

"This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

"Such real estate shall be exempt from all taxation, including special assessments, while held by the United States."

After the acquisition was complete, the 50th General Assembly amended the section, in 1943, to its present wording as §1.4, 1966 Code:

"Acquisition of lands by United States. The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise jurisdiction thereover but not to the extent of limiting the provisions of the laws of this state.

"This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

"Such real estate shall be exempt from all taxation, including special assessments, while held by the United States except when taxation of such property is authorized by the United States."

• It would appear that the 50th G. A. intended to eliminate the possibility of exclusive jurisdiction over federally owned lands by the federal government by so amending §4, 1939 Code.

However, the United States, in 1936 had already entered into the field of regulating working conditions in plants and factories involved in public contracts. Walsh Healey Act (Title 41, §35, §38, U.S.C.A.)

Section 35 of that Act provides in part:

"(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection."

Section 38 of that Act provides:

"The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. . . ."

The United States Supreme Court has historically held that "jurisdiction acquired from a state by the United States whether by consent to the purchase or cession may be qualified in accordance with agreements reached by the respective governments. The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary, its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred." *James Stewart & Company v. Sadrakula*, 309 U. S. 94, 99 (1909). The Court went on to say: "Since only the law in effect at the time of transfer of our jurisdiction continues in force, *future statutes of the state are not a part of the body of laws in the ceded area.*" 309 U. S. at age 100. (Emphasis supplied)

Since the United States had acquired ownership of the property prior to the 1943 amendment, and because the Walsh Healey Act of 1936 was in force and effect at the time of acquisition, the State of Iowa can have no jurisdiction in the area of health and safety conditions at the Army Ammunition Plant at Burlington, Iowa, absent some agreement with the Secretary of Labor, pursuant to Title 41, §38, U.S.C.A.

There is another reason for so holding. Under the provisions of §1.4, 1966 Code of Iowa, the state reserves jurisdiction *"except when used for naval or military purposes,"* over federally acquired lands were not preempted by federal legislation. Even if the Walsh Healey Act were not pre-emptive in this area, I believe the ammunition plant is most certainly a facility within the exception above. The U. S. Army has assigned both military and civilian personnel, including a commanding officer, to the facilities. The plant exists for only one purpose; namely the production, testing and storage of munitions. Most assuredly this purpose is military in nature. The fact that a civilian contracting company accomplishes the production of the munitions does not alter the purpose for which the facilities exist.

Accordingly, you are advised that the United States does have exclusive jurisdiction over the health and safety conditions at the Army Ammunition Plant in Burlington, Iowa and that Iowa has no jurisdiction under either Chapter 88 or Chapter 88A, 1966 Code of Iowa.

November 18, 1968

STATE OFFICERS AND DEPARTMENTS: Executive Council, repairs to buildings at seat of government — §19.18, Code of Iowa, 1966. The executive council and superintendent of buildings and grounds have authority to make certain repairs and changes to the Capitol building deemed desirable in anticipation of the forthcoming legislative session. (Haesemeyer to Garrison, Director, Iowa Legislative Research Committee, 11/18/68) #68-11-3

Mr. Serge H. Garrison, Director, Iowa Legislative Research Committee:
Reference is made to your letter of October 15, 1968, in which you state:

"On October 14, 1968 I and members of the Equipment Subcommittee of the Legislative Research Committee and several members of the Facilities Subcommittee of the Legislative Processes Study Committee appeared before the Executive Council for the purpose of seeking approval and requesting that certain actions be taken prior to the convening of the Sixty-third General Assembly.

"Members of the Equipment Subcommittee of the Legislative Research Committee appearing before the Executive Council were: Representative Floyd H. Millen, Chairman, Senator Kenneth Benda, Senator Donald S. McGill, and Senator H. Kenneth Nurse. Members of the Facilities Subcommittee appearing before the Executive Council were: Dr. William C. Lang, Senator Max Milo Mills, and Mrs. Matthew Bucksbaum.

"Approval of and action on the following recommendations were requested:

"1. Legislators be assigned specific parking spaces in a reserved area during the legislative session. This area should be policed and the regulation enforced.

"2. A signal system be installed in all public areas and committee rooms to inform legislators of impending quorum or roll call votes in either or both houses. Such a system might be incorporated into the civil defense alert warning system or existing telephone lines in the building.

"3. The public address system in the House of Representatives be replaced, and the Senate public address system made compatible with it. The public address system control panel should be replaced with individual controls at the desk of each legislator.

"4. As space becomes available in the State House, it be used as a private dining area for legislators and elected state executives, and that a semi-private lounge in which legislators could meet constituents could be provided. Rooms 16 and 17 on the ground floor of the State House, recently vacated by the Fuel Tax Division, seem most appropriate for the purposes. The Executive Council has approved the use of this area for the intentions expressed, and it is anticipated that the present concessionaire, The Commission for the Blind, responsible for operating the State House Cafeteria would operate the private dining area and would provide steam tables, chairs and tables, and other needed facilities to perpare the area for its intended use.

"5. Space near the State House be reserved for loading and unloading the heavy audio-visual equipment; such space might be provided for television and other media on the northwest side of the Capitol near the old Post Office. The space currently occupied by the Post Office is being vacated and might be put to this use.

"6. The existing lighting system in each chamber is inadequate for live coverage by television or for filming of the legislative session. This situation could be improved by inserting larger wattage bulbs at regular intervals in the lighting circuit following the perimeter of the chamber above the windows.

"7. Some of the frosted glass panels in the lounge area should be replaced with clear glass to facilitate the view of floor action and reduce congestion in the doorways.

"8. The opening in the rotunda, which reveals the unaesthetic cafeteria in the basement, be enclosed with a suitable covering. The existing first floor rotunda opens to an offensive view and permits disturbing odors and noises to rise to the first and second floors.

"9. The electrical wiring system in the House and Senate be replaced to provide maximum flexibility for future electronic demands. The situation in the House is especially critical, as hot wires have actually burned the carpet. In any modernization of the wiring system provision should be made for coaxial cable conduits and other audio-visual wiring. At present, the necessary electrical connections and wiring for live television and radio coverage of the session are strewn about both chambers, creating problems of safety and communications interruption. All wiring should be permanently installed providing maximum flexibility to connect with the speaker system in both houses. Areas assigned to audio-visual equipment should be provided multiple access points to connect with electrical power and the speaker system. It is suggested that before such renovation is undertaken, media engineers be consulted with regard to the specific requirements.

"10. Private restroom facilities for women legislators be provided with direct access from the floor, if possible.

"11. Additional signal buzzers for pages should be provided in the press areas in both houses.

"12. The number of press desks in each chamber should be expanded to approximately thirty to accommodate the increasing demand and to relieve present cramped working conditions. The Chief Clerk of the House and the Secretary of the Senate should establish a priority system for seat assignment based on regularity of use as well as seniority. It should be remembered, in making assignments, that out-of-town correspondents require more working space than those of the Des Moines area. As a temporary remedial measure, the benches in front of the windows at the sides of the Senate Chamber should be removed and working press space provided. A similar procedure should be followed in the House of Representatives if space become available through reduction in membership.

"Members of the Executive Council were agreed that the suggested recommendations should be carried out, but questioned the authority for carrying out those recommendations which require a substantial amount of planning and expenditure of state funds. In endorsing the above enumerated recommendations the Executive Council suggested that an attorney general's opinion be requested and that answers be obtained in such opinion to the following questions:

"1. What authority does the Executive Council have in regard to carrying out all or specified recommendations herein enumerated?

"2. Under what authority would the implementation of the above enumerated recommendations be financed and who has the obligation to finance such recommendations? More specifically, does chapter 19 or chapter 2, *Code of Iowa* (1966), grant the necessary authority to the Executive Council or the General Assembly to carry out and finance the above enumerated recommendations? A related question would be as to the propriety of the procedure presently being implemented, that of a committee composed of legislators and citizens seeking the approval of

the Executive Council and asking it to carry out the above enumerated recommendations.

"This request for an attorney general's opinion is being submitted on behalf of the Executive Council, the Equipment Subcommittee of the Legislative Research Committee, and members of the Facilities Subcommittee of the Legislative Processes Study Committee, acting jointly.

"Your cooperation in clarifying the above questions is greatly appreciated."

Under §19.18, Code of Iowa, 1966, the executive council has the responsibility for operating and maintaining the buildings of the state at the seat of government. We can find nothing in chapter 2 of the code relating to the general assembly, nor in any other chapter or provision of such code, which would authorize any committee of the legislature or any agency of government other than the executive council to do any of the work or make any of the changes you describe.

§19.18, Code of Iowa, 1966, provides:

"19.18 Repairs — supplies. The executive council may contract for the repairing of all buildings and grounds of the state at the seat of government, for the necessary telephone, telegraph, lighting, and water service for such buildings and grounds, for all necessary furniture, fuel, stores, and supplies for the said buildings and grounds, and for the various departments of the state government at the seat of government. Payment for telephone, telegraph, water, and lighting service shall not exceed the minimum charge to private parties.

"Any such project for repairing of buildings or grounds at the seat of government for which no specific appropriation has been made, which when completed will cost more than one hundred thousand dollars, shall, before work is begun thereon, be subject to approval or rejection by the budget and financial control committee."

It is clear from the foregoing that the executive council may "repair" the buildings at the seat of government as well as provide necessary utilities, furniture and supplies to the departments and agencies housed therein. Moreover, under chapter 18, the superintendent of buildings and grounds, an official appointed by the executive council, has charge of the day to day operation of the state capitol and other buildings at the seat of government. The distinction between repairing and remodeling or making improvements to a building is not always an easy one to make. See e.g. 66 OAG §5.61, p. 150. Among the definitions of repair quoted in such prior opinion of the attorney general are the following:

"An 'alteration,' as of leased building, denotes substantial change therein, while 'repair' means to restore to soundness or work done to keep property in good order. Ten-Six Olive, Inc. v. Curby, C.A. Mo., 208 F. 2d 117, 122."

" 'Repair' means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, and is synonymous with 'mend' and 'renovate,' but, generally does not mean to alter or change condition or to replace with new or different material. Mozingo v. Wellsburg Electric Light, Heat & Power Co., 131 S. E. 717, 718, 101 W. Va. 79."

"The word 'repair,' as defined by Webster: 'Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.' — is applied by courts in the construction of statutes and contracts. The word 'improvement,' defined by the same authority as 'a valuable addition or betterment as a building, clearing, drain, fences, etc., on land,' is a broader word than 'repair,' but includes the latter and

is also practically applied by the courts. Garland v. Samson, C.C.A. Minn., 237 F. 31, 35."

"Right of buyer of patented machine are limited to use and repair thereof, without right to rebuild or reconstruct machine, and legal limit of 'repair' is passed and realm of 'reconstruction' invaded if repairs are so extensive that identity of machine is lost. Ideal Wrapping Mach. Co. v. George Close Co., D.C. Mass., 23 F. 2d 848, 850."

"The words 'repairing' and 'remodeling' are not synonymous or included within the meaning of the word 'building,' within an ordinance prohibiting the erection of a wooden building within the fire limits. City of Mayville v. Rosing, 123 N. W. 393, 395, 19 N. D. 98, 26 L.R.A., N.S., 120."

"The constitutional provision prohibiting a county from borrowing money except for purpose of 'erecting' necessary public buildings prohibits borrowing money to remodel, alter, or repair a building already existing unless such processes amount in fact to erection of a building, and unless the term 'remodeling' is invariably included within the meaning of 'erecting' and 'building.' Const. art. 9, §10. The 'repair' of a building may involve 'remodeling' thereof. Frequently, the terms 'repair' and 'remodel' are used interchangeably, but it may be assumed that 'remodel' is a word of larger signification than 'repair.' 'Remodel' means to model, shape, form, fashion, afresh, or to recast, and is also defined as meaning to model anew; to reconstruct. It is a word of broad meaning. Among other definitions it means to reform, reshape, reconstruct, to make over in a somewhat different way. 'Remodeling' of a building is more than 'repairing' it or making minor changes therein. The ordinary significance of the term imports a change in the remodeled building practically equivalent to a new one. In common understanding, the 'building' of a house means the 'erection' or 'construction' of a new house and not the 'repair' or 'remodeling' of an old one. Board of Com'rs of Guadalupe County v. State, 94 P. 2d 515, 520, 43 N. M. 409."

In our opinion all of the twelve items you enumerate, with the possible exception of items 8 and 10 could either reasonably be characterized as repairs or are within the power of the superintendent of buildings and grounds to perform under chapter 18. Items 8 and 10 could be approved by the legislature when it convenes in January.

The enumerated recommendations would be financed out of funds appropriated by §19.29, Code of Iowa, 1966, the executive council's "performance of duty" fund.

We see nothing improper in the procedure you have elected to follow of a committee of legislators and citizens requesting the executive council to carry out these recommendations.

November 26, 1968

STATE OFFICERS AND DEPARTMENTS: Merit system council, appointment of members — §8.5(6), Code of Iowa, 1966. A member of the merit employment commission may also be appointed to fill a vacancy in the merit system council. (Haesemeyer to Clarke, Administrative Assistant to Governor, 11/26/68) #68-11-5

Mr. Wade Clarke, Jr., Administrative Assistant, Office of the Governor: Reference is made to your letter of November 21, 1968, in which you state:

"The members of the Iowa Merit System Council recently resigned, effective November 10, 1968. Governor Hughes has accepted their resignations. The procedure for filling the vacancies which these resignations

have created is set out in Article II, Section 1(h) of the Merit System Council Rules. Enclosed you will find a copy of correspondence which we have received from the Commissioner of Social Services which indicates the recommendations being made by the Merit System Council agencies to the Governor to fill the vacancies.

"Would you please advise us, with respect to the following questions:

"1. Does the action taken by the Merit System Council agencies meet the formal legal requirements for submission of names to the Governor for appointment?

"2. Is there any legal obstacle which would prevent a present member of the Merit Employment Commission from serving as a member of the Merit System Council?"

Attached to your letter was a letter from the commissioner of social services to the governor dated November 19, 1968, which states:

"Per the request of your office, I served as temporary chairman in calling together the following representatives of departments related to the Iowa Merit System Council:

"NAME	DEPARTMENT	TITLE
Mr. F. W. Colbert	Iowa Mental Health Authority	Administrative Associate
Mr. George W. Orr	Civil Defense Division	State Director
Mr. K. E. Hartoft	Department of Health	Assistant Commissioner for Administration
James Speers, M.D.	Department of Health	Commissioner
Mr. J. W. Janssen	Iowa Employment Security Commission	Chairman
Mr. Cecil A. Reed	Iowa Employment Security Commission	Commissioner
Mr. Edward M. Whitley	Iowa Employment Security Commission	Personnel Officer
Dr. Edward B. Jakabauskas	Commission for the Aging	Commissioner
Mr. Maurice A. Harmon	Department of Social Services	Commissioner

"The purpose of the meeting was to arrive at a group recommendation of names from which you may consider appointments to the existing three (3) vacancies on the Council.

"The following names were unanimously recommended by the representatives present at the meeting:

"For the vacancy of Mr. Walter W. Moeller

1. E. J. Paul, Ph.D., Assistant Dean, College of Business Administration, Drake University, Des Moines

2. Mr. Charles F. Iles, Present Member of the Iowa Merit Employment Commission

3. Mr. Dean Price, Personnel Director, Employers Mutual Casualty Company, Des Moines

"For the vacancy of Mr. Ben A. Henry

1. Mr. Al Meachem, Present Member of the Iowa Merit Employment Commission

2. Mr. John Estes, President, Des Moines Chapter of the N.A.A.C.P.

3. Rev. James Shopshire, Pastor, Burns Methodist Church, Des Moines

"For the vacancy of Mr. James D. Brand

1. Mr. David Griffith, Personnel Director, City of Des Moines

2. Mr. Fred Doderer, Personnel Director, State University of Iowa, Iowa City

3. Mrs. Emma Jo Uban, Present Member of the Iowa Merit Employment Commission."

Article II, §1(h) of the merit system council rules provided in part:

"Members of the council shall serve for a term of three years or until successors have been appointed by the governor, except that in the first instance one member shall be appointed to serve until December 31, 1940; one member shall be appointed to serve until December 31, 1941; and one member shall be appointed to serve until December 31, 1942. In appointing a successor to a member of the council, the governor shall make his selection from a panel of three names presented to him through joint action of the state board of social welfare, the employment security commission, the state department of health, the state services for crippled children, the Iowa mental health authority and the Iowa civil defense administration. A member appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed for the remainder of such term."

In answer to your first question the action taken by the merit council agencies does, in our opinion, meet the formal legal requirements for submission of names to the governor for appointment.

In response to your second question it is our opinion that there is no legal obstacle which would prevent a present member of the merit employment commission from serving as a member of the merit system council. Indeed, since the merit system council will pass out of existence as soon as new rules under chapter 95, Acts of the 62nd General Assembly, are promulgated and approved, which we under stand will be very soon, it would probably make a lot of sense and make for a smooth transition if the present merit employment commission members received these interim appointments to the merit system council.

November 27, 1968

REAL ESTATE COMMISSION: **Licensing** — §§117.1, 117.3, 117.5 and 117.6, Code of Iowa, 1966. Advertising service consisting of providing a sales kit and other advertising material to owners of real property for a price certain is not within the purview of Chapter 117, Code of Iowa, 1966, and the person or persons providing such service are not required to obtain a license as provided in said chapter. (Peterson to Synhorst, Secretary of State, and Clarkson, Director of Real Estate Commission, 11/27/68) #68-11-6

Hon. Melvin D. Synhorst, Secretary of State and Mr. George M. Clarkson, Director, Real Estate Commission: Receipt of your letter of October 28, 1968 is hereby acknowledged. In that letter you ask for an opinion on the following question:

"Whether or not an organization referred to as 'available Homes of America' should be licensed to sell real estate in the State of Iowa."

Information as to the operation of Available Homes of America was furnished with your letter. The entire business operation will be conducted as a franchise with Available Homes of America being the franchisor who will sell to, in some instances, people who are not licensed real estate brokers or real estate salesmen.

Generally, the business conducted by the franchisee will be in the form of an advertising service offered to sellers of real estate with the purpose of finding prospects. The service will consist of the sale of a kit which will contain the following material:

1. Use of a "FOR SALE BY OWNER" sign.
2. "OPEN FOR INSPECTION" sign.
3. Flags to attract attention to the signs.
4. Briefcase in which to keep the selling data, prospects' records, etc.
5. A "SALES HANDBOOK FOR HOMEOWNERS."
6. Brochures relating to the real property for sale.

In addition, the franchisee establishes in his office a board upon which the kit purchaser is entitled to place a picture of his real property or home which can be observed by any person in the community who is interested in buying local real estate.

Advertising of both the franchisor and franchisee will state that they are not real estate brokers or salesmen. The franchise agreement will reserve the right to franchisor to revoke the franchise of any franchisee who enters into the sphere of real estate brokers or real estate salesmen in the conduct of its franchise. The Operation Manual furnished each franchisee emphasizes the advertising service to be performed, generally warns the franchisees to "Keep out of the actual real estate transaction completely," and lists specific areas of activity which the franchisee should avoid.

The franchisee does not represent either the buyer or the seller of real estate, does not assist either buyer or seller in obtaining financing, and does not remain physically present at any closing of the real estate transaction. The franchisees sole means of compensation is the original fee charged for the sales kit. This fee is not based upon the sales price of the real estate involved and the seller is required to pay the fee whether or not he is successful in selling his property.

Statutory requirements relative to licensing of real estate brokers and real estate salesmen are contained in Chapter 117, Code of Iowa, 1966. Applicable to this situation are the following sections:

"117.1 *License mandatory.* No person shall act as a real estate broker or real estate salesman without first obtaining a license as provided in this chapter. The word 'person' as provided in said chapter shall mean and include partnership, association, or corporation."

"117.3 *'Broker' defined.* The term 'real estate broker' within the meaning of this chapter shall include any person, other than a salesman and except as herein provided, who engages for all or part of his time in the following:

1. The business of selling, exchanging, purchasing, or renting of real estate for another for a fee, commission, or other consideration.

2. Listing real estate of others for sale, exchange, or rental for a fee, commission, or other consideration or advertises or holds himself out as a real estate broker."

"117.5 *'Salesman' defined.* 'Real estate salesman' as used in this chapter is a person employed by or otherwise associated with a real estate broker, as a selling, renting, or listing agent or representative of said broker."

"117.6 *Acts constituting dealing in real estate.* Any person, partnership, association, or corporation, who, for another, in consideration of compensation, by fee, commission, salary, or otherwise, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, does, offers or attempts or agrees to do, engages in or offers or attempts or agrees to engage in, either directly or indirectly, any single act or transaction contained in the definition of a real estate broker as set out in section 117.3, whether said act be an incidental part of a transaction, or the entire transaction, shall constitute such person, partnership, association, or corporation a real estate broker or real estate salesman within the meaning of this chapter."

It is the opinion of this office that the advertising service described above in which only a sales kit and other advertising material are furnished to owners of real property for a price certain is not within the purview of Chapter 117, Code of Iowa, 1966, and the person or persons providing such service are not required to obtain a license as provided in said chapter. It should be noted, however, that serving as the initial link between buyers and sellers of real estate will provide opportunities to engage in real estate transactions requiring a license. Any franchisee expanding his service to include any of the activities listed in §117.3, supra, become subject to all provisions of said chapter 117, including both licensing and penal provisions thereof.

December 2, 1968

ELECTIONS: Registration of absent voters — §§48.3, 53.9, 53.28 and 53.38, Code of Iowa, 1966. Provisions of §53.28 to the contrary notwithstanding the affidavit on the absentee ballot envelope, except for members of the armed services, does not constitute sufficient registration of the voter where permanent registration is required or has been adopted by ordinance. (Haesemeyer to Van Gilst, State Senator, 12/2/68) #68-12-1

The Hon. Bass Van Gilst, State Senator: Reference is made to your letter of November 22, 1968, in which you request an opinion of the attorney general with respect to the following:

"The Absentee Voters Law, Section 53.28, appears to be in direct conflict with the Permanent Registration Law, Section 48.3. Section 53.28 provides that the affidavit upon the absentee ballot envelope shall constitute a sufficient registration of the voter in precincts where registration is required, but Section 48.3 provides that from and after July 1, 1928 no qualified voter shall be permitted to vote at any election unless such voter shall register in accordance with the provisions of Chapter 48.

"Section 48.3 was passed by the legislature after Section 53.28 and an Attorney General's Opinion, dated September 17, 1940, stated as follows:

" 'Therefore, we think the fair interpretation of Section 718.03, now Section 48.3, is that where permanent registration is required by law or has been adopted pursuant to an ordinance, the affidavit upon the ballot

envelope referred to in Section 954, now Section 53.28, is not a sufficient registration.'

"The 55th General Assembly in the year 1953 saw fit to enact Section 53.9 which, in effect, reaffirms the law as set out in Section 53.28 and at a time when permanent registration was a matter of statute. It now appears that the facts are different than those existing in 1940.

"I, therefore, respectfully request an Attorney General's Opinion as to the following question, to wit:

" 'Does the affidavit upon the absentee ballot envelope constitute a sufficient registration of the voter in precincts where registration is required?' "

Your statement that, "The 55th General Assembly in the year 1953 saw fit to enact Section 53.9 which, in effect, reaffirms the law as set out in Section 53.28 and at a time when permanent registration was a matter of statute," does not appear to be correct. §53.9, Code of Iowa, 1966, merely provides:

"53.9 Ballot mailed. Upon receipt of such application, and immediately after the ballots are printed, it shall be the duty of such auditor or clerk to mail to said applicant, postage prepaid, such official ballot or ballots as such applicant would have the right to cast at such election."

This section has remained unchanged since the 40th General Assembly, 1923-1924, Ex. Sess., S.F. 27, §8. The 55th General Assembly did in 1953 enact a law relative to voting by members of the armed forces. Chapter 59, Acts of the 55th General Assembly, now §§53.37 through 53.52, Code of Iowa, 1966. By its express terms this Act applies only to voting by members of the armed forces and the other pre-existing provisions of the absent voters law, i.e., §§53.1 through 53.36, continue to govern absent voting by voters other than members of the armed forces. It is also clear that insofar as servicemen are concerned the affidavit on the ballot is sufficient registration. Thus §53.38 provides:

"53.38 Affidavit constitutes registration. Whenever registration is required in order to vote at either the primary election or general election, in the case of voters in the armed forces of the United States, the affidavit upon the ballot envelope of such voter, otherwise qualified, shall constitute a sufficient registration, whether the registration required be under the provisions of chapter 47 or chapter 48."

In *Richards v. Board of Supervisors of Story County*, 256 Iowa 1317, 131 N. W. 2d 100 (1965), the supreme court, citing §53.38 confirmed that where members of the armed forces are concerned the affidavit on the ballot is sufficient registration even where permanent registration is required. However, §53.28 does not apply to members of the armed forces and the passage in 1953 of Chapter 59, Acts of the 55th General Assembly, does not amount to a reenactment of such §53.28. Under these circumstances it is our opinion that the prior opinion of the attorney general to which you refer, 40 OAG 577, still would be applicable to the situation you present. As stated in such opinion:

"We are of the opinion that the affidavit upon the ballot envelope referred to it [is] not sufficient to constitute registration in any case where permanent registration is required by statute or has been adopted by ordinance.

"We hereinafter set out our reasons for so holding. Section 718.03, Code of Iowa, 1939, [§48.3, Code of Iowa, 1966] provides:

" 'From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter.' The chapter referred to is Chapter 39.1, Code of Iowa, 1939, [Chapter 48, Code of Iowa, 1966], setting forth the various provisions with reference to permanent registration.

"Section 954, Code of Iowa, 1939, [§53.28, Code of Iowa, 1966] provides: 'The affidavit upon the ballot envelope shall constitute a sufficient registration of the voter in precincts where registration is required.' This registration is required.' This registration clearly pertains to what may be designated as 'ordinary registration,' i.e., the registration provided under Chapter 39, Code of Iowa, 1939, [Chapter 48, Code of Iowa, 1966]. In this connection, as you suggest, we think it should be borne in mind that the permanent registration law, to wit, Chapter 39.1 [Chapter 48, Code of Iowa, 1966], was passed after the ordinary registration law and subsequent to the absent voter's law. Therefore, we think the fair interpretation of Section 718.03 [§48.3, Code of Iowa, 1966] is that where permanent registration is required by law or has been adopted pursuant to an ordinance, the affidavit upon the ballot envelope referred to in Section 954 [§53.28, Code of Iowa, 1966] is not sufficient registration. This interpretation, we think, imposes no hardship and makes the law entirely workable, in view of Section 718.12, Code of Iowa, 1939 [§48.12, Code of Iowa, 1966], which provides:

" 'Any person entitled to register who is permanently disabled by sickness or otherwise, or who will be absent from the election precinct until after the next succeeding election, may * * * apply in writing to the commissioner of registration who shall * * * forward * * * registration cars [cards] which shall be executed by the voter before a notary public and returned to the commissioner of registration. If such registration cards are properly executed and show that the voter is duly qualified, then such cards shall be placed in the registration lists.'

"It is our conclusion, therefore, that the affidavit upon the ballot envelope is not a sufficient registration in any city where permanent registration is required, to wit, all cities having a population of 125,000 or over, or where permanent registration has been adopted by ordinance as by law provided."

See also 30 OAG 302, and 28 OAG 414.

December 9, 1968

MOTOR VEHICLES: Suspension of License. Operation of motor vehicles on highway. Sections 321A.32(1), 321.174, 321.210. Operating a car without a license does not result in a suspension of license for which he can be convicted under *321A.32(1)*. (Zeller to Johnson, Assistant Fayette County Attorney, 12/9/68) #68-12-3

Mr. J. G. Johnson, Assistant Fayette County Attorney: Reference is made to your recent letter relating in part as follows:

"I would appreciate an opinion from your office (informal or otherwise) regarding an interpretation of Section 321A.32(1) [Code of Iowa, 1966].

"We have a man charged with a violation of this section, and it now appears that the defendant did not have any Iowa Operator's License at the time of the suspension. The defendant was charged with operating a motor vehicle without a valid operator's license and paid a fine for this offense. When it developed that he had also been placed under suspension for failure to post financial security, he was then charged with violation of Section 321A.32(1).

"This code section provides that it is a violation for anyone to operate a motor vehicle 'whose license or registration or nonresident's operating privilege has been suspended, . . .' Because the defendant did not have a 'license or registration' and was not a non-resident of the state of Iowa, was he in violation of this section by operating a motor vehicle? That is, did the Department of Public Safety have authority to suspend his operating privilege under the provisions of Chapter 321A when he had no driver's license at all?"

Section 321.174 reads as follows:

"No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur issued by the department of public safety."

Section 321A.17(1) provides as follows:

"1. Whenever the commissioner, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the commissioner shall also suspend the registration of all motor vehicles registered in the name of such person, . . ."

Section 321A.17(2) provides as follows:

"2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person . . . until he shall give and thereafter maintain proof of financial responsibility."

Section 321A.17(3) provides as follows:

"3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring suspension or revocation of license, no license shall be thereafter issued to such person . . . until he shall give and thereafter maintain proof of financial responsibility."

Section 321A.32 reads as follows:

"1. Any person whose license or registration or nonresident's operating privilege has been suspended, denied or revoked under this chapter or continues to remain suspended or revoked under this chapter, and who, during such suspension, denial or revocation, or during such continuing suspension or continuing revocation, drives any motor vehicle upon any highway . . . shall be fined not more than five hundred dollars, or imprisoned not exceeding six months or both."

The history of your proposed defendant shows that he has had no Iowa license at any time, although a resident of Iowa. Nevertheless, on May 9, 1967, the department of Public Safety purported to suspend his privileges to operate motor vehicles for 30 days from June 9 to July 9, 1967, for careless driving under §321A.17(1). And as of July 9, 1967, the department of public safety ordered a continuation of his suspension until such time as he posted proof of financial responsibility, pursuant to the provisions of §321A.17(1) and (2), (supra). These statutory provisions, however, relate solely to the suspension of "license of any person."

These provisions do not cover the case of the *unlicensed* driver, who may be denied a license under the provisions of §321A.17(3). In answer to your question, the department of public safety did have authority to deny the issuance of a license to an unlicensed person under §321A.17(3),

but it has not done so, because it did not base its orders on this subsection. It relied solely upon subsections (1) and (2) which relate solely to the actual suspension of the license of any person.

Accordingly, the order of May 9, 1967, did not comply with the statute, as written, your defendant's license was not suspended, as he had no license, and in our opinion should not be charged with a violation of §321A.32, which is also a part of your question. "Before a man can be punished, his case must be plainly and unmistakably within a statute." *State vs. Bright*, 232 Iowa 1087, 1090.

December 10, 1968

COUNTIES AND COUNTY OFFICERS—Compatibility of offices; county treasurer and inheritance tax appraiser—§450.24, Code of Iowa, 1966. The offices of inheritance tax appraiser and county treasurer are not incompatible. (Nolan to Pelzer, Emmet County Attorney, 12/10/68) #68-12-4

Mr. Max O. Pelzer, Emmet County Attorney: This replies to your request for an opinion on the following:

"May the county treasurer also act as inheritance tax appraiser in the same county?"

In your letter you stated that you have opinions from this office holding that incompatibility of office exists with some offices (clerk of district court, deputy sheriff, etc.). It is my view that those opinions are still valid with respect to the offices with which they deal. However, I do not find that such incompatibility exists between the office of county treasurer and that of inheritance tax appraiser. I base this view on the rule set in *State ex rel. LeBuhn v. White*, 257 Iowa, 606, 133 N. W. 2nd 903, 1965 in which the Supreme Court of Iowa discusses the problem of incompatibility of offices and states:

"The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. Bryan v. Cattell, supra. But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' State v. Bus, 135 Mo. 338 (36 S. W. 639, 33 L.R.A. 616); Attorney General v. Common Council of Detroit, supra; State v. Goff, 15 R. I. 505 (9 Atl. 226, 2 Am. St. Rep. 921). A still different definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' State ex rel. Crawford v. Anderson, 155 Iowa 271, 273, 136 N. W. 128."

Unlike the situation where the deputy sheriff would be precluded from occupying the office of inheritance tax appraiser because of his duties as a peace officer, and that where the clerk of court would be likewise precluded because of the necessity of his making out a report as tax appraiser to be filed in his office as clerk of court, or a member of the state legislature who is prohibited by the Constitution of the State of Iowa

from holding any lucrative office "under the United States or this State, or any other power" (Article III, §22) there appears in this case to be no inconsistency in functions nor inherent repugnance. Therefore, I am of the opinion that the county treasurer may also act as inheritance tax appraiser if appointed by the court pursuant to §450.24, Code of Iowa, 1966.

December 13, 1968

LIQUOR, BEER AND CIGARETTES: Tobacco, sale to or possession by minors — §§98.2, 98.4, 98.5, Code of Iowa, 1966. (1) It is unlawful to give or sell cigarettes or cigarette paper to a minor under age eighteen even though he has the permission of parents or guardians. (2) A minor in possession of cigarettes in places other than his parents' home may be required to tell where he got them. (3) Minors may legally buy and possess "tobacco in any other form" when the parent or guardian or person who has legal custody supplies a written order. (4) "Legal custody" would include only persons, other than parents or guardians who had custody under a specific court order but not including a mere court order of commitment to an institution. (Turner to Ossian, State Representative, 12/13/68) #S68-12-1

The Hon. Conrad Ossian, Iowa State Representative: On August 8, 1968, you requested an opinion of the attorney general with regard to the sale of tobacco to minors and the scope of the limitations imposed thereon by present Iowa law.

§98.2, 1966 Code of Iowa, as amended, provides:

"No person shall furnish to any minor under *eighteen years* of age by gift, sale, or otherwise, any cigarette or cigarette paper, or any paper or other substance made or prepared for the purpose of use in making of cigarettes. No person shall directly or indirectly by himself or agent sell, barter, give to any minor under *eighteen* years of age any *tobacco in any other form* whatever except upon the written order of his parents or guardians or the person in whose custody he is." (Emphasis added)

Prior to 1959 the above section prohibited furnishing cigarettes to any minor under twenty-one years of age, but the 58th General Assembly lowered said age to eighteen. (Chapter 119, Acts of 58th G. A., p. 160). Thus for the purpose of this opinion, a minor is any person under the age of eighteen years.

The above statute clearly covers a hand to hand transaction between buyer and seller. It is also illegal in Iowa, to dispense cigarettes to such minors by means of a vending machine. If such a minor obtains cigarettes from a mechanically operated machine, the person maintaining the machine is guilty of selling cigarettes to a minor within the provisions of §98.2, 1966 Code of Iowa. 32 OAG 138. The above mentioned section is just as meaningful and enforceable when the sale of cigarettes is made by machine, as if made by a direct hand to hand sale. *Continental Industries, Inc. v. Erbe*, 1961, 252 Iowa 690, 107 N. W. 2d 57. A permitee who uses a vending machine to dispense cigarettes is liable as a seller in the event of purchase by such minors, and the city council or board of supervisors can refuse to issue licenses for cigarette sales through said vending machines.

Furthermore, no person can give such a minor a written order to secure cigarettes by *gift, sale* or otherwise, nor can such order be given to such

a minor for purposes of transporting cigarettes to the parent or guardian. OAG, February 4, 1964.

Such a minor cannot be furnished with cigarettes even with parental consent. See 1962 OAG 263, wherein it was stated:

"In our opinion, this section (98.2) by its terms, prohibits the furnishing of cigarettes *to any person under the age of eighteen*, whether or not that person is an inmate of the State Training School for Boys, and *whether or not consent to said furnishing is obtained from the parents of the inmates in question.*" (Emphasis supplied)

If such a minor is in possession of cigarettes, §98.4, 1966 Code of Iowa, states:

"Any minor under eighteen years of age in any place *other than at the home of his parent or parents*, being in the *possession* of a cigarette or cigarette papers, shall be required at the request of any peace officer, juvenile court officer, truant officer, or teacher in any school to give information as to where he or she obtained such article." (Emphasis supplied)

Thus, the one exception to giving the required information is when the minor has possession of cigarettes while at the home of his parent or parents. February 4, 1964, OAG.

The reason for requiring such a minor to give the required information is to allow the authorities to assess the penalty against the person who furnished the cigarettes. If such a minor refuses to give the required information, §98.5, 1966 Code of Iowa, provides in part as follows:

"Any minor under eighteen years of age refusing to give information as required by section 98.4 shall be guilty of a misdemeanor. Said minor shall be certified by the magistrate or justice of the peace before whom the case is tried, to the juvenile court of the county for such action as said court shall deem proper."

Section 98.2, supra, does not contain a complete prohibition against the purchase or gift of "tobacco in any *other* form" with reference to such minors. Thus, such a minor may legally buy or accept "tobacco in any other form" upon the written order of a ". . . parent or guardian or the person in whose custody he is." This would include, for example, cigars, pipe and chewing tobacco. Custody here is used in a legal sense and would include only such persons, other than parents or guardians, if they had custody under specific court order but not including a mere court order of committment to an institution.

It should also be noted that there is no authority in §98.4, supra, to question the possession of "tobacco in any other form" by such a minor. That section deals only with cigarettes or cigarette paper.

In conclusion, it is my opinion that:

1. It is unlawful to give or sell cigarettes or cigarette paper to a minor under age eighteen even though he has the permission of parents or guardians.

2. §98.4 requires a minor in possession of cigarettes in places other than his parents' home to tell where he got them.

3. Such minors may legally buy and possess "tobacco in any other form" when the parent or guardian or person who has the aforementioned specific legal custody supplies a written order.

4. §98.4, supra, does not apply to "tobacco in any other form."

December 13, 1968

IOWA GEOLOGICAL SURVEY — §19.29, Code of Iowa, 1966. There is no authority in the Executive Council to enter into a proposed lease for the housing of the Iowa Geological Survey at Iowa City under the provisions of §19.29, Code of Iowa, 1966. (Strauss to Robinson, Sec., Exec. Council, 12/13/68) #68-12-5

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: Reference is herein made to yours of the 3rd of December, 1968 with a copy of a request from the Iowa Geological Survey on which you desire our opinion as to whether or not the Executive Council has authority to enter into a proposed lease either expressly or impliedly under the performance of duty powers on behalf of the Geological Survey or other state agency. Accompanying this request was a letter from the State Geologist in which he stated:

"In the light of the opinion of the Attorney General's Office in regard to the Iowa Geological Survey leasing privileges I have the following to propose based on informal legal advice:

"1. That I seek to have Chapter 305 Code of Iowa amended to permit us to lease or rent space after approval of the Geological Board as shown by the attached draft.

"2. Meanwhile to continue on a month-to-month basis to pay for the storage area that we now occupy. The owner has agreed to do this without changing our present arrangement until the matter can be cleared.

"If this is not satisfactory, I will appreciate instructions as to what course of action to take.

"By way of backgrounds: For many years the University of Iowa has furnished our office space and some storage at no monetary cost. In recent years our rock cores and samples from other drillings along with other material, vital to our operations, have reached such a volume that the University could not provide the storage space needed. Since then we have begged, borrowed, and rented the space required."

The opinion of this department referred to in the foregoing letter advised the Council that there appears to be no statutory authority in the Iowa Geological Survey to enter into any lease.

In reply thereto I advise the following.

The performance of duty to which you refer is §19.29, Code of 1966, providing as follows:

"The executive council shall not employ others, or incur any expense, for the purpose of performing any duty imposed upon such council when such duty may, without neglect of their usual duties, be performed by the members, or by their regular employees, but, subject to such limitation, the council may incur the necessary expense to perform or cause to be performed any legal duty imposed on said council, and pay the same out of any money in the state treasury not otherwise appropriated."

It will be noted that under the foregoing, the Council may exercise the powers therein conferred where there is a duty to be performed by the Council. However, for the reasons following, I am of the opinion that

there is no duty fixed in the Council to provide space for this agency in Iowa City and to enter into a lease for such space at such place. Duty of the Council in that respect is set forth in §19.15, Code of 1966, providing as follows:

"The executive council shall control the assignment of rooms in the capitol building, provided that room four in the basement story shall be the permanent quarters of the Grand Army of the Republic, department of Iowa. Assignments may be changed at any time. Assignment of rooms which are necessary for legislative purposes shall terminate on the convening of the general assembly. The various officers to whom rooms have been so assigned may control the same while the assignment to them is in force. Official apartments shall be used only for the purpose of conducting the business of the state. The term 'capitol' or 'capitol building' as used in the Code shall be descriptive of all buildings upon the capitol grounds."

This statute in like terms in prior Codes of 1927, 1931, and 1935 have been interpreted by this department to confer upon the Council such a duty; however, only to be exercised at the seat of government. See Opinions Attorney General 1930, page 101, 1936, page 694.

In the 1930 opinion was stated the following:

"April 30, 1929. Mr. W. C. Merckens: I am in receipt of your communication of the 24th instant, which reads as follows:

" 'The Forty-third General Assembly created several new commissions of government, which will be effective July 1st or 4th, and it will be necessary that the Executive Council secure quarters for said new departments and also possibly change some locations of the present departments. Under Chapter 18, Section 295, the Executive Council is charged with the placing of the different branches of our government. It will become necessary that outside quarters be provided to take care of the changes as contemplated.

" 'Can the Executive Council, by proper resolution, contract, lease or rent outside quarters and have same paid out of Section 306 of said Chapter 18?'

"While no express authority is given by statute to the Executive Council to rent quarters for departments of government outside of the buildings owned by the State of Iowa yet, as the administrative body of the state government, it is my notion that if it is impossible to house the various departments of state government within the building owned by the state, it becomes the duty of the council as a matter of business to see that all departments are so housed that they may function as intended by legislative enactment, and for this purpose would have the right to incur the necessary expense if funds are provided that can be used to rent quarters, if necessary, to house the departments.

"I am of the opinion that the Executive Council should pay such expense under the provisions of Section 306 of the Code.

"This opinion overrules the opinion of the department given under date of September 4, 1926, on this subject."

and in confirmation of the foregoing opinion, this department stated in the 1936 opinion as follows:

"We are unable to discover any subsequent acts of the Legislature that would place a different construction upon Section 306 of the Code, other than the above and foregoing opinion of the Attorney General. Many legislative sessions have been held since April 30, 1929, and the Legislature has not seen fit to place a different construction upon this matter.

It can, therefore, be assumed that the construction placed upon Section 306 by the Attorney General on April 30, 1929, met with the approval of all subsequent Legislatures of the State of Iowa. In other words, the Legislature itself was satisfied with the interpretation placed upon Section 306 by the Attorney General in the above quoted opinion.

"Chapter 17 of the Code affords additional evidence of the legislative intention in confirmation of the Attorney General's opinion, supra. Chapter 17 of the Code authorizes and directs the Executive Council to appoint a custodian of public buildings and grounds and expressly sets forth the duties of the custodian. It is not only the duty of the custodian to have charge of, preserve and adequately protect the state capitol and grounds, but also all other state grounds and buildings at the seat of government, and all property connected therewith or used therein or thereon. The custodian shall see that all parts and apartments of said buildings are properly ventilated and kept clean and in order, and, shall have charge of and supervise all the police, janitors, and other employees of the custodian's department in and about the capitol and other state buildings at the seat of government.

"The seat of government is in Des Moines, Iowa. See Section 8 of Article XI of the State Constitution. Therefore, Chapter 17 of the Code clearly shows that the Legislature intended that buildings, other than the state capitol building itself, might be located in Des Moines, Iowa, at the seat of government."

It is to be noted that the custodian named in the foregoing opinions, now designated as superintendent, is an appointee of the Executive Council holding the position at the pleasure of the said Council and performs his duties as described by Chapter 18, Code of 1966, at the seat of government.

In view of the foregoing, I am of the opinion that the Executive Council has no authority to enter into a proposed lease either expressly or impliedly under the performance of duty powers set forth in §19.29, Code of 1966.

December 13, 1968

EMPLOYMENT SECURITY COMMISSION — Payment of Moving Expense — §§96.12 and 280.5, 1966 Code of Iowa. Statutory direction to establish offices throughout the state is authority for payment of moving expense of employee transferred for convenience of employer. (Ivie to Robinson, Sec., Executive Council, 12/13/68) #68-12-6

Mr. Stephen C. Robinson, Secretary, Executive Council of Iowa: You have requested an opinion as follows:

"The Executive Council, in the meeting of September 9, 1968, deferred a Purchase Order from the Iowa Employment Security Commission, in the amount of $252.62, for the moving of household goods and personal effects of an employee from Des Moines to Davenport, Iowa, pending further information.

"The Council, in their meeting held September 23, 1968, directed that I obtain from you, an official opinion as to whether or not the Council may authorize the approval of the payment of moving expenses in instances such as this."

Accompanying your letter of request for an opinion is a letter from E. E. Frerichs, Acting Procurement Officer of the Iowa Employment Security Commission which demonstrates that the Bureau of Employment Security, U. S. Department of Labor, approved a regulation of the

Iowa Employment Security Commission, on August 11, 1959, which regulation is authority for payment of moving expenses where transfer is for the benefit of the Commission.

By virtue of §96.12, 1966 Code of Iowa, the Commission is directed to "establish and maintain free public employment offices" throughout the state, a type of provision that is not ordinary for the various state agencies performing services for the public. Where the convenience of the employer requires intrastate transfer of employees in such a situation, the payment of reasonable moving expenses for affected employees most assuredly would fall within the category of "governmental," rather than "personal" expense. *Gallarno vs. Long*, 214 Iowa 805, *243* N. W. *719* (1932).

The material supplied to us in the letter of E. E. Frerichs, Acting Procurement Officer for the Commission, demonstrates that moving expenses are paid by the Commission only when the move is for the convenience of the Commission and does not result from disciplinary action or request of the employee for personal convenience. Under this set of facts, it is proper and a necessary "governmental" expense that may be paid by the Commission from available maintenance and support funds. See also §280.5, Code of Iowa 1966.

December 13, 1968

COURTS: Expenses of juvenile courts paid by the county—§§231.1, 231.3, 231.4, 231.12, 231.13, Code of Iowa, 1966. Expenses of the juvenile court are paid by the county even though the juvenile court judges may also serve as municipal court judges and maintain juvenile court equipment and supplies on municipal property. (Cullison to Samore, Woodbury County Attorney, 12/13/68) #68-12-7

Mr. Edward F. Samore, Woodbury County Attorney: This is in reply to your request for an Attorney General's Opinion as to whether the City of Sioux City or Woodbury County should pay for the office equipment, supplies, furniture, juvenile docket and a filing cabinet, all of which are used in juvenile court business and are located within the Sioux City Municipal Building, and some of which is located within the office of the Clerk of the Sioux City Municipal Court.

It is our opinion that the foregoing are county expenses.

The juvenile court is a county office. Section 231.1, Code of Iowa, 1966. Juvenile court judges are designated by the District Court and they may, at the same time, be judges of a superior or municipal court. Section 231.3 and 4, Code of Iowa, 1966. The fact that juvenile court judges may incidentally also be municipal court judges, and they maintain their juvenile court equipment and supplies on city property, does not relieve the county of its responsibility for the expenses thereof. Section 231.12 and 13, Code of Iowa, 1966.

December 13, 1968

COURTS: Discretion of Courts to appoint counsel other than the Public Defender for indigent defendants. §336A.7, Code of Iowa, 1966. Courts may appoint counsel other than Public Defender for indigent defendants, but defendant has no right to such other counsel merely upon his subjective dissatisfaction with representation by the Public Defender.

(Cullison to Roger Peterson, Black Hawk County Attorney, 12/13/68) #68-12-9

Mr. Roger F. Peterson, Black Hawk County Attorney: You requested an opinion from the Attorney General concerning the right of an indigent defendant to representation by someone other than the Public Defender, which office is authorized by Chapter 336A, Code of Iowa, 1966. You stated that there is a difference of opinion among the judges of Black Hawk and Linn Counties as to whether indigent defendants have an absolute right to appointment of counsel other than the Public Defender, or whether the appointment of other counsel is discretionary with the court. It is our opinion that it is discretionary with the court.

Section 336A.7, Code of Iowa, 1966, states:

"The court may, for cause, upon the application of the indigent person or the public defender, or on its own motion, appoint an attorney other than the public defender, to represent the indigent person at any state of the proceedings or on appeal."

It is clear from the foregoing language that the court has discretion to appoint an attorney other than the Public Defender. However, the defendant has no *right* to counsel other than the Public Defender merely on the basis of his subjective dissatisfaction with such representation. See *Roberts v. Bennett* (1966) 258 Iowa 1101, 141 N. W. 2d 628.

December 13, 1968

CRIMINAL LAW: Carrying concealed weapons — §695.2, Code of Iowa, 1966. The carrying of an unloaded handgun in the glove compartment of a motor vehicle, when said weapon is not in a container is a violation of the Iowa concealed weapon statute when the person carrying the weapon does not have a valid concealed weapons permit. (Carlson to Simpson, Boone County Attorney, 12/13/68) #68-12-11

Mr. Stanley R. Simpson, Boone County Attorney: This is in reply to your letter dated December 2, 1968, wherein you request an opinion as to whether it is a violation of §695.2, Code of Iowa, 1966, to carry an unloaded .22 caliber six-shot pistol in the glove compartment of a car, when the weapon was not in a container and several loaded shells were found with it. For the purpose of this opinion I will naturally assume that the suspect in question does not possess a concealed weapons permit.

The pertinent statute in regard to your question is §695.2, Code of Iowa, 1966, which provides:

"695.2 Carrying concealed weapons. It shall be unlawful for any person, except as hereinafter provided, to go armed with or carry a dirk, dagger, sword, pistol, revolver, stilleto, metallic knuckles, pocket billy, sandbag, skull cracker, slug shot or other offiensive or dangerous weapon, except hunting knives adapted and carried as such, concealed either on or about his person, except in his own dwelling house or place of business or other land possessed by him. No person shall carry a pistol or revolver concealed on or about his person or whether concealed or otherwise in any vehicle operated by him, except in his dwelling house or place of business or on other land possessed by him, without a permit therefor as herein provided.

"However, it shall be lawful to carry one or more unloaded pistols or revolvers for the purpose of or in connection with lawful target practice, lawful hunting, lawful sale or attempted sale, lawful exhibit or showing,

or other lawful use, if such unloaded weapon or weapons are carried either (1) in the trunk compartment of a vehicle or (2) in a closed container which is too large to be effectively concealed on the person or within the clothing of an individual, and such container may be carried in a vehicle or in any other manner; and no permit shall be required therefor."

The first paragraph of §695.2 provides that no person shall carry a pistol or revolver concealed in any vehicle operated by him without a permit therefor as provided by Chapter 695.4, Code of Iowa, 1966. However, the second paragraph of §695.2 is the result of an amendment by the 1965 Iowa Legislature. Paragraph 2 provides that it is legal under certain conditions to carry one or more handguns in a motor vehicle when the person carrying them does not have a permit. To comply with the second paragraph of §695.2 the handgun must be carried so as to meet the following three requirements:

1. The handgun must be being carried pursuant to some lawful purpose.

2. It must be unloaded.

3. It must be in the trunk compartment of the vehicle, or, in a closed container which is too large to be effectively concealed on the person or within the clothing of an individual.

In this case the weapon was being carried illegally, in violation of §695.2, because it was not in a container. The glove compartment of the motor vehicle cannot be considered a container within the meaning of the statute in that it is part of the vehicle itself. The fact that several loaded shells were also found in the glove compartment of the vehicle is not even necessary for this to constitute a violation of the statute. Since the weapon was not in either the trunk of the vehicle, or, a container too big to conceal on the person or within the clothing of the person, the carrying of this weapon is a violation of §695.2, Code of Iowa, 1966.

December 13, 1968

COUNTIES AND COUNTY OFFICERS — Duty of Clerk of Court and County Attorney to inspect jails: §§356.9, 356.10, 356.11, Code of Iowa, 1966. Facilities of cities and towns for the detention of prisoners are "jails" and are subject to inspection by the Clerk of Court and County Attorney. (Cullison to Pahlas, Clayton County Attorney, 12/13/68) #68-12-8

Mr. Harold H. Pahlas, Clayton County Attorney: You requested the opinion of the Attorney General as to what places of incarceration within the county must be inspected pursuant to §§356.9 and 10, Code of Iowa, 1966. You stated that Clayton County has one county jail and that some towns within the county have facilities for the detention of prisoners.

Section 356.9, Code of Iowa, 1966, states that the Clerk of the District Court and the County Attorney are inspectors of "the jails" and §356.10 states that such inspectors shall visit and examine "such prisons" twice each year and present to the District Court a detailed report of the condition thereof. Section 356.11 states:

"Such report must state the number of persons confined, for what cause, the number usually confined in one room, the distinction, if any, observed in the treatment of the prisoners, the evils found to exist in such prisons, and particularly whether any provision of this chapter has been violated or neglected, and in what respect."

From the foregoing language we conclude that a "jail" or "prison"is a place wherein persons are confined, including detention facilities of cities and towns. It would not include the cell block you mentioned in your letter which is being used as a storage room only, for the reason that it is not used as a place of confinement. See also 27 OAG 235.

December 13, 1968

CONSERVATION COMMISSION — Gifts — §111.11, Code of Iowa, 1966: The Conservation Commission may accept gifts of money made to it with the written consent of the Executive Council. (Strauss to Wellman, 12/13/68) #68-12-10

Mr. W. C. Wellman, Deputy Secretary, Executive Council of Iowa: Reference is herein made to yours of the 27th of November, 1968 with a request from the Conservation Commission relative to a proposed gift of $20.00 from Mr. B. Oday for the upkeep of Preparation Canyon State Park in Iowa.

This gift may be accepted by the Commission with the written consent of the Council under the provisions of §111.11, Code of 1966, providing as follows:

"Gifts. The commission with the written consent of the executive council, may accept gifts of land or other property, or the use of lands or other property for a term of years, and improve and use the same as public state parks."

December 13, 1968

HIGHER EDUCATION FACILITIES COMMISSION: Reserve Fund — Ch. 234, Laws of 62nd G. A. Proposed agreements to supplement reserve fund by federal credit are not presently authorized. (Nolan to Wellborne, Exec. Director, 12/13/68) #68-12-12.

Dr. W. L. Roy Wellborne, Executive Director, Higher Education Facilities Commission: This replies to your letter of August 30, 1968. In that letter you stated that you wished the benefit of an opinion concerning Iowa's eligibility for participation in the federal "re-insurance" program which was signed into law by President Johnson on August 3, 1968.

According to the explanatory memorandum to directors of Guarantee Agencies from the Bureau of Higher Education (August 21, 1968), this means that federal credit may be available as part of the reserve fund maintained by the Higher Education Facilities Commission to guarantee at an established ratio the loans made by participating lenders to eligible students in the same way that cash would be used in such loan reserve fund. Under Chapter 234 Acts of the 62nd General Assembly the Commission is authorized to establish a student loan reserve fund and

". . . receive moneys from federal, state, or private sources to guarantee payment of loans made by eligible lending institutions to student residents of the state of Iowa who are enrolled or accepted for enrollment at any eligible institution . . ."

Applying the well-known rule of statutory construction *expressio unius est exclusio alterius* Chapter 234 cannot be interpreted without further statutory amendment to permit the substitution of federal credit for "moneys from federal, state, or private sources."

Your letter also transmitted a copy of an additional proposed agree-

ment whereby the state appoints and authorizes United Student Aid Funds, Inc. ("USA Funds") as agent of the state to perform the administrative functions of the State in connection with the program for the guarantee of student loans for a fee of one-eighth of one percent of all outstanding loans guaranteed by USA Funds under the program. Each student borrower would also be charged the fee of one-half of one percent per annum of the amount of the loan for the term of the note. The reserve fund to be established by USA Funds would apparently be invested and at the end of the calendar year, if the balance in such fund is in excess of ten percent of the loans outstanding, the excess of such funds might be returned to the state either in cash or in securities. There are conditions under which a state might be required to repurchase notes, but the state under the proposed agreement might suspend endorsement of loans at any time after 30 days notice. This proposed agreement is objectionable on the basis that it requires the state to "indemnify and hold USA Funds harmless from and against all judgment and liability (including litigation expenses and attorneys' fees in connection therewith) arising from acts of USA Funds as agent for the state." See Opinion Attorney General June 19, 1967, enclosed herewith. I find no statutory authority expressed or implied for the designation of such private nonprofit corporation to act as agent for the state. Further, Chapter 234 cited above in §2 specifically prohibits the commission from in any manner, directly or indirectly, pledging the credit of the state of Iowa. This is also specifically prohibited in Article VII, §1 of the Constitution of Iowa which provides:

"The credit of the State shall not, in any manner, be given or loaned to, or in aid of any individual, association, or corporation; and the State shall never assume, or become responsible for the debts or liabilities of the individual, association or corporation, unless incurred in time of war for the benefit of the State."

For the reasons above both proposed agreements are found by this office to be contrary to the current provisions of Iowa law, and in our opinion should be abandoned.

December 17, 1968

STATE OFFICERS AND DEPARTMENTS: Iowa Public Officials Act, sales to a county in excess of $500 by a legislator — §§2, and 3, Chapter 107, Acts of the 62nd General Assembly, now §§68B.2, 68B.3, Code of Iowa, 1966. A county is not a state agency within the meaning of the Iowa Public Officials Act. Accordingly, a member of the general assembly may sell goods to a county of a value in excess of $500 without competitive bids being taken therefor. (Haesemeyer to Wornson, Cerro Gordo County Attorney, 12/17/68) #68-12-13

Mr. Clayton L. Wornson, Cerro Gordo County Attorney: By your letter of November 29, 1968, you have requested an opinion of the attorney general on the question of:

"whether or not Chapter 107 of the 62nd General Assembly will prevent an Iowa State Legislator from this County, owner of a business which has sold materials to the County for years, from selling goods to the County of a value in excess of $500.00 without the taking of competitive bids therefor.

"Section 3 of Chapter 107 provides:

'No official, employee, member of the General Assembly, or legislative employee shall sell any goods having a value in excess of $500 to any State agency unless pursuant to an award or contract let after public notice and competitive bidding . . .'

"State agency" is a defined term for the purposes of Chapter 107, and the statutory definition does not include counties or other political subdivisions. Thus, §2 of Chapter 107 provides in relevant part:

"When used in this Act, unless the context otherwise requires:

* * *

"7. 'State agency' means any state department or division, board, commission, or bureau of the state including regulatory agencies.

* * *"

In *Graham v. Worthington*, 259 Iowa 845, 146 N. W. 2d 626, 632 (1966) the Iowa supreme court was called upon to determine whether or not political subdivisions were included within the following definition of "state agency" found in the Iowa Tort Claims Act, Chapter 25A, Code of Iowa, 1966:

"1. 'State agency' includes all * * *, agencies, * * * of the state of Iowa, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the state of Iowa, * * *."

Although this statutory definition is somewhat more ambiguous than the definition found in §2(7) of Chapter 107, the court nevertheless concluded:

"We are satisfied political subdivisions such as cities, school districts and counties are neither agencies of the state nor corporations as those terms are employed and defined in the Act, and are not included within its clear intent and purpose."

In view of the foregoing it is our opinion that Chapter 107 will not prevent the legislator in question from continuing to sell, as he has in the past, goods to the county of a value in excess of $500 without the taking of competitive bids therefor.

December 18, 1968

STATE DEPARTMENTS: Industrial Loan Division — §536A.23. O.A.G., August 21, 1967, modified to clarify prohibition against charging service charge on the part of a rewritten loan used to discharge a prior loan to the same borrower by the same company. (Nolan to Bailey, Sup'r., Industrial Loan Division, 12/18/68) #68-12-14.

Mr. Clarke E. Bailey, Supervisor, Industrial Loan Division, Auditor's Office: This responds to your request for an interpretation of Chapter 536A, the Industrial Loan Law, and particularly paragraph 2 of §536A.23, which provides that no industrial loan company shall have the power and authority to:

"2. Charge, receive or collect in advance a service charge in excess of one (1) dollar for each fifty (50) dollars of the amount of the note, nor in excess of a total of forty (40) dollars. The service charge authorized by this section shall not be charged, contracted for, collected or received on any loan which is renewed or rewritten within six (6) months

of the date of the original note; nor on that part of a new loan made to the same borrower by the same company which is used to discharge a prior loan made to the same borrower by the same company."

Sutherland on Statutory Construction, Volume II, §4939, page 478, states:

"An Act should be read as punctuated unless there is some reason to the contrary, and this is especially true where a statute has been repeatedly re-enacted with the same punctuation. Obviously, the punctuation of the original act as passed by the legislature and not the printed copy controls. Although it has been frequently asserted that 'Punctuation is a most fallible standard by which to interpret a writing,' it is more satisfactory to treat the rules of punctuation on a parity with other rules of interpretation. When punctuation discloses a proper legislative intent courts should give weight to its evidence. When the act as punctuated is inconsistent with the legislative intent the punctuation should be disregarded or the act repunctuated to effect the intention of the legislature."

Following this rule of statutory interpretation, the part of §536A.23(2) appearing after the semi-colon, to wit:

"nor on that part of a new loan made to the same borrower by the same company which is used to discharge a prior loan made to the same borrower by the same company."

relates back to the prohibition against charge or collection of a service charge rather than to the six months limitation indicated by the preceding clause. Otherwise, it would seem the language of the Act should have stated:

The service charge authorized by this section shall not be charged, contracted for, or collected or received within six (6) months of the date of the original note on any loan which is renewed or rewritten or on that part of a new loan made to the same borrower by the same company which is used to discharge a prior loan made to the same borrower by the same company.

or

This charge authorized by this section shall not be charged, contracted for, or collected or received on any loan which is renewed or rewritten or which is used to discharge a prior loan to the same borrower by the same company within six (6) months of the date of the original note.

A semicolon in a statute is used to separate consecutive phrases or clauses independent of each other grammatically but dependent alike on some word preceding or following. See *Words and Phrases*, Volume 38A, page 326.

In view of the above, the opinion of August 21, 1967 is modified to clarify the point that the prohibition against additional service charges applying to the part of the loan renewed or rewritten within six months also applies to subsequent refinancing when used to discharge the original loan.

December 27, 1968

TAXATION: Personal Property Tax Credit — §§428.1, 441.17, Code of Iowa, 1966; Ch. 356, §42, Acts of 62nd G. A. (1967). Since the ultimate duty of assessing personal property in a taxing district falls upon the assessor thereof, he is not bound by the information furnished by a taxpayer in the department of revenue listing forms and he may re-

quire in each particular situation. A woman is not precluded from receiving the personal property tax credit solely because of her marital status. A taxing district must grant the personal property tax credit to all those having a requisite property and making such showing as required by the assessor regardless of the fact that the district grants more in personal property tax credits than it can be reimbursed for by the State of Iowa. (Beebe to John W. Shafer, Allamakee County Attorney, 12/27/68) #68-12-15.

Mr. John W. Shafer, Allamakee County Attorney: In your letter of September 30, 1968, which was supplemented by your letter of October 22, 1968, you requested an opinion of the Attorney General on several questions relating to the personal property tax credit which can be paraphrased as follows:

1. What authority does an assessor have to disallow personal property tax credit applications, whether split between husband and wife or otherwise, when said applications are made on Iowa Department of Revenue Forms No. 1001, 1002, or 1003, with supporting affidavits?

2. If the assessor can legally refuse to accept Forms No. 1001, 1002, or 1003 as sufficient evidence of ownership, does it follow that he should refuse to accept said forms and require additional evidence?

3. What documentary evidence is necessary for an inhabitant of Iowa to furnish the assessor of his taxing district in order to meet the requirements of §428.1, Code of Iowa (1966), other than that which is set out in Iowa Department of Revenue Forms No. 1001, 1002, and 1003?

4. Does the fact that a woman is married eliminate her from being a taxpayer as referred to in §43, Chapter 356, Acts of 62nd General Assembly (1967), for purposes of the personal property tax credit?

5. If "A," who is no relation to "B," was assessed in 1967 for $8,000 taxable valuation and during 1967 "A" sold "B," who is just starting up in farming and who was not assessed with any property in 1967, personal property valued at $4,000, does the fact that the personal property was not brought into the district deny 'B" from being eligible for a $2,500 credit as referred to in §43, Chapter 356, Acts of 62nd General Assembly (1967)?

Section 428.1, Code of Iowa (1966), provides in part as follows:

"Every inhabitant of this state of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed . . ."

Section 441.17, Code of Iowa (1966), provides in part as follows:

"The assessor shall:

"2. Cause to be assessed, in accordance with section 441.21, all the property, personal and real, in his county or city, as the case may be, except such as is exempt from taxation, or the assessment of which is otherwise provided for by law."

Section 42, Chapter 356, Acts of 62nd General Assembly (1967), provides as follows:

"Sec. 42. The personal property tax credit authorized by this Act shall not excuse the taxpayer from listing all personal property as required in chapter four hundred twenty-eight (428), Code of Iowa. The valuation of such personal property shall be determined as prescribed in

chapter four hundred forty-one (441), Code of Iowa, so that the valuations of all personal property in a taxing district shall be known and shall be made a part of the tax list compiled by the county auditor under chapter four hundred forty-three (443), Code of Iowa.

"The aggregate assessed value of personal property for each assessing district as established in the 1967 assessment year, after adjustment for equalization, shall be the basic taxable value upon which the credit granted herein shall be determined, subject to the following annual adjustments:

"1. Add: additional personal property brought into each assessing district but not to include replacement of personal property with like personal property, in accordance with section four hundred forty-one point twenty-one (441.21), Code of Iowa.

"2. Subtract: personal property removed from each district by reason of transportation therefrom, personal property destroyed, and personal property consumed or disposed of and not replaced.

"For the purpose of ascertaining assessed value of personal property added or subtracted from the aggregate assessed value of personal property for each district as established in the 1967 assessment year, assessors shall utilize personal property listing forms prescribed and furnished by the department of revenue, and shall distribute such forms in triplicate to persons possessed of such property for assessment, first by regular mail, and, where necessary, by personal service. Such assessed value of such personal property shall be determined in accordance with section four hundred forty-one point twenty-one (441.21), Code of Iowa."

Your first three questions will be treated together. Section 441.17, Code of Iowa (1966), requires each assessor to assess all personal property within his district in accordance with Section 441.21. Section 42, Chapter 356, Acts of 62nd General Assembly (1967), dealing with the personal property tax credit, requires the assessors to "utilize" personal property listing forms prescribed and furnished by the department of revenue. Pursuant thereto, the department of revenue has furnished the assessors with listing forms known as Forms No. 1001, 1002, and 1003. Each of these forms has an affidavit for the Iowa personal property tax credit contained therein.

It is the opinion of this office that although an assessor must "utilize" the forms furnished by the department of revenue, there is no conclusive presumption of the validity of information contained therein and he is in no way bound thereby.

You ask where the assessor obtains his authority to reject these forms. Such authority is implicit in his office. The law requires each assessor to assess all personal property within his district. In the construction of a grant of powers, it is a general principle of law that where the end is required, the appropriate means are given, and that every grant of power carries with it the use of necessary and lawful means for its effective execution. *United States v. Bailey*, 9 Peters (U. S.) 238, 9 L. Ed. 113, (1835); *Iowa State Highway Commission v. Hipp*, 147 N. W. 2d 195 (Iowa 1966); *Dickey v. Raisin Proration Zone No. 1*, 24 Cal. 2d 796, 151 P. 2d 505 (1944), cert. den., 324 U. S. 669, 65 S. Ct. 1013, 89 L. Ed. 1424 (1945); I Am. Jur. 2d, Administrative Law, §46 (1962). In reaching the end result of assessment, the assessor must, of necessity, determine if the person filing one of the department of revenue's forms in fact owns the property claimed therein. To hold otherwise would be a clear usurpation

of his assessment powers. If the assessor were required to accept the validity of every statement contained in these forms without further proof, the abuses which could thereby result are most apparent. Nothing said herein should be construed to mean that the assessor can exercise his powers in an arbitrary manner. See 73 C.J.S., Public Administrative Bodies and Procedure, §50 (1951).

The answers to your second and third questions are made clear by the foregoing discussion. You ask whether even though an assessor can legally refuse to accept the prescribed forms, he should in fact reject them. This is a matter completely within the discretion of the assessor to be determined upon the facts of each situation as it presents itself. If the assessor has reason to doubt the truthfulness of some of the statements contained in the department of revenue form or if for some reason he desires additional information, he is perfectly within his rights in refusing to accept said form. Following this same reasoning, we would answer your third question by stating that the assessor can require the production of whatever documentary evidence he feels is required in each particular situation.

Your fourth question asks whether the fact that a woman is married prevents her from being a taxpayer for purposes of receiving the personal property tax credit. We would answer this question in the negative. A woman can obviously be a taxpayer regardless of her marital status. Also, to hold otherwise would cause an unwarranted discrimination violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

Your fifth question presents the hypothetical situation where "A," in 1967, sells to "B," who is a resident of the same assessing district, a certain amount of personal property. You inquire whether the fact that the personal property was not "brought into" the assessing district would prevent "B" from being eligible for the personal property tax credit. We would answer this question in the negative. For one to be entitled to the personal property tax credit, it is necessary only that he own the requisite property and make such showing as is required by the assessor. It must be remembered that there are two distinct problems relating to the personal property tax credit: (1) whether a taxpayer is entitled to the credit; and (2) whether the state must reimburse the taxing district for the credit thereby allowed. It is clear that the two are not synonymous. The taxpayer is granted the credit on personal property owned in Iowa. Yet, in an opinion of this office issued March 6, 1968, a copy of which is enclosed herewith, it was determined that the amount to be paid back to the taxing districts is limited to the aggregate assessed value established in the 1967 assessment year after equalization and the adjustments set out in §42, Chapter 356, Acts of 62nd General Assembly (1967).

The situation might well present itself where a taxing district grants more in personal property tax credits than it can be reimbursed for by the state. For example, in your hypothetical situation, assuming that "A" replaces the personal property sold to "B," there would be no subtraction under §42 because the property was replaced and no addition

because the property was not brought into the assessing district. Thus, on the basis of this transaction, the state could pay out no more than in the previous year because the aggregate assessed value in the 1967 assessment year plus or minus the adjustments mentioned in §42 has been unchanged. Yet in 1968, both "A" and "B" are entitled to personal property tax credits whereas in 1967 only "A" received one. To reiterate, if a person has the requisite personal property, he is entitled to the credit, and if the amount reimbursed by the State of Iowa to the taxing district is not sufficient to cover all credits granted, the taxing district must absorb the difference.

December 27, 1968

COMPTROLLER: Credit to County — §230.20, as amended, 1966 Code of Iowa. Counties should receive 100% credit for Medicare payments, and under current bookkeeping methods used by the comptroller, counties are receiving their full credit. (Seckington to Krahl, Assistant Comptroller, 12/27/68) #68-12-16

Mr. William Krahl, Assistant Comptroller: Reference is made to your request for an interpretation of §230.20, 1966 Code of Iowa, as amended by Chapter 2, Section 5, Acts of the 62nd General Assembly, concerning credits for Medicare payments. More specifically, you inquired as to whether Polk County could recoup only eighty percent (80%) of the Medicare payments received by the state mental health institutions, the remaining twenty percent (20%) being credited to the General Fund of the State of Iowa, pursuant to the above mentioned amendment.

The language of §230.20, 1966 Code of Iowa, as amended, casts upon the superintendent of a state mental institution the responsibility of determining the amount due the state from the counties for patient care. Such determination by virtue of this language can be based solely upon funds appropriated from tax sources necessary to provide the mental health services, and cannot be based upon amounts collected in the payment of services for voluntary mental illness patients, whether such payment is provided by a patient, a relative, another person, or by the county of residence. July 1, 1964 OAG.

The amount due the state from counties for necessary mental health services includes only funds appropriated from tax sources and *excludes collections from voluntary mental illness patients.* (emphasis supplied) August 27, 1965 OAG.

As part of the Social Security Amendments of 1965, Congress enacted a three-part program of medical care for the aged. The first of these programs, which is largely financed through a separate tax provides basic protection against the costs of hospital and related care. The second of these programs is a voluntary supplemental program covering the costs of doctors' services and a number of other items and services not covered under the basic program. It is largely financed through monthly premiums from those who enroll, and matching contributions from the federal government. The last of these programs, under which medical assistance is provided to the needy under a joint federal-state program is not entirely new. This program, popularly called "Kerr Mills," is jointly financed by the participating states and the federal

government and was greatly expanded by the 1965 amendments. It also covers other needy persons in addition to the aged.

In answering your question as to whether the counties should receive a hundred percent (100%) refund as compared to the eighty percent (80%) they claim they are presently receiving, you will note that §230.20 reads in part as follows:

". . . In determining the amount due the state from the counties the superintendent shall include only funds appropriated from tax sources needed to provide the mental health services *but shall not include amounts collected in the payment of services provided voluntary mental illness patients whether provided by the patient, relatives or other persons on behalf of the patient or by the county of residence of the patient.* . . ." (emphasis added)

As noted above, §230.20 was amended by Chapter 2, Section 5 of the Acts of the 62nd General Assembly. Said amendment is as follows:

"The mental health institutes' daily per diem as determined by section two hundred thirty point twenty (230.20), Code 1966, as amended, shall be billed at eighty (80) percent for the biennium."

The Medicare payments in question may be analogized to the amounts collected in the payment of services provided voluntary mental illness patients provided by a patient, relatives or other persons on behalf of the patient. Thus, it would seem that the counties should receive the full hundred percent (100%) credit for Medicare payments instead of an eighty percent (80%) figure. This credit to be given in conformance with §230.20, supra, as follows:

The total cost of patient care from tax sources must be ascertained. The Medicare payment must then be deducted, and that last figure is certified to the comptroller by the institution. The comptroller then must take eighty percent (80%) of the figure as certified to him, and bill the counties for that amount. The following will serve as an example:

X, a voluntary mentally ill patient, is supported by tax money in the amount of $1,000. X receives $300.00 in Medicare payments. The superintendent of the hospital certifies to the comptroller a figure of $1,000 minus $300.00 or $700.00. The comptroller then takes eighty percent (80%) of $700.00 and bills the county of legal settlement that amount, i.e. $560.00.

Because Medicare payments for a given period are not made to the institutions in time to be credited as in my example above, the bookeeping method is different than above. However, the result to the county is the same. The actual procedure used is as follows for the above example:

The superintendent certifies $1,000 to the comptroller, who then takes eighty percent (80%) of that figure and bills the county $800.00. Later, when the Medicare payment of $300.00 is received by the institution, the county is given credit of eighty percent (80%) of $300.00 or $240.00. This amount is deducted from the previous billing of $800.00 for a final billing to the county of $560.00.

The Medicare program was designed to provide hospital and other medical assistance to those in need who qualify for it. It is in fact a

method of helping ease the financial burden of the respective counties on patients they are bound to support. Medicare may be thought of in the same light as a relative or other person helping to finance the patient's cost of care. As such, it would appear that a close reading of §230.20, coupled with the purpose and implementation of the Medicare program, would indicate that the respective counties should receive full credit for Medicare payments received for the benefit of county patients.

As shown above, the counties are receiving the full benefit, even though the bookkeeping procedures might lead one to believe otherwise.

It is, therefore, the opinion of this office that the counties should and are receiving the full benefit of medicare payments pursuant to §230.20, 1966 Code of Iowa, as amended, and the comptroller's method of billing is correct.

December 31, 1968

LIQUOR, BEER AND CIGARETTES — Liquor Control Commission Law Enforcement Division: §§123.16(9), 123.93, 748.3, Code of Iowa, 1966. Enforcement division agents are not "peace officers" but this does not prevent performance of statutory duties. (Claerhout to Lemon, Dir., Law Enforcement Div., Liquor Control Comm., 12/31/68) #68-12-17.

Mr. Harlan L. Lemon, Director, Law Enforcement Division, Iowa Liquor Control Commission: This is in response to your letter of October 10, 1968, wherein you requested the opinion of the Attorney General as to whether or not agents of the Iowa Liquor Control Commission Law Enforcement Division are "peace officers" while performing their statutory duties.

Section 748.3 of the Iowa Code defines "peace officers" as follows:

"1. Sheriffs and their deputies.

"2. Constables.

"3. Marshals and policemen of cities and towns.

"4. All special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting members of the clerical force.

"5. All agents appointed by the secretary of the board of pharmacy examiners.

"6. Such persons as may be otherwise so designated by law."

Because it is obvious agents of the commission law enforcement division are not included specifically under the first five designations of §748.3, we must rely upon the general provision of number six thereunder and look to the Iowa Liquor Control Act. According to §123.16 of the 1966 Code of Iowa:

"The commission shall have the following functions, duties and powers:

* * *

"9. To license, inspect and control the manufacture of alcoholic liquors and regulate the entire liquor industry in the state. The commission shall create an enforcement division and shall appoint a director, who shall be an attorney licensed to practice in the state of Iowa, and three assistant directors. The director of the enforcement division shall employ needed

clerical help, and such other assistants and agents as are necessary to carry out the enforcement of the laws on liquor control. The enforcement division shall enforce the provisions of Title VI of the Code."

Also, §123.93 of the Code states:

"In every county the enforcement division will constitute the head of the enforcement provision for the liquor control commission. The state department of public safety, county attorney, the sheriff and his deputy or deputies, and the police department of every city, including the day and night marshal of any incorporated town, shall be supplementary aids to such enforcement division.

"Any neglect, misfeasance, or malfeasance shown by any peace officer included in this section will be sufficient cause for his removal as provided for by the statutes of the state.

"Nothing in this section shall be construed to remove or lessen the duties or responsibilities of any county attorney or peace officer with respect to law enforcement."

It is clear that commission law enforcement division agents have been given the responsibility to "carry out the enforcement of the laws on liquor control" under §123.16(9) but nowhere have they been designated as peace officers. The Iowa Supreme Court has faced similar definitional problems in the past. In *Twinam vs. Lucas County*, 1897, 104 Iowa 231, 73 N. W. 473, the court found that a deputy marshal was not a peace officer even though his duties were the same as the marshal. The court relied upon the words of the statute which, like §748.3, designated sheriffs and "their deputies" while naming "marshals" but neglecting their deputies. In *Merchants Motor Freight vs. State Highway Commission*, 1948, 239 Iowa 888, 32 N. W. 2d 773, the court rejected an attempt to create the status of peace officer by implication. One of the Code sections there in issue, §321.477 Code of Iowa, 1946, allowed the highway commission to "designate by resolution certain of its employees upon each of whom there is hereby conferred the authority of a peace officer to control, direct, and weigh traffic on the highways and to make arrests for violations of the motor vehicle laws . . ." The court concluded that while the statute may have given the employees the required authority to carry out enforcement of their designated duties, it did not make those persons "peace officers."

Based on the persuasive and logical reasoning in the above cases, I am of the opinion that law enforcement division agents of the Iowa Liquor Control Commission are not "peace officers."

December 31, 1968

COUNTIES — Benefited Fire Districts — Chapter 306, Laws of the 62nd General Assembly. The tax for the maintenance of fire districts shall be levied only against those property owners who are members of the district. (Nolan to Samore, Woodbury County Attorney, 12/31/68) #68-12-18

Mr. Edward F. Samore, Woodbury County Attorney: This replies to the request from your office for an opinion on the following:

"A question has arisen, under Chapter 306 of the Laws of the 62nd General Assembly, as to the correct procedure for property owners, contiguous to an established fire district, to join the said district. Particu-

larly, how would the township trustees levy a tax on the property to be added to the established fire district in the event that some members of the township do not sign the petition of the property owners. In other words, can the trustees levy a tax on just those property owners petitioning the fire district and exclude the property owners who have not petitioned. If not, the end result would be that all property owners within the township must sign the petition in order for any property owners to petition to join an established fire district."

It is our view that the provisions of Chapter 306, supra, permit the levying of a tax on the property owners who petition to join the fire district and that there is no requirement that all the property owners within a township must join such established fire district. The provisions of Chapter 306 provide in pertinent part as follows:

"Chapter three hundred fifty-seven A (357A), Code 1966, is hereby amended by adding the following new sections:

"The owner or owners of any property *immediately contiguous* to the boundaries of any established fire district may petition the board of supervisors to be included in the district. Upon receipt of such petition the board shall submit the request to a competent disinterested civil engineer to investigate the feasibility of adding such additional territory and to make a report to the board. If, on receipt of a favorable report, the board agrees that said property should be added to the district, *the tax levy for the next year shall be applied to said property and on the first day of the said next year said property shall be considered a part of the district.* In the event the fire district lies in more than one county the joint action of the boards of supervisors shall be required to add additional territory." (Emphasis added)

In §2 of Chapter 306, provision is made for the owners of property joining an established fire district to pay an initial fee to the district trustee to help defray the costs and maintenance of the fire fighting equipment. The amount of this fee is to be determined on the basis of the number of owners joining this fire district. From this we must conclude that it is not required that all of the property owners of a township join such fire district.

December 31, 1968

LEVEE DISTRICTS: Cooperation with other governmental bodies: Chapters 458, 466 and 467. Levee districts have power to enter into agreements with other counties, states and with the U. S. provided the conditions of the above cited chapters are met. (Seckington to Eaton, Fremont County Attorney, 12/31/68) #68-12-19

Mr. Gene Eaton, Fremont County Attorney: Receipt of your letter is hereby acknowledged, requesting an opinion regarding the authority of the Hamburg Levee District to enter into interstate agreements, contracts with other districts, and contracts with the United States.

Statutes concerning drainage districts should be liberally construed. I.C.A. §455.1 et seq., *Thorson v. Board of Supervisors of Humboldt County*, 90 N. W. 2d 730, 249 Iowa 1088.

A county levee or drainage district may enter into an agreement with another county district and thus form an inter-county district. The authority for this proposition is found in Chapter 458, 1966 Code of Iowa. Section 458.1 provides:

"Whenever one or more drainage districts in one county outlet into a

ditch, drain, or natural watercourse, which ditch drain or natural watercourse is the common carrying outlet for one or more drainage districts in another county, the boards of supervisors of such counties acting jointly may by resolution, and on petition of the trustees of any one of such districts or one or more landowners therein, in either case such petition to be accompanied by a bond as provided in section 457.1, must initiate proceedings for the establishment of an inter-county drainage district by appointing commissioners as provided in section 457.2 and by requiring a bond as provided in section 457.1 and by proceeding as provided by chapter 457, and all powers, duties, limitations, and provisions of this chapter and chapter 457, shall be applicable thereto."

Section 458.2, 1966 Code of Iowa states:

"Neither any land nor any previously organized drainage district shall be included within, or assessed for, the proposed new inter-county district unless such land or unless such previously organized district shall receive special benefits from the improvements in the proposed new inter-county district."

Thus, it would appear that county drainage districts may enter into agreements with other county drainage districts, provided there is a compliance with §458.1, 1966 Code of Iowa, and that there is also a special benefit from the improvements created in the newly established inter-county district as provided by §458.2, 1966 Code of Iowa.

Regarding the question of whether the Hamburg Levee District may enter into agreements with the United States, Chapter 466, 1966 Code of Iowa seems to be in point. Section 466.1 provides as follows:

"In any case where the United States has built or shall build a levee along or near the bank of a navigable stream forming a part of the boundary of this state, the board of supervisors of any county through which the same may pass shall have the power to aid in procuring the right of way for and maintaining said levee, and providing a system of internal drainage made necessary or advisable by the construction thereof. Such improvement shall be presumed to be conducive to the public health, convenience, welfare, or utility."

Section 466.2, 1966 Code of Iowa further states:

"Any United States government levee under the conditions mentioned in section 466.1 may be taken into consideration by the board as a part of the plan of any levee or drainage district and improvements therein, and such board may, by agreement with the proper authorities of the United States government, provide for payment of such just and equitable portion of the costs of procuring the right of way and maintenance of such levee as shall be conducive to the public welfare, health, convenience, or utility."

These sections permitting Iowa drainage districts to enter into agreements with proper federal agencies or instrumentalities and to cooperate with them in flood control work to accomplish purposes for which the district was established, do not materially alter or change existing laws pertaining to levee and drainage districts in Iowa. I.C.A. §§455.201 to 455.216, 255.214, *Harris v. Board of Trustees of Green Bay Levee and Drainage District, No. 2, Lee County*, 59 N. W. 2d 234, 244 Iowa 1169.

Thus, it would seem that the Hamburg District could enter into agreements regarding levees in the area constructed by the United States along or near the bank of a navigable stream forming a part of the boundary

of this state; providing the requirements of Chapter 466, 1966 Code of Iowa, are met.

In regard to the issue of whether the Hamburg Levee District may enter into an interstate agreement with another state, Chapter 467, 1966 Code of Iowa, entitled "Interstate Drainage Districts," seems applicable. Section 467.1 provides as follows:

"When proceedings for the drainage of lands bordering upon the state line are had and the total cost of constructing the improvement in this state, including all damage, has been ascertained, and the engineer in charge, before the final establishment of the district, reports that the establishment and construction of such improvement ought to be jointly done with like proceedings for the drainage of lands in the same drainage area in such an adjoining state and that drainage proceedings are pending in such state for the drainage of such lands, the said authorities of this state may enter an order continuing the hearing on the establishment of such district to a fixed date, of which all parties shall take notice."

Section 467.2, 1966 Code of Iowa, further provides:

"The board shall have power, when the total cost, including damages, of constructing the improvement in such other state has been ascertained by the authorities of such other state, to enter into an agreement as to the separate amounts which the property owners of each state should in equity pay toward the construction of the joint undertaking. When such amount is thus determined, the board or boards having jurisdiction in this state shall enter the same in the minutes of their proceedings and shall proceed therewith as though such amount to be paid by the portion of the district in this state had been originally determined by them as the cost of constructing the improvement in this state."

Thus, it is the opinion of this office that the Hamburg Levee District may enter into inter-county agreements as provided by the above cited sections of Chapter 458, 1966 Code of Iowa; it may enter into agreements with the United States provided the above cited sections of Chapter 466, 1966 Code of Iowa, are complied with; and further, it may enter into interstate agreements, provided the district meets the requirements of the above cited sections of Chapter 467, 1966 Code of Iowa. See also Chapter 28E, Code of Iowa, 1966.

December 31, 1968

CONSERVATION—Land acquisition or development programs of county conservation boards: §111A.4(3); S.F. 366, Chp. 147, Acts of 62nd G. A. Approval of State Conservation Commission is required prior to execution by a county conservation board of any portion of an acquisition or development program for a particular recreational area owned or to be acquired by such board where the total cost of such program exceeds $2,500.00. (C. Peterson to Priewert, Dir., State Conservation Comm., 12/31/68) #68-12-20.

Mr. Fred A. Priewert, Director, State Conservation Commission: Reference is made to your recent request for an opinion of this office with regard to the effect of §111A.4(3), Code of Iowa 1966, as amended by Senate File 366, 62nd General Assembly, in the following particulars quoted from your letter:

"1. In the use of the word 'program.' In this bill [S.F. 366, 62nd G. A.] what was the intent of the members of the legislature in the use of this word?

"2. Does the word program mean an entire project, such as the development of the entire area, or each segment or contract of development?

"3. Does the use of the word program mean each land acquisition segment or the acquisition of the total land required for a specific county-owned recreational area?

"As an explanation of this request, we have one County Conservation Board acquiring land for one of their projects in which they will have to purchase the land from 12 or more property owners for the land is divided into lots. The Commission has already approved the acquisition of 5 of these lots with a total acquisition cost of $7,170. At the present time, we have another request that will go before the members of our Commission at their November meeting for another lot costing $4,000. Over all, this project will require the acquisition of approximately 30 acres of land totalling an estimated cost of $25,000.

"We have been advised by this same county that during the summer of 1968 they acquired one of these other lots at a total cost of $1,562.47. They explained to us that due to the fact that this one lot cost less than $2,500, it wasn't necessary for them to submit that particular land acquisition to the State Conservation Commission."

Prior to the 62nd General Assembly amendment, §111A.4(3) provided as follows:

"The county conservation board shall file with and obtain approval of the state conservation commission on all proposals for acquisition of land, and all general development plans and programs for the improvement and maintenance thereof before any such program is executed."

Senate File 366 amended subsection 3 by adding thereto the following:

"Approval of the state conservation commission shall not be necessary unless the cost of the proposed acquisition or development program exceeds twenty-five hundred (2,500) dollars."

Of help in determining the legislative intent with regard to the excepted ". . . acquisition or development program . . ." are the following definitions taken from Webster's Third New International Dictionary:

"Program — . . . a plan of procedure: a schedule or system under which action may be taken toward a desired goal: a proposed project or scheme . . .

"Project — . . . a specific plan or design . . . a devised or proposed plan . . . a planned undertaking: as . . . an undertaking devised to effect the reclamation or improvement of a particular area of land . . .

"Plan — . . . a method of achieving something . . . a method of doing something . . . a detailed and systematic formulation of a large-scale campaign or program of action . . .

"Plan, design, plot, scheme and project can mean, in common, a proposed method of doing or making something or of achieving an end . . ."

In *Bowden v. Kansas City*, 77 P. 573, the Kansas Supreme Court held that:

"The word 'plan,' in speaking of public work, is ordinarily used to describe the general plan or system of work."

We are not persuaded that the legislature intended, by enactment of S.F. 366, to completely destroy the effect of the existing §111A.4(3) to

which it was added. This result could have been achieved directly and simply by repeal of the existing requirement. To construe the amendment as exempting the acquisition or development of individual parcels of land making up a larger recreational area would give effect only to the exemption and not to the principal requirement providing for review and approval of land acquisition or developement programs by the State Conservation Commission. This construction of the amendment would permit piece-meal acquisition and development of a recreational area at a total cost far in excess of $2,500 without any review, supervision or coordination at the state level.

The word "program" as used in S.F. 366 must then refer to a more comprehensive activity than the execution of a portion of a particular acquisition or development plan or project. In this context, we are of the opinion that the word "program" means a planned undertaking or proposed project devised to effect the acquisition and/or development of a particular recreational area owned or to be acquired by a county conservation board. The amendment to §111A.4(3) enacted as S.F. 366 exempts only those minor programs which can be executed at a total cost not to exceed $2,500.

In summary, we are of the opinion that approval of the State Conservation Commission is required prior to execution by a county conservation board of any portion of an acquisition or development program for a particular recreational area owned or to be acquired by such board where the total cost of such program exceeds $2,500.

December 31, 1968

MOTOR VEHICLES: Suspension of license; failure to satisfy judgment for damages; statute of limitations, §§321A.13, 321A.14, 614.1, 615.2. Suspension of license authorized until judgment is paid to the extent provided. Statute of limitations does not bar or limit the statutory authority to suspend license for non-payment. (Zeller to Holden, State Repr., 12/31/68) #68-12-21

Hon. Edgar H. Holden, State Representative: Reference is made to your letter of December 14, 1968 in which you ask the following questions with regard to the application of §321A.14(1), Code of Iowa 1966:

"A. If a judgment is not renewed at the end of a period of ten years, does this then end the period of suspension even though not satisfied in full or in part as provided in §321A.15 and §321A.16?

"B. If a judgment is renewed at each ten-year period, is there any escape from perpetual suspension (aside from full or partial settlement)?

"C. If a Commissioner of Public Safety fails to suspend the license during the first ten years from the date of the judgment, does he have authority to suspend after this period if the judgment was not renewed?"

In answering these questions, the following statutes should be applied or construed:

Section 321A.13 provides in part:

"The commissioner upon receipt of a certified copy of a judgment, shall forthwith suspend the license and registration . . . of any person against whom said judgment was rendered. . . ."

Section 321A.14 provides in part:

"1. Such license, registration, and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment is satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 321A.13 and 321A.16.

"2. A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of sections 321A.12 to 321A.29, inclusive. Acts 1947 (52 G. A.) ch. 172, §14."

Section 614.1 provides in part:

"Action may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards." * * *

"6. Those founded on written contracts, or on judgments of any courts except those provided for in the next subsection, and those brought for the recovery of real property, within ten years.

"7. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years."

Section 615.2 provides in part:

"After January 1, 1934, no action or proceedings shall be brought in any court of this state for the purpose of renewing or extending such judgment or prolonging the life thereof."

1) In answer to your first question, the period of suspension is not ended at either ten or twenty years, but continues until the judgment is satisfied. This was the intention of the Legislature, and the statute is unlimited in scope. The above statute of limitations (§614.1) simply takes away the right to maintain an action but does not destroy the action. As stated in *Burns v. Burns, 11 N. W. 2d 461, 233 Iowa 1092, 150 ALR 306:* "It is a statute of repose which simply takes away the right to maintain an action but does not destroy the action."

Further, the intention of the Legislature was manifest by saying in §321A.14(2) that not even a discharge in bankruptcy should relieve the judgment debtor from any of the requirements of §§321A.12 to 321A.29.

Also see: *Equitable Life Insurance Company of Iowa v. Condon, 10 N. W. 2d 78, 233 Iowa 567.*

2) In answer to your second question, there can be no renewal of the judgment, but there appears to be no escape from perpetual suspension (aside from a settlement with the person who has the judgment).

3) In answer to your third question, the Commissioner of Public Safety does have continuous authority to suspend the license of the judgment debtor, until the judgment is paid or a settlement made. In a previous case referred to, the former operator left the State of Iowa and thereby prevented the service of the order of suspension until he returned to Iowa ten years later. But the statute was still valid and effective, and service was finally made, and the service was valid.

December 31, 1968

MERIT SYSTEM — County Government — Chapter 95, Acts, 62nd G. A. County government has no authority to adopt merit system but may establish personnel system based on merit principles after contracting

with the Director, Iowa Merit Employment Commission. (Ivie to Fenton, Polk County Attorney, 12/31/68) #68-12-22

Mr. Ray A. Fenton, Polk County Attorney: This will acknowledge your letter of December 6, 1968 in which you present the following question:

"The Polk County Board of Supervisors has requested an Attorney General's opinion as to whether Polk County, as a subdivision of the State of Iowa, is already eligible to come under Civil Service and/or the Merit System without further action of the Legislature.

"I find nothing in Section 8.5 which gives counties such authority and Sections 365.1 to 365.3 of the 1966 Code of Iowa applies only to cities and towns.

"The only possibility for such authority that I can find, if it is authority, is the second unnumbered paragraph following Section 15 of Chapter 95 of the 62nd General Assembly which provides: 'nothing herein shall be construed as precluding the appointing authority from filling any position in the manner in which positions under the Merit System are filled.'

"It is possible, of course, that we may have missed some section of the Code or the 62nd General Assembly, which gives counties such authority.

"There has been some interest on the part of the county to establish Civil Service or a Merit System for Polk County employees."

In the third paragraph of your letter, you refer to "Section 15 of Chapter 95 of the 62nd General Assembly." It seems clear that you are making reference to §3(15) of Chapter 95 of the 62nd General Assembly, which provides in part:

"Nothing herein shall be construed as precluding the appointing authority from filling any position in the manner in which positions in the merit system are filled."

It is clear that the above quoted section can have no application to you. Section 3 deals exclusively with state employees. The section you refer to applies to state offices and departments which are excluded by law from the State Merit System, and encourages such offices and departments to practice merit system principles.

It is the opinion of this office that counties are not authorized to come under the State Merit System created by Chapter 95 of the 62nd General Assembly. However, there is authority for the proposition that any political subdivision of the state, working with the Iowa Merit Employment Commission, may establish a personnel department founded and administered on "merit principles." Section 16 of Chapter 95 of the 62nd General Assembly provides:

"Subject to the rules approved by the commission, the director may enter into agreements with any municipality or political subdivision of the state to furnish services and facilities of the agency to such municipality or political subdivision in the administration of its personnel on merit principles. Any such agreement shall provide for the reimbursement to the state of the reasonable cost of the services and facilities furnished. All municipalities and political subdivisions of the state are authorized to enter into such agreements.

"Nothing in this Act shall affect any municipal civil service programs presently established under and pursuant to the provisions of Chapter three hundred sixty-five (365) of the Code."

It seems clear that Polk County, and all other political subdivisions, are authorized to proceed under §16 of Chapter 95 of the 62nd General Assembly without further action by the Legislature.

However, no action may be taken pursuant to §16 of Chapter 95 of the 62nd General Assembly at this time because the director of the Iowa Merit Employment Department is not presently authorized to make any such agreements. The section authorizes the director to enter into such agreements *subject* to the rules approved by the commission. Presently no such formal rules exist. At the time the directives of §9 of Chapter 95 of the 62nd General Assembly are formally promulgated, the director will be so authorized to act, but until that time, no agreements under §16 of Chapter 95 of the 62nd General Assembly can be formalized.

December 31, 1968

COUNTIES AND COUNTY OFFICERS: Chs. 174 and 358A, Code of Iowa, 1966. Compatibility of office of Zoning Board of Adjustment and County Fair Board. (Nolan to Armknecht, Montgomery County Attorney, 12/31/68) #68-12-24

Mr. Philip C. Armknecht, Montgomery County Attorney: In your letter dated November 18, 1968 you requested the opinion of this office on the following question:

"May the same person be a member of the Montgomery County Iowa Fair Board, which is a tax supported agricultural society, and also serve as a member of the Board of Adjustment created and established by a duly adopted County Zoning Ordinance?"

The test for compatibility of offices has been stated by the Supreme Court in *State vs. White*, 257 Iowa 606, 133 N. W. 2nd 903, 1965. In that case the Supreme Court held that a person may not serve as a member of a local school board and of the County Board of Education at the same time, stating:

". . . A board can only act through the consensus of its members and it is the board rather than its individual members which is given the power and duties. . . . If the duties of the boards of which an individual is a member are incompatible, his membership on such boards is also incompatible."

The powers of the management of an agricultural society are set out under Chapter 174 of the Code of Iowa, 1966, and include the power to hold an annual fair to further the interest in agriculture and to encourage the improvement of agricultural products, livestock, articles of domestic industry, implements, and other mechanical devices and to generally exercise the powers of a corporation not for pecuniary profit under the laws of this state. Such societies also have the power under §471.4(2) to take private property for public use when the property sought to be taken is necessary in order to enable the society to carry out the authorized purposes of its incorporation. Such societies are required to report to the County Board of Supervisors (§174.19) and the right of such society to control and manage as agent for the county all grounds, buildings or other improvements constructed on the fairgrounds may be termi-

nated by the Board of Supervisors whenever well conducted agricultural fairs are not held annually thereon by the society. (§174.16) Membership on the board of directors of such society is determined by the articles of incorporation rather than by statute.

Members of the board of adjustment established pursuant to the provisions of Chapter 358A of the Code of Iowa are appointed by the Board of Supervisors. (§358A.10) And the board of adjustment shall have the powers set forth in §358A.15 as follows:

"1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administration official in the enforcement of this chapter or of any ordinance adopted pursuant thereto.

"2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

"3. To authorize upon appeal, in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

The board of adjustment powers are limited to questions involving county zoning and do not involve review of actions of any administrative official except in the application of zoning rules and regulations to an aggreived property owner. Title to all grounds managed by the fair board is held by the county. (§174.15)

It is my view that there is no inconsistency in the functions of the two boards nor is one subordinate to the other so as to render it improper from consideration of public policy for an individual to be a member of both boards at the same time. The fact that both boards are supported by county tax levys, standing by itself and in the absence of expressed statutory prohibition, does not establish incompatibility. Particularly is this true where one of the boards is merely an affiliated agency of the county and its members are neither county officers nor county employees. See 1966 OAG 15.22.

December 31, 1968

BANKING DEPARTMENT — Debt Management — Chapter 380, Acts of the 62nd General Assembly. Future rent to become due is not a "debt" for which debt managers may charge a fee unless the debtor is renting under a lease agreement and includes the lessor as a creditor in the debt management contract. (Nolan to Foster, Dept. of Banking, 12/31/68) #68-12-25

Mr. Holmes Foster, Deputy Superintendent, Department of Banking:

This replies to your letter of August 9, 1968 in which an opinion was requested as to whether a licensee engaged in the business of debt management may receive a fee based on the payment of rent, under §§8 and 9 of Chapter 380, Acts of the 62nd G. A. The sections cited authorize a debt management licensee to be paid a fee agreed upon in advance in a written contract with the debtor. The fee many not exceed 12½% of "any payment made by the debtor and distributed to the creditors pursuant to the contract." Specifically, your inquiry asks whether a landlord is a creditor under the following circumstances:

"(1) Rent due but not yet payable under the terms of a bona fide lease for a period not to exceed 36 months from the date of the contract with the debtor.

"(2) Rent due but not yet payable for a period not to exceed 36 months from the date of the contract with the debtor where there is no bona fide lease but the rent is paid on a day to day, week to week or month to month basis in the discretion of the landlord.

"(3) Rent to the extent that such is past due and remains payable on the date of the contract with the debtor whether or not there is a bona fide lease in existence."

The basic idea of debt is that an obligation has arisen out of contract, express or implied, which entitles a creditor unconditionally to receive from the debtor a sum of money which the debtor is under legal, equitable or moral obligation to pay without regard to any future contingency. 26 CJS Page 2. The relation of debtor and creditor between a landlord and tenant does not arise until the time stipulated for the payment of the rental. *Harrison v. National Cash Register Company*, 82 P 2d 136. In *Evans v. Kroh*, 284 S. W. 2d 329, 58 A.L.R. 2d 1446, it is stated:

"The relationship of lessor-lessee is not always co-existent with that of debtor-creditor, since the latter relationship arises only upon the failure of the lessee to pay the rent agreed upon at the time in the future fixed by the lease. An interruption of the peaceful enjoyment and possession of the leased property under certain circumstances would excuse the lessee from the obligation to pay any future rental."

A lease may be terminated by mutual consent, thus cutting off the liability of the tenant for future rent. *Benson v. Bake Rite*, 207 Iowa 410, 221 N. W. 464. Rent is not a debt before the day arrives on which it is covenanted to be paid. *Commission of Insurance v. Massachusetts Accident Company*, 310 Mass. 769, 39 N. E. 2d 759. Therefore, in answer to your first question, while rent which may be due, but is not yet payable under terms of the bona fide lease, is not regarded as a legal debt, such rent may be included in the debt management contract since the amount is certain and the lease contract continues until terminated by the parties.

The rent due but not yet payable where there is no bona fide lease, but the rent is paid on a day to day, week to week, or month to month basis in the discretion of the landlord, is not a debt which is certain and therefore, should not be in the debt management contract.

The statutory remedy for the non-payment of rent when due is forcible entry or detention of real property under Chapter 648 of the Code of Iowa. This remedy is not exclusive, and a landlord may also establish priority through a landlord lien under Chapter 570 of the Code of Iowa in a creditor's suit against the debtor. This being the case, it is my opinion that past due and payable rent is properly included in a debt management contract under Chapter 380 of the Acts of the 62nd General Assembly.

December 31, 1968

ELECTIONS: Justice of the Peace, votes necessary to elect — §§39.21, 49.99, Code of Iowa, 1966. A single write-in vote, where there is no question as to the validity of the vote, is sufficient to constitute election

to the office of Justice of the Peace. (Haesemeyer to Jansen, Johnson County Attorney, 12/31/68) #68-12-26

Mr. Robert W. Jansen, Johnson County Attorney: Reference is made to your letter of December 2, 1968, in which you state:

"The Johnson County Auditor, Mrs. Dolores A. Rogers, has requested me to seek an Attorney General's Opinion concerning the following described situations in Johnson County.

"At the recent general election in two of the townships within Johnson County a name was written in on the ballot beneath the designation 'Justice of the Peace.' There was no designation as to the point in time said terms of office, if in fact they prove to be such, were to begin. Mrs. Rogers consulted Secretary of State Synhorst by telephone concerning her belief that the single write-in vote in each township did not constitute election to office. Secretary Synhorst advised Mrs. Rogers to consult this office with the thought that an Attorney General's Opinion would be requested. Of perhaps no legal significance, it is a fact that there are either (1) Justice of the Peace, (2) Police, or (3) Mayor's Courts in 14 of the 22 townships which comprise Johnson County.

"I hereby request an Opinion as to this question: Does a single write-in vote, the validity of the vote itself not being challenged, constitute election to public office under the above-described circumstances?"

§39.21, Code of Iowa, 1966, provides:

"39.21 Justices and constables. In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace and two constables, who shall hold office two years and be county officers."

Although your letter does not so state, I will assume that no part of either of the townships in question fall within a city having a municipal court. If this were the case the justice of the peace courts would, of course, be abolished. §§39.21, 602.1 and 602.17, Code of Iowa, 1966, 64 OAG 145.

Since you indicate that there is no question as to the validity of the ballots I presume that such ballots complied with §49.99, Code of Iowa, 1966, which provides:

"49.99 Writing name on ballot. The voter may also insert in writing in the proper place the name of any person for whom he desires to vote and place a cross or check in the square opposite thereto. The writing of such name without making a cross or check opposite thereto, or the making of a cross or check in a square opposite a blank without writing a name therein, shall not affect the validity of the remainder of the ballot."

On these facts it is our view that a single write-in vote is sufficient to constitute election to office.

December 31, 1968

COURTS: Jurisdiction of Mayors' and Justice of the Peace Courts to enforce municipal ordinances. §§367.4, 5, 6, and 7, Code of Iowa, 1966. The mayors' court has exclusive jurisdiction of the enforcement of city and town ordinances, that informations with respect thereto must be brought before the mayors' court, unless the mayor is absent or unable to act, and they cannot be transferred from the mayors' court to a justice of the peace court except by the mayors' own motion. (Cullison to Enich, Poweshiek County Attorney, 12/31/68) #68-12-27

Mr. Michael Enich, Poweshiek County Attorney: You requested an opinion of the Attorney General concerning the original jurisdiction of justices of the peace to enforce ordinances of cities and towns. You also asked whether, if a mayor "simply refuses to act," a justice of the peace in the same county has jurisdiction to enforce the city or town ordinances.

It is our opinion that the mayor has, with superior, municipal, and police courts, exclusive jurisdiction over prosecutions for violations of city and town ordinances and that justices of the peace do not have such jurisdiction simply because the mayor refuses to act.

Sections 367.4 and 5 state that superior, municipal, and police courts, in cities, and mayors authorized to hold mayors' court, have exclusive jurisdiction of all prosecution for violations of city and town ordinances. Section 601.1, Code of Iowa, 1966, on the other hand, states that the jurisdiction of justices of the peace is coextensive with their respective counties "when not specially restricted." It is our opinion that §§367.4 and 5, mentioned above, are such a special restriction.

Section 367.6 states that, if the mayor or judge of the superior, municipal, or police court is "absent or unable to act" the nearest justices of the peace shall have jurisdiction and hold court in criminal cases. We note that a refusal to act is not absence or inability to act.

Section 367.7, Code of Iowa, 1966, clarifies the question further by stating that informations filed before the mayor for violations of city and town ordinances may be transferred to justices of the peace courts upon the mayor's "own motion only."

Based upon the foregoing it is our opinion that the mayors' court has exclusive jurisdiction of the enforcement of city and town ordinances, that informations with respect thereto must be brought before the mayors' court, unless the mayor is absent or unable to act, and they can not be transferred from the mayors' court to a justice of the peace court except by the mayor's own motion. See O.A.G. May 29, 1968, which is herewith enclosed.

December 31, 1968

COUNTIES — COUNTY OFFICERS: Sanitary Districts, Legal Assistance — Chs. 336, 358, Code of Iowa, 1966. The county attorney is not required either under Ch. 336 or 358 of the Code of Iowa to furnish legal assistance in connection with the establishment of sanitary districts. Such district may, however, employ him and compensate him as an attorney in private practice. (Nolan to Blum, Franklin County Attorney, 12/31/68) #68-12-23.

Mr. Lee B. Blum, Attorney at Law: This is in reply to your request for an opinion on several questions about a sanitary district under Chapter 358 of the Code of Iowa, 1966, as follows:

"1. Must the County Attorney furnish legal assistance in connection with petition, hearing, resolution establishing boundaries, notice of election, canvass of votes, and election of trustees without compensation other than salary?

2. If a district is organized, and after trustees are elected, may the trustees hire an attorney when needed and compensate him out of district moneys?

3. If so, may the County Attorney be so employed and so compensated as a private practicing attorney?"

In answer to the first question, it is my view that the County Attorney is not required either under Chapter 336 which prescribes the duties of the County Attorney or under Chapter 358 relating to sanitary districts to furnish legal assistance in connection with the establishment of such districts.

After such a district is organized, the trustees, by virtue of §358.12, Code of Iowa, are declared to be the corporate authority of the sanitary district and are directed to exercise "all the powers and manage all the affairs and property of such district." §358.17 pertains to the power to acquire and dispose of property. Subsequent subsections of the Chapter, including §358.23, imply that occasions may arise demanding appeal proceedings in which case the district would require representation of counsel. In such case the right to hire counsel while not specifically enumerated in the Code, is implied by virtue of the necessity. An attorney so hired could be compensated out of district moneys. §358.12 provides, in part, the board of trustees shall have the right to elect:

". . . from without their own number, such employees as the board may deem necessary, who shall hold their employment during the pleasure of the board, and shall prescribe the duties and fix the compensation of all employees of said sanitary district . . ."

It is my opinion that the County Attorney could be so employed and compensated as a practicing attorney.

December 31, 1968

COURTS: Indictable misdemeanor — §777.16, Code of Iowa, 1966. Defendant who pleads not guilty to indictable misdemeanor may not waive trial by jury. (Cullison to Wehr, Scott County Attorney, 12/31/68) #68-12-28.

Mr. Edward N. Wehr, Scott County Attorney: You requested an opinion of the Attorney General as to whether a defendant charged with an indictable misdemeanor can waive his right to a jury trial in the Municipal Court and proceed to trial before the Court. In our opinion he can not.

Section 777.16, Code of Iowa 1966, states:

"An issue of fact arises on a plea of not guilty. . . . Issues of fact must be tried by a jury."

State v. Berg (1946) *237* Iowa *356*, 21 N. W. 2d 777, holds that this statutory provision applies to indictable misdemeanors.

December 31, 1968

MOTOR VEHICLE FUEL TAX — Price posting. §324.20, Code of Iowa, 1966. Only those persons engaged in the sale of motor fuel for resale to dealers in this state are required to post the conditions and prices of sale. (Martin to Fullmer, Motor Fuel Tax Division, Dept. of Revenue, 12/31/68) #68-12-29.

Mr. Wayne J. Fullmer, Motor Fuel Tax Division, Department of Revenue: You have requested an opinion of the attorney general with reference to §324.20, Code of Iowa, 1966. Your letter inquires as follows:

"1. Would a distributor have to post motor fuel prices only when he sells motor fuel 'for resale to dealers in this state' (condition in line #3) or:

"2. Would a distributor also have to post motor fuel prices when he sells 'to any purchaser' (condition in line #16)?

"3. May a purchaser of motor fuel as set out in the statute, be construed to be either a wholesale purchaser or a retail purchaser?

"4. If selling motor fuel to a purchaser, either wholesale or retail, is a condition requiring price posting by the distributor, must the distributor post individual prices as would relate to the type of purchaser concerned?"

As you will note §324.20, to which you refer, is penal in nature. As such, the rules of statutory construction indicate that this statute is to be strictly construed.

In *State v. Bright*, 232 Iowa 1087, 7 N. W. 2d 9, the Court stated as follows:

"It is a settled rule in this state that criminal statutes are to be strictly construed and not extended to include an offense not clearly within the fair scope of the language employed."

As presently constituted, §324.20, Code of Iowa, 1966, provides in pertinent part as follows:

"*Every distributor and other person selling motor fuel in this state for resale to dealers in this state,* shall keep posted . . . a placard showing . . . the price per gallon of each grade of motor fuel offered for sale. . . ." (emphasis added)

In tracing this provision through the Codes of 1927, 1935, 1939, 1946, 1950 and 1954 one notes a gradual expansion of the characteristics of those who were required to post prices. Section 1 of Chapter 164, Acts of the 57th General Assembly drastically changed the verbiage of this portion of the statute, eliminating many of the adjectives describing those who are required to post prices. It is apparent from these deletions that the legislature intended thereby to reduce the instances in which the statute would apply. This now narrowed coverage deletes all reference to wholesale and retail sales as a characteristic of the sales, the prices of which are required to be posted. In place of this characterization appear the words "selling motor fuel . . . for resale to dealers . . ." As a result the only person required to post prices by §324.20, Code of Iowa, 1966, is one who sells motor fuel in this state for resale to dealers in this state.

This view is further buttressed by the fact that, the word "and" which appears between the words "distributor" and "other person" is conjunctive rather than disjunctive. As such, only those attributes of a distributor which involve "a person selling motor fuel in this state for resale to dealers in this state" apply. The only difference between the word "distributor" and the phrase "other person selling motor fuel in this state for resale to dealers in this state" is that the former is licensed while the latter is not licensed, but operates under the provisions of §324.9, Code of Iowa, 1966. This wordage is intended to clarify the fact that possession of a license is not a prerequisite to the requirement that an in-

dividual post prices as long as he is selling motor fuel in this state for resale to dealers.

Your second question invites this office to fix upon the words ". . . to any purchaser . . ." in line 16 of §324.20 and require that the price of any sale to any purchaser must be posted.

The sentence in which the quoted language appears reads:

"If any rebate, discount, commission, or other concession is granted by the distributors or persons engaged in the sale of motor fuel *for resale to dealers* of such nature as will reduce the cost or price to any purchaser or dealer *in such products*. . . ." (emphases added)

The underscored language in this sentence when viewed in light of the appertaining rule of construction clearly limits the requirement of posting conditions of a discount to cases in which such discount is granted to one who resells to dealers. The language "to the purchaser" is a characteristic of the rebate or discount, i.e. to aid in the defining of what a rebate or discount is. Thus, a reduction in the cost or price to any purchaser on down the economic ladder from the distributor, which reduction may be factually tied to some act of the distributor, will be deemed to be a discount or rebate the conditions of which should have been posted at the time of sale. We do not attempt to catalog the characteristics of the acts of distributors which may reduce the price to a purchaser.

In addition, the language "such products" refers back to motor vehicle fuel sold for resale to dealers, thus limiting the interpretation of the words "any purchaser or dealer."

Your third and fourth questions relate to defining the word "purchaser," in terms of wholesale or retail activity. In light of our opinion as to question 2, this need not be answered.

It is therefore the opinion of this office that only those distributors' prices of sales of motor fuel to be resold to dealers in the state are required to be posted.

December 31, 1968

COUNTIES AND COUNTY OFFICERS: §§441.5 and 441.6, Code of Iowa, 1966. Validity of appointment of county assessor. (Nolan to Rowe, Jefferson County Attorney, 12/31/68) #68-12-30

Mr. Thomas Rowe, Jefferson County Attorney: This is in reply to your letter of October 24, 1968 which requests an Attorney General's opinion on validity of an appointment of a county assessor under the following circumstances:

"A portion of Section 441.5 provides:

'The examining board shall conduct such further examination either written or oral, necessary to determine the executive ability, experience, general reputation and physical condition of each applicant and make written report thereof and submit such report together with the results certified by the state tax commission to the conference board within 15 days from the date of the written examination.'

"Section 441.6 provides that the physical condition, general reputation of the applicants and their fitness for the position as determined by the examining board shall be taken into consideration in making such appointment.

"At the meeting of the conference board to appoint an assessor, request was made of the Chairman of the Conference board for the results of the written report as required in Section 441.5. The Chairman stated to the entire conference board that he was in receipt of such a report, but stated that the results of the examination were not contained therein, when in fact the results of said examination were contained in said report.

Further, the Chairman, though requested, did not make known to the conference board the recommendations and evaluations made by the examining board.

"It is the position of several members of the conference board that if they had known the contents of the written report by the examining board, their votes would have been different and the appointment would not have been made."

In determining whether an appointment made in such manner is legal, it appears to be immaterial that one member of the committee may have acted in bad faith with respect to the presentation of the written report of the examining board to the other members of the conference board. The law requires the conference board to consider "the physical condition, general reputation of the applicants and their fitness for the position *as determined by the examining board.*" Obviously, the county conference board could not consider the "physical condition, general reputation of the applicants and their fitness for the position as determined by the examining board" unless the report of such examining board was made known to them. The law contains mandatory language that these factors be taken into consideration in making the appointment. If this was not done, then no appointment was made.

The following quotations from 42 Am Jur Public Officers are pertinent to the conclusion arrived at above.

"§100. . . . Although an appointee to an office may be required to qualify for it, the appointment and the qualification are distinct and separate things. It may be said that an appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed. . . ."

"§104. Very often the officer or board which has made a selection of a person for a public office wishes for various reasons to reconsider the action thus taken. This does not involve a removal from office and is to be distinguished therefrom. The two classes of cases are, however, closely allied and are occasionally confused in the decisions. A removal from office takes place after title to the office has become vested in the appointee, whereas revocation of an appointment is had, if it is to be successful, before the appointment is complete. . . ."

"§107. Undoubtedly the general rule that an appointment to an office once made and complete is not subject to reconsideration or revocation is applicable where the appointment is made by a collective body. When a collective body expresses by ballot its will concerning an appointment to office, its act is not complete before the result of the ballot is ascertained and made known. But when this is done and it appears clearly from the announcement of the vote that the number of ballots requisite to an appointment has been lawfully given for one person, and no further action is taken, the will of the body is finally expressed and the appointment is complete beyond the power of the body to reconsider and revoke it, unless for some irregularity, fraud, or other invalidating element. . . ."

"§108. The courts have quite consistently ruled that an appointment

to a public office by a collective board is not subject to reconsideration where it has become final and complete. A different conclusion is reached where for some reason the appointment has not been finally completed so as to entitle the appointee to qualify for the office. Until the appointment has thus become complete, there is no doubt that it may be reconsidered and rescinded. It is said that if the vote of the collective body is subject to reconsideration in accordance with its own rules or the rules of parliamentary practice, the appointment is not complete beyond recall until the power to reconsider has been cut off by lapse of time."

It should be observed, however, that should the conference board fail to take immediate action reconsidering the appointment of the assessor, and the person appointed acts in reliance upon such appointment, the statutory remedies for removal from office would be the only possibility thereafter available.

December 31, 1968

COUNTIES: Tax Sales — §569.8, Code of Iowa, 1966, as amended by Ch. 357, §5, Acts, 62nd G. A. Public auction must be held for property sold at tax sale. (Nolan to Armknecht, Montgomery County Attorney, 12/31/68) #68-12-31

Mr. Philip C. Armknecht, Montgomery County Attorney: This replies to your letter dated September 20, 1968 requesting an opinion on the following:

"This request for an opinion involves the interpretation of Section 569.8 of the 1966 Code of Iowa with the addition to said Section as enacted by the 62nd General Assembly.

"The addition, as enacted, would seem to require that when the Board of Supervisors of a County sell property which they have obtained title to by virtue of a scavenger tax sale, that the same must be sold at public auction with one publication in a local newspaper.

"The manner and method by which this County has proceeded in the past is to perfect our title to the property, after acquiring the same by tax sale, by serving a Notice of Expiration of Right of Redemption of said property upon the person in whose names the property was taxed, the City in which the property was located, and any persons who might be in possession thereof. It is then our policy to file an affidavit of completed service with the Treasurer whereby we have always believed that we had perfected title to the property and could dispose of the same by merely issuing a warranty deed accompanied by appropriate resolution.

"Section 569.8 in its present form would seem to require, if applicable, the property so acquired by the County must be sold at public auction and that in the event the tax sale certificate shows taxes and subsequent amounts to be in excess of $250.00 that we must have the consent of the tax levying districts which would, of course, include the City and the School District.

"Is there any way the County can avoid the auction sale of such property by serving notice on the tax levying districts at the time that the Notice of Expiration of Right of Redemption is served upon the parties as required by the tax sale statutes?

"If the answer to my inquiry is in the negative and that the Section is applicable and that procedure must be followed, it would seem to unduly restrict the County from selling the property for a reasonable price and thereby getting it back on the tax rolls."

In answer to the above I advise that the amendment to §569.8 enacted by the 62nd General Assembly (Chapter 357, §5) does require that a

public auction be held when the County Board of Supervisors sells real property acquired through tax sale. There appears to be no way that the county can avoid such auction sale. Therefore, your question must be answered negatively.

Iowa Code §569.8 as amended now reads:

"Title under tax deed — sale — apportionment of proceeds. When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed, and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests, and costs, without the written approval of the tax-levying and tax-certifying bodies having a majority interest in said general taxes. However, where the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests, and costs does not exceed two hundred fifty dollars, such real estate may be sold by the board of supervisors without the written approval of any of the tax-levying and tax-certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold.

"*Real property sold under this section shall be sold at public auction and not by use of sealed bids*, but only after notice thereof has been published once in a newspaper of general circulation in the county wherein the property is located, stating the description of the property to be sold and the date, place and time of such sale, at least ten (10) days, but not more than fifteen (15) days prior to the date of such sale." (Emphasis added)

It is a well-established rule of statutory construction that the use of the word "shall" in a statute relating to the duties of public officers creates a mandatory duty rather than impressing a discretionary power. Therefore, while the board of supervisors has the power to manage property taken at tax sale or to return such property to the tax rolls through public sale, if the latter is chosen, the sale must be public auction as prescribed in the statute set out above.

December 31, 1968

COUNTIES: Compatibility of Offices — Ch. 332, §§373.1, 373.9, 358A.12, Code of Iowa, 1966. The offices of city zoning commissioner and county supervisor are incompatible from a standpoint of public policy. (Nolan to Carstensen, Clinton County Attorney, 12/31/68) #68-12-32

Mr. L. D. Carstensen, Clinton County Attorney: This is in response to your request for an opinion dated December 12, 1968 on the following question:

"Is it lawful for a member of the Clinton County Board of Supervisors to also serve as a member of the City Plan Commission of the City of Clinton, Iowa. The City Plan Commission members do not receive compensation. The Commission is concerned with matters of zoning, subdivisions and planning."

Neither Chapter 332 of the Code of Iowa pertaining to the duties of members of the board of supervisors nor §373.1 of the Code pertaining to the qualifications of the members of the City Plan Commission contain any specific prohibition against a person holding both offices at the same time. However, §373.1 does provide that a person appointed to the City Plan Commission shall be one who is qualified by knowledge and experience and "who shall not hold any elective office in the municipality." As used in this section, the words "in the municipality" clearly pertain only to the city. The elective offices of any other municipality, such as a county, which would exist both within and without the city limits are not within the purview of this section.

There is, however, a test to be applied in such a case as stated by the Iowa Supreme Court in *State ex rel LeBuhn vs. White*, 257 Iowa 606, 133 N. W. 2d 902, wherein the court ruled that a person cannot serve as a member of a local school board and the county board of education concurrently and where the court applied as the test of incompatibility the question of whether there would be "an inconsistency in the functions" as where one office is subordinate to the other or where "the nature and duties of the two offices are such as to render it improper from considerations of public policy, for an incumbent to retain both."

Inasmuch as the powers of the City Plan Commission as set out in §373.9 include the power to "make or cause to be made such surveys, studies, maps, plans, or charts of the whole or any part or portion of such municipality and *of any land outside thereof which in the opinion of such Commission bears relation to a comprehensive plan, . . .*" (Emphasis supplied), it is our opinion that the two offices are incompatible from a standpoint of public policy. Particularly is this true in counties where a county zoning commission has been appointed by the board of supervisors and where the board adopts rules and regulations for zoning pursuant to §358A.12, Code of Iowa, which authorizes such rules.

December 31, 1968

COUNTIES: County Road Employees; Tort Liability — §97B.48, as amended by §14 of Ch. 121, Acts, 62nd G. A.; Ch. 405, Acts, 62nd G. A. 1. No provision of law permits wage raises for employees to be made retroactive. 2. Ch. 405, Acts, 62nd G. A. authorizes claims against counties for torts arising out of governmental activities. (Nolan to Richardson, Greene County Attorney, 12/31/68) #68-12-33

Mr. R. K. Richardson, Greene County Attorney: In your letter of October 2, 1968 you stated the following:

"As County Attorney, I have been asked to write you a letter, requesting an opinion from your office on a couple of matters.

"First, our County Engineer has several employees working for the County under his department, who have reached the age where they automatically froze their wages a year or so back, but he continued to let them work for the County. I now understand that it is not admissible to freeze the wages and have the employee continue to work at the same employment. If this is true, is it necessary to now raise the wages of the employee to that paid other employees performing the same service, and is it necessary that this pay raise be made retroactive back to the period that the employee automatically would have received his pay raise had his wages not been frozen?

"My next question concerns the matter of damages, payable by our County, to citizens operating their motor vehicles on our public roads. has the recent change in the liability of counties, and the fact that counties and county officers can now be sued, changed the policies which a county should follow concerning payment of damages? I refer, primarily, to an incident where one of the citizens was driving his motor vehicle down a country road, where the maintainer had pushed some rather large rocks to the middle of the road. One of these rocks flew up and struck the pan of the vehicle being operated by the citizen, making a hole in the pan and causing the engine to lose oil. Up to this time, our County has considered this a hazard of operating a motor vehicle upon the public highways. I am wondering now whether the county's liability has changed in any way and what your opinion of the county's liability might be for such a damage."

In answer to your first question, I advise that the amendment to §97B.48 of the Code of Iowa by §14 of Chapter 121 of the Laws of the 62nd General Assembly increased from $1,200 to $1,800 the amount which is considered the criterion for full time employment after the retirement of a person covered by IPERS. Inasmuch as the County Board of Supervisors sets the pay scale for workers on the secondary road system, they have the power to raise the wages of such employees. Assuming that the reason for the freezing of wages of an employee who continued to work at the same employment was to permit him to receive his retirement allowance payments under Chapter 97B of the Code, such employee could, subsequently to July 1, 1967, earn the $1,800 without forfeiting IPERS monthly retirement allowances. There appears to be no requirement under this section of the Iowa Code of minimum wage grants which would necessitate the raising of the wages of a county road employee.

You have also asked if it is necessary that the pay raise be made retroactive to the period that the employee would have automatically received his pay raise if his wages had not been frozen. It is my view that such question should be determined by the individual involved filing a claim for the amount of wages which he believes himself to be entitled to and for which he did not receive payment. I do not know of any provision of law that would require such retroactive payment to be made across the board.

On the second question concerning the liability of the county for damages to the automobile driven on a county road, Chapter 405 of the Laws of the 62nd General Assembly authorizes claims against a county for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function. Prior to the enactment of this legislation, counties' liability had been limited to torts arising out of proprietary activities. To this extent the counties' liabiilty has changed.

December 31, 1968

SCHOOLS: Area Colleges — §280A.23, Code of Iowa, 1966. Merged area school rent may not be used for scholarships. (Nolan to Edgren, Dept. of Public Instruction, 12/31/68) #68-12-34

Mr. W. T. Edgren, Assistant Superintendent of Public Instruction: This replies to your letter of October 17, 1968 requesting an opinion on the question of whether scholarships to area colleges may be established

with funds derived from leasing of a portion of the school site. Your letter states:

"One of the merged areas has leased out a part of a site, owned by it, but not immediately needed for school purposes. It proposes to use the rent received to establish scholarships. We are unable to discover any statutory authority for the creation of scholarships by a merged area, except to the extent that such corporation might be able to accept and administer gifts made to it for such purpose.

"We, therefore, request your opinion whether a merged area, created under Chapter 280A, Code of Iowa, has authority to establish scholarships, with its own funds, received from sources other than gifts, or; whether such area has authority to rebate or forgive the payment of tuition by students, other than those under the age of twenty-one who have not been graduated from high school, and are exempted by statute."

The powers of a merged area as described in Chapter 280A, Code of Iowa, do not include the power to establish scholarships from rent. Under §280A.18 the board of directors of a merged area is authorized to receive and expend federal funds, tuition, state aid and funds for sites and facilities, and donations and gifts. All of these funds are to be expended in accordance with the terms prescribed in the law or regulations making such funds available.

In addition to the authority contained in §280A.18, there is also in §280A.23 the power, not otherwise provided in the chapter, which is prescribed for boards and directors of local school districts by Chapter 279. Section 279.41 provides:

"Any fund received from the condemnation, sale, or other disposition for public purposes of schoolhouses, school sites or both schoolhouses and school sites may be deposited in the schoolhouse fund and may withut a vote of the electorate be used for the purchase of school sites or the erection or repair of schoolhouses or both as ordered by the board of directors of such school district, provided, however, that the board shall comply with section 297.7."

If a portion of the school site is not presently needed and is leased for public purposes under the authority of §279.41, the rent should be placed in the schoolhouse fund.

In answer to the second part of your request, we find no authority in the present law for the rebate or forgiveness of tuition. The statutory provisions relating to tuition at an area school are contained in §280A.23 as amended by the laws of the 62nd General Assembly (Chapter 244):

"The board of directors of each area vocational school or area community college shall:

* * *

"3. Have authority to determine tuition rates for instruction as authorized under section 280A.18, subsection 3. Tuition for residents of Iowa shall not exceed the lowest tuition rate per semester, or the equivalent, charged by an institution of higher education under the state board of regents for a full-time resident student. Tuition for nonresidents of Iowa shall be not less than one hundred fifty (150) percent and not more than two hundred (200) percent of the tuition established for residents of Iowa. Tuition for resident or nonresident students may be set at a higher figure with the approval of the state board. A lower tuition for nonresidents may be permitted under a reciprocal tuition agreement be-

tween a merged area and an educational institution in another state, if the agreement is approved by the state board."

While it appears that a merged area tuition rates are to be kept low, there is no authority that permits the subsidization of any student's tuition from the rent of part of the school site.

March 16, 1967

STATE OFFICERS AND DEPARTMENTS—Vacancies—Commissioner of Public Safety, §§63.8, 69.1, 69.2, 80.2 and 80.3, 1966 Code of Iowa. Pursuant to §80.3 the appointment by the Governor of a successor to a resigned Commissioner of Public Safety was effective only until 30 days following the convening of the next General Assembly. The refusal of the Senate within such 30 days to confirm the Governor's appointment of such successor for the balance of the unexpired term amounted to a failure to appoint within the time fixed by law within the meaning of §69.2(1). Upon the expiration of such 30 days the office of Commissioner of Public Safety became vacant. The valid interim appointment was not for a "fixed term." Accordingly, the provision of §§69.1 and 69.2(2) relative to holding over and qualification are inapplicable. (Turner to Rep. Harold Fischer, 3/16/67) S67-3-3.

Hon. Harold Fischer, State Representative: I have your letter of March 10, 1967, wherein you inquire as follows:

"Please let me know if the position of Commissioner of Public Safety is presently legally occupied, and whether or not the State Comptroller has authority to make any salary payments to Mr. Needles."

§§80.2 and 80.3, Code of Iowa, 1966, provide as follows:

"80.2. *Commissioner-appointment.* The chief executive officer of the department of public safety shall be the commissioner of public safety. The governor shall, within sixty days after this chapter shall have become effective, and in every fourth year after the year 1939, within sixty days following the organization of the regular session of the general assembly in said year, appoint, with the approval of two-thirds of the members of the senate, a commissioner of public safety, who shall be a man of high moral character, of good standing in the community in which he lives, of recognized executive and administrative capacity, and who shall be selected solely with regard to his qualifications and fitness to discharge the duties of his office. He shall have been for a period of at least five years, immediately prior to his appointment, a resident of the state of Iowa. The commissioner of public safety shall devote his entire time to the duties of his office and shall serve for a period of four years from July 1 of the year of his appointment at an annual salary as fixed by the general assembly. The governor, with the approval of the executive council, may remove the commissioner of public safety for cause after a public hearing before the executive council."

"§80.3. *Vacancy.* A vacancy in the office of the commissioner of public safety that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes. Prior to the expiration of said thirty days, the governor shall transmit to the senate for its confirmation an appointment for the unexpired portion of the regular term. A vacancy occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session, and for the unexpired portion of the regular term."

§69.1, Code of Iowa, 1966, provides:

"§69.1. *Holding over. Except when otherwise provided,* every officer elected or appointed for a *fixed term* shall hold office until his successor is elected and qualified, unless he resigns, or is removed or suspended, as provided by law." (Emphasis added).

Former Commissioner Sueppel resigned effective January 1, 1966, failing to serve out the balance of his four-year term which otherwise would have expired on June 30, 1967. The Governor appointed Mr. Needles to fill the vacancy. That appointment expired on February 8, 1967, thirty days after the General Assembly convened on January 9, 1967. Prior to the expiration of said thirty days, but on February 8, 1967, the Governor transmitted to the Senate for its confirmation, the appointment of Mr. Needles for the unexpired portion of Mr. Sueppel's term (to June 30, 1967) and for a new four-year term commencing thereafter.

On February 28, 1967, the Senate took action on the appointment, and did not confirm same. A motion to reconsider confirmation is still pending in the Senate.

It is apparent that the first issue is whether the office is vacant or whether §69.1 prevents a vacancy by providing that Mr. Needles "holds over" or serves until his successor is appointed, confirmed and qualified.

§69.1, it will be noted, applies "Except when otherwise provided." §80.3 does not otherwise provide or specify that a commissioner appointed to fill a vacancy occurring while the legislature is not in session shall not hold over until his successor is appointed and qualified. If Mr. Needles was appointed to a "fixed term," he was entitled to hold over. *Walker v. Sears,* 1953, 245 Iowa, 262, 61 N. W. 2d 729.

But Mr. Needles was not appointed to a "fixed term." The fixed term, in this case, was the four-year term to which Mr. Sueppel was appointed as provided in §80.2, or the balance thereof remaining after Sueppel's resignation (to June 30, 1967). Mr. Needles was not appointed to fill the entire vacancy created by his predecessor's resignation, but only a portion thereof, which portion expired on February 8, 1967 (thirty days after the legislature convened). That portion which Mr. Needles served under a valid interim appointment, though definitely determinable by statute, was not a "fixed term." *Wilson v. Shaw,* 1922, 194 Iowa 28, 188 N. W. 940. §69.1 does not apply to an officer who is not elected or appointed to a "fixed term" and thus Needles was not entitled to hold over under Chapter 69.

§69.2 provides, in part:

"69.2. *What constitutes vacancy.* Every civil office shall be vacant upon the happening of either of the following events:

1. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.

2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.

* * *."

Even had Mr. Needles been entitled to hold over he has failed to requalify within 10 days as required by §63.8, Code of Iowa, 1966, and his failure to do so creates a vacancy under §69.2, Subsection 2. *State v. Carvey*, 1915, 175 Iowa 344, 154 N. W. 931.

However, it is my opinion that the office of Commissioner of Public Safety became vacant at midnight on February 8, 1967, pursuant to the provision of §69.2(1) and it is therefore unnecessary to consider the application of subsection 2 of such §69.2. Accordingly, from and after midnight on February 8, 1967, Mr. Needles was neither legally occupying the office of Commissioner of Public Safety nor was he entitled to the emoluments of such office nor to the perquisites thereto appertaining.

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